COMMENT

Two reasons were given above as to why the suspect should have a right to a lawyer at an identification test: first, to ensure that there is no possibility of suggestion at the test; and second, to ensure that the identification test can be reconstructed and assessed at trial. What role should a lawyer play at the identification test, in order to ensure that he or she can perform these functions?

The lawyer can discharge the second function simply by assuming the role of a passive observer. Along with the written record of the proceedings, the lawyer's presence and observations at the identification test should ensure that the court is provided with a complete picture of the conduct of the proceedings.

The role the lawyer should play to ensure that the identification test is not suggestive is more troublesome. Obviously the lawyer has to be able to make suggestions to the police in the conducting of the proceedings in order to discharge this function. But what if he or she objects to a particular procedure (the appearance of a number of lineup participants, for example), but the supervising officer disagrees? There are really only two alternatives: the proceedings might be halted and the issue resolved, perhaps by an interlocutory motion to a judge; or counsel's objections might be recorded, the police could continue with the procedure in the fashion they think proper, and the issue could be resolved at trial. In this guideline, this second alternative is recommended.

Resolving an issue of contention before trial would be time-consuming and disruptive to the conducting of the procedure, which often requires the co-operation of a considerable number of members of the public. It would also delay the holding of the identification test. In cases where the police are looking for a dangerous offender and need quick confirmation as to whether they have found the right person, it is important that the identification procedure be held as expeditiously as possible.

Thus, the guideline provides that lawyers may make objections and suggestions but that the police are under no duty to follow them. The only requirement is that they be made part of the record which will be preserved for later reference at trial. Moreover, to protect the accused and to prevent the procedure from becoming unduly contentious, it is provided that lawyers not be obliged either to make objections at the lineup or be deemed to have waived them. That is, the prosecution will be prohibited from arguing at trial that the defence lawyer's previous silence on an aspect of the lineup should be viewed as evidence that the matter involved no impropriety. This latter provision should prevent lawyers from making a series of contentious objections at the procedure,

which, while understandable, would be resented by the police who would view many of them as frivolous. Of course, if counsel does not object to an obviously unfair procedure, at trial a factual inference might be drawn that the procedure did not appear at the time to be unfair. And as the American Law Institute noted in making a similar proposal, "[t]his possibility may be thought to provide just the right degree of incentive for defense counsel to make reasonable objections which the police might heed, rather than sitting back and hoping to trap the police in error."[182]

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.

COMMENT

Requiring the police to obtain a description of the suspect from all potential eyewitnesses recognizes the several valuable purposes that such descriptions serve. First, such a description may assist the police in the apprehension of criminals and remove from suspicion people whom the police might otherwise investigate, but who do not fit the witnesses' description of the offender.

Second, witnesses who had previously described the offender will probably exercise greater caution at subsequent identification proceedings, since their reliability will be attacked if they carelessly identify a person bearing little resemblance to their description of the offender.

Third, descriptions of the offender furnished by witnesses to the police soon after the commission of a crime can play an important role in determining the reliability of an eyewitness identification. The witness's identification might be called into question if there are material discrepancies between the witness's description and the actual appearance of the person whom the witness identifies;[183] if the original description by the witness does not include a prominent and distinguishing characteristic possessed by the person identified;[184] if the witness is unable to offer a

description of the accused, or offers only a vague description, but later purports to be able to identify the person with certainty;[185] or if the description contains details that could not have been perceived by the witness at the original viewing.[186] On the other hand, a prior detailed description which is later confirmed by an identification of the suspect can support the reliability and credibility of the eyewitness's testimony.[187]

A fourth use of descriptions is to test the reliability of subsequent identifications where two or more witnesses have given descriptions of the offender. For example, if the descriptions are quite different, provided that these witnesses possess normal sensory organs and that they observed the accused under roughly similar conditions, it might be apparent that the conditions at the time of the original viewing were such as to render any identification inherently unreliable — the lighting may have been dim, all of the witnesses may have managed only a fleeting glimpse of the accused, or the culprit may have been disguised in some way.[188]

If witnesses are similarly situated and some offer a description of the alleged offender and others do not, the testimony of those who are unable to describe the offender might be relevant in assessing the trustworthiness of the descriptions given by the other witnesses.

Although the case for requiring the police to obtain descriptions from all potential eyewitnesses might appear to be obvious, there are two arguments that might at least cast some doubt on this conclusion.

First, psychologists have shown that many people are very bad at describing appearances, and furthermore, that there is no correlation between a person's ability to describe someone's appearance and his or her ability to recognize that person.[189] Moreover, it has been found that training in giving verbal descriptions of faces does not improve visual recognition performance.[190] In part, this may be because faces are, in the main, recognized on the basis of patterns and configurations rather than specific features, and patterns are extremely difficult to put into words.

These findings suggest that if too much emphasis is placed on the descriptions witnesses give, a court might make too much of discrepancies between the description of the offender and the accused's actual appearance. Overemphasis on discrepancies might lead to the rejection of reliable identification evidence. An emphasis on the witnesses' description might also encourage the courts to give undue weight to detailed descriptions of the suspect's appearance.

However, no matter how real are these concerns, they do not necessarily lead to the conclusion that witnesses should not provide descriptions of the offender. In some cases their description will

nevertheless be important. If the witness failed to mention a salient characteristic of the alleged accused, or mentioned one that the accused did not possess, that evidence would still be important in assessing the witness's reliability. In any event, a description of the suspect might be important in attempting to locate the offender and in constructing an unbiased lineup. The facts that some people are not good at describing appearances, and that there is no necessary relationship between a person's ability to describe someone and their ability to recognize them, are matters that the trier of fact should consider in determining what weight to place upon a particular witness's testimony.

The second concern in this area is, that if verbal descriptions of the offender are taken from witnesses, it might impair their ability to make a subsequent reliable identification. There is some suggestion in the relevant psychological studies that giving a prior description may hinder identification performance. For example, Belbin[191] found that recognition accuracy of complex visual forms is significantly decreased when subjects are first asked to describe the form. Williams[192] found that subject-witnesses, undergoing a questionnaire type of description probe of a mugger in a brief film clip, were less accurate in their identifications of the suspect in a six-photograph lineup than subjects who had not received the description probe. Williams concluded that "[t]he description probe seemed to decrease the accuracy in recognition by serving its major function: to disassemble the witness's memory of the suspect into parts .... [W]hen he [attempts to] reassemble the parts [at the line-up] there will be details changed, distorted, left out or added. This would ... decrease accuracy."[193] Other studies, however, have found no significant differences in identification performance between those witnesses who gave some type of prior description and those who did not.[194]

The apparently disparate findings of these studies might be explained on the basis of the factual differences between the studies. In attempting to reconcile the studies, it would appear that a detailed verbal probe might interfere with the accuracy of a person's identification, if the identification test takes place immediately after the detailed questioning. However, the passage of time seems to alleviate whatever adverse impact verbal description problems might have on a witness's ability to identify the criminal subsequently.[195] It also appears that if the description probe is very detailed, forcing the witness to guess at answers to specific questions about the suspect's appearance, it might affect the witness's ability to recognize the person later. [196] Subsequent guidelines, dealing with the timing of description-taking and the manner of taking descriptions, attempt to ensure that the description probe will not interfere with the witness's ability to recognize the person he or she saw.[197] In some cases at least, a description given immediately after viewing a person might enhance subsequent identification by capitalizing on the witness's short-term memory.

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.

COMMENT

In many cases, descriptions of the offender will be obtained at the scene of the crime. The objection has been made that since, at this point in time, the police are interested in the speedy apprehension of offenders, the imposition of a requirement that they obtain a complete description of the offender might impair the speed and success of their search.[198] However, it seems unlikely that the police would ever be in such need of a hasty description that they could not, at the first opportunity, take a complete description from each eyewitness. The danger of not taking a description at the first opportunity is that the witnesses' perceptions of the person they saw may become tainted by suggestion and perceptual filling-in. The danger of taking only a partial description from a witness is that a person who is asked to repeat a description becomes progressively more certain of the details, but at the same time less accurate.[199]

In some cases, a witness who views a traumatic or emotional event might immediately repress the details of the event and be unable to provide a clear description of the person involved. Later, when the emotion has subsided, the witness is able to produce a fairly detailed description. Although this might be taken to cast doubt on the witness's credibility, these situations are best dealt with as special cases.

In all cases, the description should be taken before the witness identifies the suspect. Otherwise, the witness might simply give as a description the characteristics of the person he or she observed when the suspect was identified. Because of the possible effect that a verbal description might have on a person's immediate ability to identify a person (see the discussion that follows Rule 301), the description should be taken two or three days before the identification test, if at all possible.

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.**

COMMENT

In taking a description from a witness, the police should first ask the witness about the context of the observation. Information about the duration of the observation, the witness's distance from the suspect, the lighting conditions, what directed the witness's attention to the suspect, and the witness's emotional state are of vital importance in evaluating the reliability of the identification.

This information should be obtained from the witness before he or she is asked about the suspect's appearance. In being asked to recount this information first, the witness might, for example, be alerted to the fact that there was very little time to observe the suspect, and might thus not feel obligated to provide the police with a "good" description. If a witness immediately provides the police with a detailed description, and information relating to the circumstances of the observation is obtained later, the witness might feel some pressure to exaggerate this general information in order to bolster his or her credibility.

(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.**

COMMENT

After witnesses have committed themselves to a description of an offender there will be a strong tendency for them to select from the lineup the person who most closely fits the initial description.[200] This applies especially to those witnesses who have inaccurately described the offender. It is therefore of crucial importance that witnesses' initial descriptions be as accurate as possible.

Psychologists have found that witnesses' recall will include fewer errors when they are asked to describe the offender in a free narrative form.[201] This would suggest that police should simply ask witnesses to give descriptions in their own words. However, these same studies show that free recall results in extremely incomplete descriptions.[202] To obtain useful descriptions, it is therefore often necessary to ask specific questions about particular features of the offender; but while the completeness of the description increases as questions move from the general to the specific, its accuracy decreases. Thus the best method of obtaining a description is first to ask witnesses to describe freely the person they

saw. This information is very likely to be accurate. Then, in order to increase the completeness of the witnesses' reports, a series of specific questions can be asked. Asking a general question first will not only ensure that information as accurate as possible is recorded; it will also prevent witnesses from incorporating into their free narrative information learned from the questioner.

Elizabeth Loftus, a psychologist, illustrates with the following scenario the danger of asking specific questions before inviting a general narrative:

> For example, suppose a bystander has witnessed a crime, has described everything he can remember in a free report to the police, and is then asked some specific questions, such as: "Was the intruder holding a gun?" At that point the witness may remember the gun and may include a description of it, even though he had initially forgotten to mention it. But if the witness is asked specific questions before his free report, such as "Did you see a gun?" he will probably say no if no gun existed, but when later asked to "tell us everything you remember about any weapons," the witness might say to himself: "Gee, I remember something about a gun. I guess I must have seen one. It was probably black".[203]

To guard against error as much as possible, the specific questions asked should not be leading and the witness should be discouraged from guessing at the answer.

All studies agree that leading questions can seriously distort a witness's description.[204] One psychologist[205] has conducted several interesting studies which show how dramatically even the slightest changes in the wording of a question can affect a witness's response. For example, a witness who is asked, after viewing a film of an automobile collision, whether he saw "the" broken headlight is significantly more likely to report seeing this non-existent item than a witness who, after having viewed the same film, is asked whether he saw "a" broken headlight.[206] Another experiment showed that estimates of the height of a basketball player varied on average by 10 inches, depending upon whether the witness was asked to estimate "how tall" as opposed to "how short" the player was.[207] The implications of these studies for police description-taking are clear. Caution must be taken so as not to put a question to the witness which, by its very form, will affect the response. Thus, for example, a witness who does not mention the offender's height in his or her free narrative description should be asked to "estimate his height" rather than be asked "how tall was he?"

Witnesses who guess at the answer to specific questions in giving a description are more likely to be unreliable in making a subsequent identification than those who do not.[208] A witness who guesses at a particular aspect of someone's appearance is likely later to forget that the response was a guess, and will simply incorporate this feature into his or

her memory of the person and, over time, will become increasingly certain of it.

Studies have shown that an intensive concentration on minor details of a person's appearance interferes with recognition memory.[209] Thus, witnesses should not be pressured into answering detailed questions about a person's appearance. The questioning should be general, and should focus on easy or obvious physical features.

(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.**

COMMENT

Common sense would suggest that the more confident witnesses are in their ability to recognize the suspect, the more likely it is that their identification will be accurate. No psychological studies have tested this hypothesis. However, there are numerous studies on the relationship between peoples' confidence that they have correctly identified a person and the accuracy of their identification. Some of these studies show a positive relationship between confidence and accuracy; others reveal none.[210]

Whatever the relationship between confidence and accuracy, there is still some value in obtaining from witnesses a statement soon after the time they originally viewed the suspect, as to how confident they are that they will subsequently be able to identify the person. It might be that before witnesses have been influenced by extraneous factors, their own judgement as to how likely it is that they will be able subsequently to identify the person is probative in assessing their evidence. A discrepancy in the degree of confidence at any time might call for an explanation.

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.

COMMENT

A series of psychological experiments have shown how subtle differences in the form of a question can influence the response.[211] A

police officer who is aware of the description given by one witness may, by the wording of a question, unintentionally lead a second witness to give a description similar to that given by the first. Therefore, where there is more than one witness, a different officer should take the description from each witness. This will reduce the possibility that a witness will unconsciously be influenced by what the officer may have learned from questioning another witness.

In many cases a shortage of police manpower may prevent compliance with this precaution. Also, at the scene of the crime, for example, police officers would have no motive for attempting to elicit the same description from each witness. Therefore, separate police officer should be used only when practical.

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.

COMMENT

The purpose of this rule is to sanction the use of non-photographic pictorial representations by the police where there is no suspect, thus making the holding of a lineup or confrontation impossible, and photograph identification probably unsuccessful. In these circumstances, the fact that such representations may not be as effective as other procedures in leading to identifications is outweighed by the interest in law enforcement.

The general label "non-photographic pictorial representation" encompasses a variety of techniques employed by police for the purpose of obtaining identifications of suspects.[212]

One of the most common forms of such representations is the police artist's sketch or drawing. The witness describes the person alleged to have committed the crime to a police artist, who prepares a sketch which conforms to the witness's description.

An early form of composite used to reconstruct faces is called the identi-kit. It consists of over 500 transparent celluloid sheets portraying different facial features such as hairlines, eyes, chins, noses, ears and beards, drawn by an artist from a large number of photographs. Particular transparencies are chosen to conform, as much as possible, to the witness's description, and a composite face is constructed.

More recently, however, the identi-kit has been replaced in many police departments by the photo-fit, which was invented by a Canadian, Jacques Penry, in conjunction with the British police. This type of composite consists of separate photographs of five facial features (eyes, mouth, nose, chin, and foreheads or hair).[213] From a great number of alternative photographs, features are "mixed and matched" in an effort to construct a face. Facial accessories such as beards, moustaches, hats and glasses may also be added. A fully assembled face can be altered or enhanced by substituting or adding other features.

The relative reliability of these different forms of non-photographic pictorial representations has been the subject of much debate. The reliability of the artist's sketch is ultimately dependent upon the accuracy of the communication between the witness and artist.[214] This accuracy may be reduced by suggestion. Repeated constructions may confuse witnesses to the point where they cannot distinguish between the artist's increasing number of pictures and their own changing memory image of the suspect's face. There is also the constant underlying doubt as to witness's ability to describe a face accurately.

By comparison to artist's drawings, composite kits cannot, even under the best of conditions, result in a completely accurate picture of the suspect. Studies have reached the conclusion that artists' sketches tend to be better representations of real faces than identi-kit composites, probably because of the fundamental deficiency of a composite technique of identification.[215]

The increasing use of photo-fits has led to a number of studies concerning their efficiency.[216] It has been found that photo-fits are more likely to lead to identifications than identi-kits, presumably because

photographs of parts of actual faces are more conducive to identifications than the relatively artificial outline features used in identi-kits.[217]

Even though these three basic forms of non-photographic pictorial representations might be unreliable, in some circumstances there are simply no alternatives to their use. Furthermore, the dangers that might arise because of their unreliability are minimized to some extent by the fact that the reliability of particular representations will be subject to verification if they lead to the identification of a suspect. The rule provides that, in this case, the original witnesses should be asked to attend a lineup in which the suspect is a participant. Recent studies have suggested that the construction of a photo-fit has little effect on a person's ability to recognize the suspect later.[218]

Case Law

In *R.* v. *Riley (No. 2)*[219] the witness assisted the police in compiling an identi-kit photograph which was then tendered as evidence of identification. This evidence was held to be relevant and admissible:

> [E]vidence can be given of identification in the course of a line-up, and evidence can be given that the witness selected a photograph of the accused.... It would seem to be that it would also be permissible for evidence to be given that the witness had selected, for example, a sketch of the accused...on the same basis, I think that the identi-kit photograph is the selection of the witness of a number of different aspects of the head and face shown in the identi-kit photograph....[220]

The photo-fit composite picture has also been introduced as evidence of identification at trial.[221]

Present Practice

In London, a sketch or composite is considered, more often than not, to be simply confusing to everyone involved in the investigation. However, if some form of representation is necessary, an artist's drawing is used; identi-kits or photo-fits are never used. In Ottawa, artists' drawings and composites are used fairly regularly. Identi-kits tend to be used more often than photo-fits. In Toronto, when identification is at issue, all witnesses who have indicated that they might be able to subsequently identify the offender are asked to construct a composite drawing of the offender, through the use of an identi-kit. The identi-kit sketches are always made part of the record. Artists' sketches are never used in Toronto. In Kingston, artists' drawings are used in the more serious cases, and where the witnesses, by their previous descriptions, have indicated that they had a fairly good look at the offender.

The police in Calgary report that identi-kits are not as flexible as artist's drawings but are used when a suitable artist is not available. The

police in Fredericton report that the composite kits are used in about 30 per cent of the cases. The police in Newfoundland, Montréal and Sherbrooke report that the composite techniques are used in a small percentage of the cases. The police in Saint John, Vancouver and Edmonton report that sketches of composites are never used.

Most cities report that all eyewitnesses would be asked to compose a representation of the person they saw, but that they would be asked to do so separately.

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:

COMMENT

A number of procedures may be used to test whether eyewitnesses can identify a police suspect as the person they saw at the scene of the crime. These procedures most commonly include a confrontation, an informal viewing, a photographic display, and a lineup. Under these guidelines, unless a lineup is unnecessary, unwise or impractical for one of the reasons ennumerated in Rule 501, a lineup must be used as the test for determining whether eyewitnesses can identify the police suspect.

The lineup (or the "identification parade" as it is called in Great Britain and a few other Commonwealth countries) appears to be the most reliable and fairest means currently used to test the ability of eyewitnesses to identify the person they saw.[222] In this comment, the reasons why a lineup is preferred over a confrontation, an informal viewing or a photographic display are discussed.

Confrontations vs. Lineups

A confrontation or show-up consists in presenting a single suspect to an eyewitness, and then asking the witness whether he or she can identify

the suspect as the offender. In some cases the suspect will be in the custody of the police, and handcuffed. This is obviously the most unsatisfactory method of pretrial identification. Witnesses who confront a person in police custody will find it difficult to resist the almost overpowering suggestion that the police suspect that person of being the offender, and might abandon their judgment to that of the authorities. If the suspect bears even the slightest resemblance to the witnesses' mental image of the offender, uncertainties in the witnesses' mind may be resolved by altering their mental picture of the offender to one more closely fitting the accused. This is particulary true in cases where witnesses consider it their public duty to assist the police in whatever way possible; where witnesses feel an extraordinary need to show appreciation and gratitude for all the time and effort the police have devoted to finding the criminal; where witnesses are particularly retributive and will not be satisfied until someone has been convicted and punished; or where the witnesses find the aftermath of the crime so emotionally disturbing that they simply wish the identification procedures to end. Under these guidelines a confrontation is prohibited except in very rare circumstances: see Part VIII.

Case Law

The courts in virtually all common-law jursidictions have condemned the unnecessary use of confrontations as a method of identification. For example, in England, in a case in which two accused were identified while standing alone at the police station, Phillimore J. of the English Court of Criminal Appeal commented: "Such methods as were resorted to in this case make this particular identification nearly valueless, and police authorities ought to know that this is not the right way to identify."[223]

In an Australian case[224] two witnesses to an assault were shown the accused in a room at the police station where the only other people present were police officers. The court noted:

> It has long been the experience of judges that evidence, as to the recognition of an accused person, in a dock, or, in a police station alone, or in company with police officers, is open to grave objection. For to see an accused so situated is to observe him in such incriminating circumstances, as to suggest to the witness that the prisoner is in fact the offender or was believed by the authorities to be the offender. Prejudice to the accused is unavoidable.[225]

The court went on to consider the effect of the identification procedure upon the value of the identifying witnesses' evidence:

> It has been held by the High Court that if a witness, whose previous knowledge of the accused has not made him familiar with his appearance, has been shown the accused alone as a suspect and has, on that occasion, first

identified him, the liability to mistake is so increased as to make it unsafe to convict the accused, unless his identity is further proved by other evidence direct or circumstantial.[226]

The attitude of Canadian courts is similar to that of the courts in England and Australia. In a case involving the display of one photograph, the Ontario Court of Appeal stated: "Anything which tends to convey to a witness that a person is suspected by the authorities, or is charged with an offence, is obviously prejudicial and wrongful. Submitting a prisoner alone for scrutiny after arrest is unfair and unjust."[227]

In the Commonwealth jurisdictions discussed, the courts have been unanimous in stating that a confrontation is an improper method of identification.[228] A conviction obtained by the use of such identification evidence will be quashed, unless there is strong independent evidence of guilt.[229]

Early case law in the United States suggested that, if the police hold a show-up, evidence of all pretrial identification should be excluded on the grounds that the accused was denied due process of law. The in-court identification should also be excluded unless an "independent source" for such an identification is established. In *Stovall* v. *Denno*[230] the United States Supreme Court held that the issue was whether the confrontation "was so unnecessarily suggestive and conducive to irreparable mistaken identification"[231] as to be a denial of due process of law. In this case, the court found that the particular confrontation was not a denial of due process, since the only eyewitness was dying in the hospital. Thus, while the confrontation was suggestive, it was not "unnecessarily" so because of the circumstances.

The implication of the *Stovall* decision seemed to be that if a confrontation was held and there was no "necessary" reason for holding it, there was a *per se* violation of due process. Subsequent Supreme Court decisions have, however, changed the focus of the test to be applied. In *Neil* v. *Biggers*[232], the court emphasized the reliability of an identification made by way of a confrontation rather than its potential for suggestiveness. The majority of the court implied that it is not the denial of fundamental fairness, but "the likelihood of misidentification which violates a defendant's right to due process."[233] Indeed the majority held that the "central question" was whether "the identification was reliable even though the confrontation procedure was suggestive."[234] The court listed five factors to be considered in determining reliability (and hence admissibility) of admittedly suggestive eyewitness confrontations: the opportunity of the witness to view the criminal at the time of the crime; the witness's degree of attention; the accuracy of the witness's prior description of the criminal; the level of certainty demonstrated by the witness at the confrontation; and the length of time between the crime and the confrontation.

Subsequent cases have confirmed that evidence of an identification made at a confrontation will not be excluded if the evidence might be reliable because of the factors mentioned above.[235]

Present Practice

Canadian police departments generally report that they will only hold a confrontation in exceptional circumstances. See the discussion of present practices in Part VIII.

Informal Viewing vs. Lineup

Another identification procedure sometimes used by the police is to place the suspect among a group of people in a natural setting (for example, a bus depot, courtroom, or police station lobby), and invite the eyewitness to pick the person he or she saw. Generally, the suspect will be unaware of being observed.

This type of informal identification procedure might appear to have a number of advantages over a lineup. First, it has the possible advantage of presenting the witness with a much larger number of people to choose from than is possible at lineups. This will be particularly true if the viewing location is, for example, a large courtroom or busy bus depot. Second, suspects and other people at the viewing location will not know that they are being observed and will, therefore, be more likely to act normally. In a lineup, suspects might draw attention to themselves through nervousness. Distractors, because they are likely to know who the suspect is, might unconsciously convey this information to the viewing eyewitnesses by, for example, standing a slightly greater distance from the suspect. Third, in an informal viewing the conditions under which the original observation took place might be more closely simulated. Fourth, if the police tell witnesses that the suspect may or may not appear at the location, the witnesses will not be as inclined to make an identification just because they believe it is expected of them.

However, in spite of these apparent advantages, an informal viewing potentially violates each purpose of these guidelines: it does not permit the suspect to exercise his or her rights; it cannot be controlled to ensure that it is not suggestive; it is difficult to reconstruct at trial; and the conditions might be unfavourable for a witness to attempt to make an accurate identification. Each of these objections will be discussed in turn.

First, some subjects will be unaware that informal viewing procedures are taking place. Therefore, they will necessarily be denied the right to counsel and the ability to ensure that the procedures are conducted fairly and in an unsuggestive manner.

Second, the police will not be able to exercise control over what takes place at the viewing location. Thus the suspect may unwittingly engage in some form of behaviour that may tend to attract the witness's attention. Furthermore, the police will be unable to control the type of distractors; thus there can be no assurance that the distractors in an informal viewing will possess the same distinctive features or mannerisms as the suspect. Lineups, by contrast, can be controlled in order to eliminate any conditions that might bias the witness towards identification of the accused.

Third, it will not be possible to describe precisely either the number and appearance of the other people present at the viewing location, or the general manner in which it was conducted. The court, therefore, will be unable to review the fairness of the circumstances under which the accused was identified. This is unlike a lineup, which can be photographed and the procedure accurately described.

Fourth, the witness will not be permitted to examine closely each person who appears. It may be too much to expect a witness to identify the suspect who is perhaps seen at a distance for a brief period of time. Yet, the jury may tend to place considerable weight upon the fact that the witness saw the accused and did not make an identification. Furthermore, witnesses who mistakenly identify someone under these poor conditions may afterwards be reluctant to admit their mistake, even though closer observation reveals less resemblance than was originally thought. The witness will thus tend to concentrate upon the similarities and minimize any dissimilarities between the accused's appearance and the witness's mental picture of the offender.

Finally, there is a danger that a witness may observe the suspect at the viewing location, and even though he or she does not make an identification, the witness may have unconsciously formed an image of the suspect. At a subsequent identification proceeding or at trial, the witness may experience some recognition and superimpose the image of the suspect acquired at the viewing location upon the more distant and uncertain image of the offender.[236]

Thus, although an informal viewing may offer a few apparent advantages over the more formal lineup, on balance, the lineup is by far the better method of testing an eyewitness's reliability.

Present Practice

Informal viewings are frequently used by some police departments. For a description of the present practice with respect to informal viewings, see the discussion under Part VIII.

Photographs v. Lineups

It is understandable that in the nineteenth century the lineup would be regarded as the most reliable method of identifying suspects; there was really no alternative. However, modern police forces have access to vast numbers and types of photographs from which stringent identification tests can be constructed. Thus, the question of whether the lineup is simply an anomaly, preferred by the criminal justice system because of tradition, is a serious one. In this section, the merits of live lineups are compared with those of photographic displays.

(a) Why Photographic Displays Might be Preferred to Lineups.

First, with a photographic display there are no cues as to whom the police suspect. In a lineup, on the other hand, there are at least two sources of cues from the lineup participant that a witness might use in selecting the police suspect. First, if the suspect displays nervousness while the distractors are calm, the witness may identify the suspect on this basis. The extent to which this occurs is unknown: in many lineups, distractors, simply because of the strangeness of the surroundings, might display considerable anxiety. Conversely, many suspects may display few signs of nervousness in this setting. A second source of cues for the witness might be the behaviour of the distractors. They might unconsciously behave so as to direct the witness's attention to the suspect. They may, for example, look at the suspect out of curiousity about his or her reaction to the presence of the witness, or they may feel uncomfortable about being so close to a suspected criminal, and respond by standing slightly further away from the suspect than from the other participants. In some cases this danger can be controlled for. In Rule 505(7) it is recommended that this danger be controlled by ensuring that the lineup distractors do not know who the suspect is. Where the participants do know who the suspect is, perhaps this danger can be controlled to some extent by a careful instruction.

Second, a photographic display might be preferred to a lineup because witnesses at lineup procedures might feel under pressure to make quick identifications, so as not to waste the time of the distractors. On the other hand, an appropriate caution to witnesses, as required by Rule 205(b), should ensure that they feel comfortable in making an unhurried identification.

Third, witnesses might experience anxiety at the prospect of having to identify a suspect personally, particularly if they fear retaliation. A photographic display permits a witness to make an identification in a relatively relaxed environment. Rule 505(13) would alleviate this anxiety at lineups, by permitting the use of one-way mirrors.

Fourth, in a lineup the police are limited by the practical consideration as to how many distractors they can present — the usual number will be around eight. Normally, a much larger number of photographs similiar in appearance to the suspect can be located. Thus, a more challenging test of the witnesses' ability to pick the suspect out of a group can perhaps be constructed using photographs. However, although it is impossible to determine the optimal number and kind of distractors in a fair identification test, there is evidence that suggests that properly conducted live lineups provide a fair test of the witnesses' ability.[237]

Fifth, it is alleged that forming lineups is time-consuming, expensive for the public, and inconvenient for the distractors; and that a photographic array can be assembled with little expense or inconvenience. However, most lineups do not take long to assemble; less than two hours is required in most cases. Distractors do not appear to be unduly inconvenienced. Indeed, holding a live lineup is another way in which the public can become involved in the administration of criminal justice.

Although these disadvantages of a lineup over a photographic display would not appear to be overwhelming, they would swing the balance in favour of photographic displays, if lineups had no compensating advantages.

(b) Why Lineups Might be Preferred to Photographic Displays.

First, the most important reason for preferring lineups over photographic displays is that they appear to be a more accurate method of identification. A number of studies have reported that subjects find it easier to recognize suspects in a lineup than they do in a photographic display.[238] These studies confirm what would appear to be a commonsense judgment. A lineup provides more dynamic cues to aid identification than a photographic display does. All people possess a number of personal distinguishing features which are noticeable to those who view them "in the flesh", but which cannot be accurately reproduced through photographic techniques. The fine details of complexion, including skin tone, texture, and blemishes, will not generally appear in photographs. In addition, any single photograph allows a view of the suspect's face as seen from only one angle and at a certain distance. On the other hand, corporeal identification allows the witness to study the suspect from a variety of angles and distances, and permits the recognition of certain habits and mannerisms, such as excessive eye-blinking or twitching of facial muscles, which would not be discernible in a photograph.

Second, in addition to being generally more reliable, lineups are preferable to photographic displays because they are more flexible. Suspects can be asked to perform various gestures and bodily movements which might help the witnesses in confirming their identification. Lineups

also allow the appearance of the participants to be altered to conform more closely to that of the alleged appearance of the person seen at the scene of the crime. For example, the participants can be asked to don special clothing or eyeglasses similar to those worn by the offender.

Third, lineups are preferred to photographs because the procedure takes place in the presence of the suspect. This serves as a restraint on the manner in which the suspect is presented to the witness for identification. The police will probably be far more careful about avoiding suggestive behaviour if the suspect is present at the proceedings. If improprieties do occur, the accused will be able to raise them at trial. Particularly in view of the importance of the identification test, since witnesses usually cling tenaciously to their original identification, it seems in keeping with the most fundamental notions of justice that the accused should be permitted to be present when a witness, in effect, first accuses him or her of having committed a crime.

Fourth, there is also some danger that witnesses who view a photographic display will be less careful in their identification than would be the case at a lineup. Witnesses viewing a lineup are usually aware of the fact that some of the participants are law-abiding members of the public. They will therefore exercise more caution in viewing a lineup than they would while looking through an album containing photographs of convicted criminals.

Finally, lineups are preferable to photographs for the reason that if evidence from a photographic display is presented at trial, the jury might infer that the police had a photograph of the accused because she or he had a criminal record. Most people know that the usual practice is for the police to show witnesses a series of photographs or "mug shots" of people who have been arrested or convicted in the past. These mug shots are contained in police albums commonly referred to as the "rogues' gallery". The prejudice against the accused by virtue of the jury's believing that he or she has been previously convicted of a crime obviously compounds the danger of wrongful conviction. The use of photographic displays allows the prosecution indirectly to put before the jury evidence that could not be offered in chief, namely the fact that the accused had a record of a previous conviction.

A weighing of the relative merits of photographic displays and lineups as techniques of identification leads to the conclusion that the police should conduct lineups whenever possible. In some instances a photographic display might be more appropriate; for example, where the suspect has radically altered his or her appearance, the suspect is uncooperative, or where for some reason distractors cannot be obtained. In these limited cases, photographic displays are permissible under these guidelines: see Rule 501.

As stated in the introduction to this paper, this conclusion can only be reached tentatively on the basis of our present knowledge. It might well be that since by using photographs the police are able to obtain so many more and better distractors, therefore photographic displays are a much better identification test than lineups. This might particularly be the case if the kinds of photographs used were of three-quarter poses and of otherwise-provided optimal viewing conditions. Unfortunately, it would be extremely difficult to determine this question empirically. Therefore, in this paper at least, it is recommended that the traditional identification test be retained.

Case Law

In a number of reported Canadian cases, the police have held photograph displays in situations where it appears that lineups could have been conveniently arranged, and the judges have not commented adversely on the failure to hold a lineup.[239] But in other Canadian cases, judges have expressed concern that when a photographic display is used, the trier of fact often infers that the accused has a previous record, and therefore these judges have encouraged the use of lineups. In a number of Commonwealth cases, judges have expressed dissatisfaction when the police have held a photographic display in a situation where a lineup could have been conducted. In *R.* v. *Seiga*[240] the witness was shown an array of photographs even though the accused was under arrest at the time. The English Court of Criminal Appeal commented that "this court in the absence of any explanation cannot but regard the conduct of the detective constable as unsatisfactory."[241] Similarly, in *R.* v. *Bouquet*,[242] the police showed photographs of the accused, who was being held in custody. The New South Wales Court of Criminal Appeal commented that "[a] personal identification parade should be employed except special circumstances."[243] In a recent case decided by the New Zealand Court of Appeal,[244] the court stated that "...only in exceptional cases should photographs be used at a stage when some particular person is directly suspected by the police and they are able to arrange an identification parade or some other satisfactory alternative means whereby the witness can be asked directly to identify the suspected person."[245]

Present Practice

Barring exceptional circumstances, most cities use a lineup whenever identification is at issue, particularly if the case is a serious one. However, in Hamilton and London, photographic displays are routinely used in place of lineups. In Ottawa, a lineup is held in virtually every case.

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

COMMENT

Only rarely will a witness's description of the offender be detailed enough to enable the police to narrow their search to only a few possible suspects. Thus, if the police do not have a suspect, a common law enforcement technique is to have a witness look through a series of photographs of previously-convicted persons in order to attempt to identify the person. The police might select photographs of persons who fit the description given by the eyewitness, of persons convicted of similar crimes, or those who, for some other reason, might be suspect. Obviously, in these cases the police cannot go to the inconvenience and expense of requiring all these people to attend a lineup. To prohibit the showing of photographs to witnesses in these circumstances would impose an unacceptable burden on the police's search for the criminal. Consequently, this exception provides that a lineup is not mandatory (and therefore the police may show photographs) where they have no particular suspect.

A lineup will be required if the police have a particular suspect, even though they might not have sufficient evidence to justify an arrest. It has been suggested that, in these circumstances, the police should also be able to show photographs to witnesses. However, when the police suspect that a particular person may be responsible for a crime, they should seek to confirm their suspicions in a manner that most effectively guards against the danger of misidentification. They should, accordingly, ask the person whom they suspect whether he or she would be willing to appear before the witness in an identification lineup. Only if the suspect refuses to participate should consideration be given to employing either some less formal method of corporeal identification or a photographic array. In addition, a rule that would permit the police to hold a photographic display when they had a suspect, but not sufficient evidence to arrest, would be difficult to enforce, since it would require the determination of whether the police did, at that particular point in time, have sufficient evidence to arrest.

Case Law

The courts have been unanimous in approving the police practice of showing photographs to witnesses when they do not yet have a suspect.[246] Indeed, a number of cases suggest that it is proper for the police to show photographs to witnesses where they suspect a particular person, but do not yet have sufficient evidence to justify an arrest. For example, the Court of Criminal Appeal of Queensland has stated that:

> When the police suspect a particular person has committed an offence, it is quite legitimate for them to show a collection of photographs including a photograph of the suspect to persons who may be able to assist in the identification of the offender ....[247]

(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.**

COMMENT

A lineup will only fairly test whether the police suspect is the person that the witness saw, if the suspect is placed in a lineup composed of a number of similarly-appearing persons. Otherwise the police suspect will simply be too obvious. Thus Rule 505(4) requires that "[t]he significant physical characteristics of all persons placed in a lineup should be approximately the same." However, in some cases the suspect's appearance will be unique, making it impossible to assemble a suitable number of similarly-featured people willing to participate in a lineup. For example, the suspect might be very tall or very short, very young or very old, or the suspect's hair length or facial features may be unusual. If the suspect is of a particular racial origin, it may be impossible, in some communities, to obtain participants of the same race, either because they are not present in the community or because they are unwilling to participate. In these circumstances, the witness's attention would be drawn to the suspect's unique appearance; therefore, holding a lineup would not serve any purpose.

In some cases, the police will be able to proceed with a lineup by disguising a distinguishing feature possessed by the suspect which, if left uncovered, would tend to attract the witness's attention. For example, a suspect who has a prominent scar on his or her cheek may have a bandage placed over it. Of course, all the other participants would have a similar bandage placed on their cheeks. Rule 505(5) provides for such a procedure in conducting lineups.

However, if it is impossible to obtain suitable lineup distractors, some other form of recognition test should be used. In most cases, a photographic display would be the possible to find the requisite number of similar-looking people (for example, people of the same race) from a mug shot file; photographs might not reveal the suspect's distinguishing characteristic (for example, that the suspect has only one arm); and in some cases, it might be easier to disguise distinguishing features that the suspect possesses since photographs can be retouched.

Present Practice

The police in most cities report that they would not hold a lineup in these circumstances. Halifax and Vancouver police report that in some cases (about 25 per cent) distractors are not available because of the reluctance of certain racial or ethnic groups to co-operate with the police.

(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.**

COMMENT

It is possible to conceive of situations (for example, where the witness and suspect are located in different provinces) where to arrange a lineup would be costly and time-consuming or otherwise inconvenient. In such circumstances, a photographic display should be used. Lineups are, of course, always more inconvenient to hold than photographic displays, but the guideline makes it clear that lineups can be dispensed with for this reason only in exceptional cases.

Another obvious situation in which the guidelines provide that a witness might be shown a photographic array in lieu of a lineup is when he or she is, through illness or other cause, incapable of attending the lineup. The propriety of this practice will depend upon the urgency of securing an identification.

Case Law

Although there are no cases directly on point, since lineups are not normally required under Canadian jurisprudence, photographic displays have been expressly sanctioned in cases where it would be highly inconvenient to hold a lineup.[248]

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

COMMENT

It is clear that if a witness is in immediate danger of death or blindness, and some form of identification can be made immediately, a lineup should be dispensed with. In such a case, normally a confrontation will be held: see Rule 801.

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

COMMENT

Most police forces now use one-way mirrors, and therefore there is little justification for witnesses being reluctant to view a lineup, since they will not personally have to confront the suspect. The *Devlin Report* proposed that the police be given the power to issue a summons to witnesses to require them to attend a lineup. However, because this problem arises infrequently in Canada, this power would appear to be unnecessary. Furthermore, in the few instances where a witness might be unwilling to view a lineup, for example, where the police do not have facilities with a one-way mirror, and the witness is too terrified to confront the suspect because he or she has been the victim of a violent crime, it does not seem wise to compel the witness to do so. A photographic display should normally be arranged in such circumstances.

Present Practice

Police from all cities report they have one-way mirrors and that the problem of witnesses refusing to attend the lineup rarely arises. When it arises, it is because the crime is a minor one and the witness does not want to be troubled; the witness is not affected in any way by the crime and does not want to become involved; or, the witness is an elderly victim of a violent crime or otherwise concerned about pursuing the matter.

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

COMMENT

Obviously, a lineup should not be held if the witness's attention will be drawn to the accused. It would not achieve its purposes in such a case, since the tendency of most witnesses would be to identify the person to whom their attention is particularly attracted. A clear instance where it would be prejudicial to place the accused in a lineup would be if he or she refused to co-operate: an unwilling lineup participant would be liable to draw the particular notice of the viewer. Although it has been suggested that it might be possible safely to compel a suspect to appear in a lineup by instructing the other participants to act out signs of resistance similar to those displayed by the recalcitrant suspect, the practicality of such a proposal is doubtful and, in any case, there would be a danger that the confusion arising out of such a demonstration might seriously impair the witness's ability to make an accurate identification. Moreover, such a

procedure unduly infringes on the dignity of the distractors. The question of what consequences should flow from the accused's refusal to participate in a lineup is fully discussed under Rule 504.

Present Practice

See comment following Rule 504.

(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.**

COMMENT

Another situation in which it is impossible to hold a lineup is where the police have a definite suspect whose whereabouts are unknown. The police could, of course, be required to wait in such cases until the suspect is apprehended, before asking the witness to attempt an identification. However, this may involve a lapse of months or even years, during which the witness's recollection of the offender's appearance may become vague and distorted. As a result, the witness may be unable to identify, or may be more inclined to misidentify the offender. Consequently, when the suspect's whereabouts are unknown, and there is no prospect of locating him or her within a reasonable period of time, a photographic display should be conducted, if possible.

Case Law

An illustration of the circumstance covered by the rule is provided in *Astroff* v. *The King*.[249] The police had seized some narcotics from an apartment. The name Cecil Wilson appeared on the door. The police showed a photograph to two employees of the apartment building who each identified it as the occupant of the apartment, Cecil Wilson. Two years later he was arrested in New York. The court stated that "no injustice was done the accused by this method of identification."[250]

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

COMMENT

The suspect may, between the time of the offence and the conducting of the pretrial identification proceeding, alter his or her appearance in a

material way. For example, he may remove his beard, or grow one. Studies have shown that changes in the appearance of a face can reduce the probability of recognition almost to chance.[251] In cases where the police possess a photograph of the suspect before his appearance was changed, a strong case can be made for submitting the witness to a photographic, rather than a corporeal, identification test.

In some cases it is possible to prevent the suspect from altering his or her appearance. If it is thought that the suspect might remove his beard, for example, the police might attempt to prevent him from shaving. It has been suggested that the police should be given such authority. However, such actions would be a serious infringement on the suspect's right to privacy. Therefore, it is not recommended that the police be given this power. In any event, a suspect is likely to be deterred from seriously altering his or her appearance since a court may, in such circumstances, view the suspect's behaviour as indicative of guilt.

Case Law

Most of these issues raised by this rule have never been considered by Commonwealth courts. In an Indian case, however, it was suggested that the authorities be given considerable power to prevent suspects from making their identification more difficult:

> Beards or clean-shaven faces furnish frequent cause for trouble, for sometimes in order to avoid recognition a bearded criminal after committing the crime gets himself shaved, or vice versa. It is notoriously difficult to recognise a bearded man who has got himself shaved, or a clean-shaven man who has grown a beard. If therefore the Magistrate comes to entertain good cause for the belief that the suspect has indulged in such a trick, it is open to him to defer the identification of the clean-shaven suspect until he has grown a beard of the appropriate size, or to get the bearded suspect shaved.[252]

Present Practice

Some police forces report that when a suspect's appearance has changed drastically, they will use a photographic display if they have a photograph of the suspect that was taken before the change. Most forces however, reported that if the suspect's appearance has not changed too drastically, they will still hold a lineup. In Ottawa, the police recounted an incident in which a suspect had pulled out his mustache; they still went ahead with the lineup. But they said that if the suspect's appearance has changed drastically, they might simply use a show-up. All of the police forces reported, however, that they were not too concerned about drastic changes in the suspect's appearance; they felt that this would be good evidence to use against the accused.

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.

COMMENT

If the police do not have a suspect, or for one of the other reasons mentioned in Rule 501, a lineup need not be held, it is, of course, quite proper for the police to show photographs to witnesses. However, if a lineup is required to be held under Rule 501, it is improper for the police to show witnesses photographs of the person they will be asked to attempt to identify. The danger is that the photograph of the suspect will become so imprinted on the witnesses' minds that at any subsequent lineup, the image of the photograph will displace the witnesses' recollection of the offender. This danger is likely to arise because of a number of factors. First, the photographic identification would be much more recent than the original encounter between the witness and the suspect. This could cause the photograph to be imprinted more strongly in the mind of the witness. Second, witnesses would probably have a much longer period of time (not to mention better viewing conditions) to study and carefully look at the photograph than they did to study the actual features of the person they are trying to remember. This again is a psychological factor, which might result in a bias towards identifying on the basis of a previously shown photograph.

This danger might be present even if the witness fails to identify the suspect's photograph. At a later lineup, the witness might remember having seen the suspect somewhere before and conclude that it was at the scene of the crime.[253]

Case Law

The courts have clearly recognized the danger of showing a witness a photograph of the suspect prior to the conducting of a lineup. In *R.* v. *Goldhar and Smokler*,[254] in discussing the probative value of the identification evidence in such a case, the court noted, "there is always the risk that thereafter the person who has seen the photograph, will have stamped upon his memory the face he has seen in the photograph rather than the face he saw on the occasion of the crime".[255] The courts have been virtually unanimous in condemning the showing of photographs prior to a lineup.[256]

The reported cases, however, reveal differences of opinion as to the extent to which evidence that a witness saw the accused's photograph will detract from the value of the witness's testimony. While some of the

early cases go so far as to suggest that such a witness would no longer be "useful" to the prosecution,[257] most of the cases hold that the issue goes to the weight, rather than the admissibility, of the identification evidence. Thus, provided that the jury is instructed about the possibility that the witness, in identifying the accused, may be relying more upon a recollection of the photograph than upon a recollection of the offender, the appeal court will not generally interfere with a jury's verdict.[258]

A photographic display may be necessary to aid the police in selecting a suspect, and if both the photographic display and the subsequent lineup are properly conducted, a number of cases appear to hold that the evidence will be admissible, and a warning unnecessary.[259]

Yet in some cases, even though the photographic display was improperly conducted, it has been suggested that no warning need be given to the jury. For example, in *R.* v. *Ireland*,[260] even though only one or two photographs were displayed to the four witnesses prior to the lineup identification, Mr. J. Fair said that this evidence was admissible and that it could not be said "that the evidence of the witnesses was so seriously affected by the course taken by the police officer that the jury was bound to reject it as worthless."[261] Although some type of comment on the weight of this evidence was apparently made by the trial judge, Mr. J. Fair went on to say that "it is not necessary for the Judge in summing-up to say that the weight of evidence might be affected by that having been done."[262]

In one case the police invited a witness, before viewing a lineup, to look through a window at the accused, who was sitting alone. The English Court of Criminal Appeal condemned this objectionable practice in the strongest language:

> We need hardly say that we deprecate in the strongest manner any attempt to point out beforehand to a person coming for the purpose of seeing if he could identify another, the person to be identified, and we hope that instances of this being done are extremely rare. I desire to say that if we thought in any case that justice depended upon the independent identification of the person charged, and that the identification appeared to have been induced by some suggestion or other means, we should not hesitate to quash any conviction which followed. The police ought not, either directly or indirectly, to do anything which might prevent the identification from being absolutely independent, and they should be most scrupulous in seeing that it is so.[263]

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.

COMMENT

As a general rule, a lineup should be held as soon as possible after a crime has been committed and a suspect has been apprehended; the offender's image will be fresher in the witness's memory, and the police will be able to identify and release innocent suspects as soon as possible.

On the other hand, psychological studies have shown that the memory of faces does not deteriorate as rapidly as, for example, the memory of names or numbers. And, indeed, there appears to be little deterioration the first few days following perception. (See the comment following Rule 801.) Therefore, a suspect's rights and the fairness of the lineup procedure should never be sacrificed for the sake of speed and expediency. In particular, ample time should be taken to find similar distractors, and to permit suspects to notify their lawyer.

In some circumstances, it might be advisable deliberately to delay the holding of the lineup for one or two weeks. For example, if the witness has recently seen a photograph of the suspect, to avoid confusion between the memory of the photograph and the memory of the actual face, a delay might be in order. Similarly, if the witness accidentally comes into contact with the suspect before any formal identification proceedings, it may be advisable to postpone the lineup. Another situation where it might be advisable to delay the holding of a lineup is one in which the witness has been the victim of a crime of violence and is in a state of anxiety.

Because of these considerations, no precise time can be set within which a lineup must be held. The guideline simply states the general rule that it ought to be held as soon as is practicable; preferably, before the suspect is arrested.

Case Law

Canadian courts have not established any guidelines relating to the effect of time lapses upon the value of identification evidence. In *R.* v. *Louie*[264] the defendant appealed on the ground that the identification evidence was unreliable, since it was that of a sole witness who had picked the accused's photograph from an array eight months after the crime. However, the majority of the court were impressed that the witness made the identification without hesitation, and they upheld the conviction.[265]

In another Canadian case, *R.* v. *Peterkin*,[266] six months elapsed between the time of the robbery and the time of the witness's identification of the accused at the lineup. The accused's conviction was

quashed, but the court gave no indication that the time lapse was particularly crucial to the decision.

In Australia, in *Craig* v. *The King*[267] a judge of the High Court was critical of the police for not placing the accused in a lineup until five days before trial, although he had been in custody for ten weeks. However, these observations were made in dissent.

The courts of India have addressed themselves to this issue on a number of occasions. In one case, the court expressed doubts about the criminal's appearance being so impressed upon the witnesses' minds as "to enable them to correctly identify a stranger after the lapse of eight months."[268] In *Mohd. Kasim Razvi* v. *State*[269] it was said that an "identification after a great length of time cannot be judicially availed unless there is some convincing reason to accept that identification."[270] The lineup was held fifteen months after the commission of the offence in *Daryao Singh* v. *State*.[271] The court stated that the "value of identification evidence is very much minimized if the identification proceedings are held long after the occurrence."[272] However, in a case where there was a ten-month lapse, the conviction was upheld by a court which stated that "no hard and fast rule can be laid down with regard to the period of time which may elapse between the commission of the crime and the identification of the culprits."[273]

Present Practice

All police forces report that they hold lineups as soon as possible. In many cases, this might be as soon as seven to eight hours after the offence; in others, it might be one day later. Of course, if the suspect is not apprehended, it might not take place until months later.

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.

COMMENT

Both innocent and guilty suspects may believe that participation in a lineup is against their interests. Innocent suspects may generally, or for some specific reason, distrust the fairness of a lineup. Guilty suspects

may believe that they will almost certainly be identified at a lineup and that it is, therefore, in their interest to force the police to arrange a less probative method of identification, such as a confrontation. They will then be able to argue at trial that doubt is cast on the eyewitness's evidence because of the means of identification employed.

This guideline provides that the police may not compel a suspect to participate in a lineup, but that comment may be made at trial on an accused's failure to participate. Rule 501(f) provides that, if a lineup cannot be held because the suspect refuses to cooperate, a less reliable method of identification, such as a photographic display, may be used.

Although the accused might be compelled to take part in other identification procedures such as fingerprinting,[274] there is little point in providing the police with the authority to compel an accused to participate in a lineup. The purpose of a lineup is to test the witness's ability to select the offender from a group of people, none of whom draws the particular notice of the witness. Obviously, if the police must use physical force to introduce the suspect into the group, the witness's attention will likely be focussed upon him or her. The lineup's purpose will thus be thwarted. Under these conditions, the "lineup" would have no advantage over a confrontation. Indeed, it would be much more prejudicial to the accused than a confrontation, since the inference drawn by most people observing the struggling suspect, would be that he or she must have something to hide.

A procedure could be provided whereby if an accused refused to co-operate in the conduct of a lineup, the police could obtain a court order compelling participation,[275] or charge him or her with obstruction of justice. Conduct on the part of the accused that tends to attract attention to himself or herself in the lineup might then be punishable as being in contempt of a court order, or as resulting in the obstruction of justice. However, this procedure seems unduly cumbersome; furthermore, incarceration for contempt for refusal to participate in a lineup seems unduly harsh. If the accused refuses to participate in a lineup, a photographic display, which is almost as reliable as a lineup, could be held in most cases.

Partly to encourage an arrested suspect to participate in a lineup, the guideline provides that a refusal to participate in a lineup can be commented on at trial.[276] In some cases, the accused's refusal to participate in a lineup might be evidence of guilt. In some cases, what makes the evidence particularly probative is the fact that, if the police do not conduct a lineup, the jury might infer that a less reliable method of identification was used because the police were unsure as to whether or not they could obtain a positive identification by using a lineup.

On the basis of this last argument, it has been suggested that evidence of the accused's failure to appear in a lineup should only be admissible in those cases in which it is necessary for the Crown to explain the failure to hold a lineup, for example, where the accused raises the issue.[277] However, it is difficult to imagine a case in which the accused refused to participate in a lineup and where it would not be necessary for the Crown to explain this fact. Even when the defence does not challenge the validity of the identification procedure adopted, there is always a strong possibility that the jury will, on its own initiative, question the value of the identification evidence in light of the manner in which the accused was first presented to the witness for identification. Furthermore, in most cases, if a confrontation or dock identification were used, the trial judge would be required to caution the jury about the dangers inherent in these methods of identification.

An innocent accused may of course have a number of reasons for not participating in a lineup; for example, a fear that the lineup will be unfairly conducted. Any such explanation will be admissible at trial and subject to consideration by the jury. The trial judge should, in such cases, caution the jury that before they draw an adverse inference from the accused's refusal, they should carefully consider the explanation given for the refusal, or indeed other possible explanations, and bear in mind that innocent people might be understandably apprehensive about taking part in a police lineup.

It might be objected that the threat of a comment on the accused's failure to participate in a lineup will coerce some accused persons to take part in a lineup against their will, and that this is an infringement of the accused's privilege against self-incrimination. However, a review of the values underlying the privilege reveals that none are threatened by this form of compulsion on the accused to participate in a lineup.[278] First, one value underlying the privilege is that it serves to protect anxious but innocent suspects from having to take the witness stand and give testimony that might convey a misleading impression of guilt. This danger does not arise when a person is simply asked to appear in a lineup. Second, the privilege operates to deny the police access to what is often unreliable evidence (a suspect's confession) and thus, forces them to search for more reliable evidence. A lineup is the most reliable type of identification evidence, and therefore it would be incongruous to deny its availability to the police for this reason. Third, the privilege deprives the State of a power that can be easily abused in suppressing dissent. Requiring a suspect to appear in a lineup is not a police power that can be used to control freedom of thought and political dissent. Fourth, the privilege ensures that all persons are treated in a manner consistent with prevalent notions of human dignity. Compelling a person to incriminate himself or herself or to lie to protect personal interests is widely seen as an invasion of personal dignity. However, commenting on a suspect's

failure to attend a lineup is not widely regarded as unduly infringing upon a person's privacy or dignity. To the extent that commenting on an accused's failure to participate in a lineup can be said to affect any of the interests underlying the privilege against self-incrimination, the danger raised is outweighed by the probative value and necessity of a lineup identification.

It must be acknowledged that one objection to permitting a comment to be made on the accused's failure to participate in a lineup is that the accused may sometimes be faced with the choice of taking the witness stand to give an explanation for not appearing in the lineup, or take the risk that the jury will improperly infer consciousness of guilt from his or her refusal. However, this choice often confronts accused persons who have exclusive personal knowledge that must be led in defence in order to prove their innocence.

Case Law

Generally, the courts have held that placing a suspect in a lineup falls within the usual power of the police when engaged in criminal investigations.[279] Both American[280] and Canadian authorities have held that participation in a lineup is beyond the protection of the privilege against self-incrimination. Basically, the privilege has been interpreted to cover only testimonial proof.[281] As Mr. Justice Dickson stated in the leading case of *Marcoux and Solomon* v. *The Queen*:

> An accused cannot be forced to disclose any knowledge he may have about an alleged offence and thereby supply proof against himself but (i) *bodily conditions*, such as features exhibited in a courtroom or in a police lineup, clothing, fingerprints, photographs, measurements ... and (ii) *conduct* which the accused cannot control such as compulsion to submit to a search of his clothing for concealed articles or his person for bodily markings or taking shoe impressions or compulsion to appear in Court do not violate the principle.[282]

In *Marcoux and Solomon* the Supreme Court held that in the circumstances of that case, evidence that the accused refused to participate in the lineup was admissible. However, as an aside, the court said that normally such evidence should only be admissible if, as the evidence unfolds, it becomes necessary for the Crown to explain why it did not hold a lineup.[283]

Present Practice

The percentage of cases in which accused persons refuse to participate in lineups varies from city to city. This probably reflects the importance various police forces attach to holding lineups, or the degree of compulsion they place on suspects to participate. In Ontario, the

police reported that suspects often refuse to participate in lineups. In Québec, on the other hand, the police report that this rarely occurs. In other Canadian cities, the approximate percentages of cases in which accused persons refuse to participate in lineups are as follows: Victoria, 25 per cent; Calgary, 5 per cent; Edmonton, 15 per cent; Vancouver, 10 per cent; Regina, 20 per cent; Fredericton, 10 per cent; Halifax, 20 per cent; Saint John, rarely; St. John's, 50 per cent.

If the suspect refuses to participate in a lineup, police in most cities report that they attempt to conduct an informal identification procedure, without the suspect's knowledge. Common techniques include having the witness hide behind a door with a window, in a hallway from which a procession of people including the suspect can be observed, or placing the suspect in a crowded holding cell or courtroom. Police in some cities use a photographic display. However, police in a large number of cities simply resort to a confrontation when the suspect refuses to participate in a lineup.

About one-half of the cities report that if suspects refuse to participate in a lineup, they are warned that their refusal may be admissible in evidence at trial, and may be taken as evidence of guilt.

Rule 505. Lineup Procedure

GENERAL COMMENT

As explained in the general comment on lineups, a properly-conducted lineup can be invaluable to the prevention of wrongful convictions. An improperly-conducted lineup, however, may be far more damaging to a mistakenly identified accused than even a confrontation. The lineup may be viewed by the jury as a scientific test for determining the identity of an offender. They may not appreciate the subtle biases that may be introduced into the lineup procedure. Indeed, it may be impossible for the defence to reveal the biases of an improperly-conducted lineup. Therefore, since a lineup biased in any manner cannot be cured by a subsequent procedure, and since the jury may not appreciate the full significance of the bias, it is crucial that the lineup be properly conducted in the first instance. Thus, although the guidelines that follow may appear rather elaborate, there would appear to be no reason why every detail of the lineup should not conform to the best practice available. Furthermore, conducting as fair a lineup as possible will generally require very little more time or effort than conducting a haphazard one. And it will ensure that the prosecution's evidence of identification at trial is as probative as possible. Furthermore, the guidelines are just that —

guidelines. None of them prescribe hard and fast rules; they are designed to guide the police in conducting fair and reliable lineups.

(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.**

COMMENT

There are two competing interests that must be reconciled in determining the number of distractors that ought to be required in a lineup. On the one hand, a lineup consisting of too few participants will prejudice the accused in two ways. First, any distinctive features of the accused will be magnified in a small group. Every person has certain peculiar features, and thus, as the number of participants decreases, the prominence of those features possessed by the suspect will tend to increase. Second, smaller lineups increase the probability that the accused will be selected by the witness who is inclined to guess. For example, if there are eight participants in a lineup, given a witness who does in fact make a choice, the suspect has one chance in eight of being chosen simply by chance.[284]

On the other hand, as the number of participants increases, the witness's recognition accuracy will decrease because of the interfering effect of similar distractors.[285] Finally, the most important factor imposing a constraint on the number of participants is the likelihood and convenience of assembling distractors similar in appearance to the suspect. Setting the number too high would place an intolerable burden upon the police officers charged with assembling lineups.

The guideline requires that the lineup normally consist of at least seven persons. This figure represents a rough trade-off between the interests mentioned above.[286] It is clearly arbitrary in the sense that it would be hard to prove with any degree of confidence that the trade-off would be better balanced at the figure of four or twelve. However, it does represent what experience in Canada and other jurisdictions has shown to be an acceptable number. The present regulations of the major Canadian police departments provide for minimum numbers, in addition to the accused, ranging from four to ten. Based upon our survey of present police practices, it would appear that most cities use five or six distractors; however, a few cities routinely use eight or nine. In England, slightly more distractors are normally used than in Canada. The *Home Office Circular on Identification Parades* suggests that lineups should consist of the suspect plus "at least eight or, if practicable, more [persons]."[287] By contrast, in the United States the number of distractors

used in lineups tends to be somewhat lower than that normally used in Canada. Most American commentators have suggested that lineups should consist of four to six participants.[288]

Case Law

There are no reported Commonwealth cases in which the defence has argued that the lineup from which the accused was selected contained an insufficient number of participants. (There are, of course, cases in which the defence complained of an absence of similarity between the accused and the stand-ins.) One of the smallest lineups reported in the Canadian cases consisted of the accused and four others.[289] One of the largest consisted of the accused and eleven others.[290] Judging from the reported cases, the average lineup size in Canada appears to be five or six.

In India, the courts have displayed far greater concern about the size of lineups than in other common-law countries. It has been stated in a number of cases that the accused should stand beside no less than nine or ten others.[291] However, in one case it was conceded that, if too large a number of persons were mixed with the suspect, "there might be a danger of putting too much strain on a witness's ability to pick out a suspect."[292]

(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.**

COMMENT

It is often convenient to select lineup participants from an institution where persons similar in appearance to the suspect might be found, such as armed forces camps, hospitals and police stations. The danger in this practice is that the distractors might have an identifiable standard appearance. For example, police officers or armed forces personnel tend to be identifiable, particularly if they appear as a group, because of their bearing and mannerisms. Using a group of people from an institution to act as distractors also raises the danger that all distractors will know each other and be unduly conscious of the stranger in their midst. Thus, the police are encouraged to obtain distractors from a variety of places.

The use of police officers gives rise to additional concerns. Even officers who are not involved in the investigation of the particular case may believe that they and their colleagues share a community of interest

in the apprehension of criminals. Thus, they may overtly or subconsciously assist the witness in identifying the suspect. Finally, it is important that lineups not only be fairly conducted, but also that they be free from any taint of potential unfairness. Even when police officers who appear in lineups conduct themselves with exemplary fairness, the appearance of justice may be lacking. People might be left with a lingering sense of bias.

People being held in local jails and nearby detention centres often provide a readily-accessible pool of lineup distractors, but they may be inappropriate for two reasons. First, they may be unkempt, even if held for only a few days, and unless the suspect is similar in grooming, he or she will stand out in contrast to the other participants. Second, people who are in custody may be tempted to disrupt the orderly and effective conduct of the lineup out of feelings of empathy with the suspect. Since this danger can be guarded against in individual cases, the guideline does not provide any general prohibition against using these people.

Case Law

In the only Commonwealth case in which most of the distractors in the lineup were police officers, the court spoke disapprovingly of the practice.[293] However, since in this particular case an adequate direction had been given to the jury as to the weight and force to be attached to the identification evidence, the court was satisfied that there had been no miscarriage of justice.

Present Practices

Most police forces normally find distractors off the street. Universities, arcades, bars, and restaurants are convenient sources of distractors. In some cities, a description of the suspect is sent over the police radio, and officers on the beat are asked to search for suitable distractors. In other cities, it appears that police officers are sent out specifically to find distractors.

In most cities, police officers are seldom used as distractors. However, two police departments appear to use them routinely, while two others use them frequently. In a large number of cities, people in custody are routinely used as lineup distractors.

In most cities, police search for distractors immediately prior to holding the lineup. In other cities, for example Guelph, the police will often schedule the lineup, and distractors will be invited to appear at the scheduled time. This might be a day or two after they were first notified.

The task of assembling distractors normally appears to take one-half to three hours.

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

COMMENT

If there is more than one offender and the police have several suspects, it might be convenient to place them all in a single lineup. However, there are a number of reasons why this is not a good practice. First, one of the reasons for requiring a lineup composed of seven participants is to reduce the chance that the witness will simply correctly pick the suspect by guessing. Obviously, if more than one suspect is placed in a lineup, the likelihood that the witness will guess at least one of them correctly increases in proportion to the number of suspects in the lineup. In such a case, the value of the lineup as a test of the witness's ability to identify the persons he or she saw is diminished.

A second reason for requiring that only one suspect appear in each lineup is that unless the suspects bear a striking similarity to one another, there is little likelihood that a lineup will be assembled in which all the participants are sufficiently similar to prevent the suspects from standing out.

Finally, if the suspects are similar in appearance (for example, if they are brothers), their relationship to one another may be manifest by their physical appearance, demeanour or physical bearing towards one another. Consequently, if the eyewitness knows, for example, that the suspects are related, the eyewitness might select the suspects because they are so similar to one another.

Most jurisdictions are very strict about not allowing more than one suspect to appear in a lineup.[294] In England, the Home Office rules provide that where there are two suspects of "roughly similar appearance", they may be paraded with at least twelve others, but where two suspects are not similar in appearance, or there are more than two suspects, separate parades should be held, using different persons in each parade.[295] The rules also provide that where the suspects are members of a group, for example, where police are involved, the identification parade should include not more than two of the possible suspects, and even then only if they are of similar appearance.[296]

Present Practice

Police in most cities report that separate lineups would not normally be held if there were more than one suspect, but that the number of distractors in the lineup would be increased. However, if the suspects were obviously dissimilar to one another, for example, where one suspect was white and one black, two lineups would be held. A few cities report that the same lineup would be used and the number of participants would not be increased. Others, for example, Edmonton, Fredericton, and Sherbrooke, report that a separate lineup is held for each suspect and the distractors match the physical characteristics of each suspect.

Case Law

In Canada, the practice of placing more than one suspect in a lineup has escaped criticism from the courts. In cases involving three suspects in lineups composed of seven[297] and ten participants,[298] the courts have failed to comment adversely. In one case, five suspects were placed together in a lineup and no adverse comment was made; however, the reported decision does not disclose how many distractors were used.[299]

In India, where it is common to hold lineups containing as many as ten suspects, the courts have acknowledged that the proportion of non-suspects to suspects may, in such cases, be reduced from the normal ratio of nine or ten to one. However, in one case where the ratio was permitted to drop below three to one, the court stated that the "identifications have little value because there is an appreciable risk of persons being implicated purely by chance."[300]

It is clear that if separate lineups are held, an entirely different group of stand-ins must be used with respect to each suspect. In a South African case this was not done. Two men were charged with theft. One of the accused was placed in a lineup with eight others. He was identified by one of the two witnesses. Shortly thereafter, the other accused was added to the lineup, which was otherwise composed of the same people. He was identified by both of the witnesses. The Supreme Court of South Africa referred to the identification parade as "entirely useless" and set aside the conviction.[301]

(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.**

COMMENT

If a witness were able to give a complete, detailed and accurate description of the offender, there would be little point in holding a lineup. The offender could be identified on the basis of the witness's description alone. However, witnesses are often unable to articulate many physical characteristics of the person they saw and are unable to recall other characteristics, even though they might recognize them. The purpose of the lineup is to present the witness with a number of persons similar in appearance to the offender as described by the witness, and then to have the witness choose the person with the unarticulated or forgotten characteristics of the person seen. Consequently, it is important that all lineup participants appear similar. If only one lineup participant has the physical characteristics the witness described, the witness might identify that person because it will be obvious that the person is the police suspect. In effect, the lineup would raise all the dangers of a confrontation.

Thus, a lineup of similarly-appearing persons serves two functions. First, it obscures the person whom the police suspect. Second, by presenting a number of persons who fit the general description of the offender, it compels the witness to be cautious in making an identification.

Lineup participants clearly cannot be similar in all respects. Physical characteristics such as apparent age, height, weight, hair length, skin colour, and build should be considered. General traits such as attractiveness and facial expression are also important.[302] In determining which characteristics of the lineup participants should be similar, the police should view the suspect and attempt to match obvious characteristics. However, the witness's description of the suspect should also be used to discover what characteristics the witness felt were salient.[303]

Still, it will only be possible to assemble a range of people approximating the suspect in appearance. Thus, if the suspect weighs 150 pounds, a group of people ranging in weight from approximately 140 to 160 pounds will necessarily have to be included in the lineup. However, the suspect's features should always fall close to the median of any such range of features represented in the lineup.

If a lineup is fair (in the sense of serving the purposes mentioned above), then a person who knows only the general description of the offender should not be able to pick him or her out of the lineup. In a number of actual cases, psychologists have given testimony about the fairness of a lineup. For example, in an Ontario case, *R.* v. *Shatsford* (unreported) the witness described the offender as being rather good-

looking. Even though the witness was unable to give many further details about the offender's appearance, she picked the accused out of a lineup. Simplifying the experiment that formed the basis of their testimony, the psychologists showed a photograph of the lineup to a large number of people and asked them to pick out the guilty person. The subjects were told: "Imagine that you are a witness to a crime. All you can remember about the criminal is that he was rather good-looking. The police then arrest someone whom they think committed the crime, and they place him in a lineup. Imagine that you are shown this lineup and asked by the police to identify the guilty person. The police seem certain that they have the right person, but they need your identification. You try your best to pick out the guilty man. In the picture below, whom would you pick?" If the lineup were a fair one, based on this general description, people should only have been able to pick the suspect by chance. Twenty-one subjects were shown the photograph; by chance, fewer than two should have been able to pick the apparent suspect. In this particular case, eleven out of the twenty-one subjects picked the suspect.[304]

While studies such as this can only provide a rough measure of the fairness of a lineup, they do emphasize the need for lineup participants to be of similar appearance, if the lineup is to achieve its purpose.

All jurisdictions require that lineup participants be of similar appearance. It is interesting to note that in some countries, this includes the express requirement that they be members of the same social class. For example, the *Mexican Code of Penal Procedure* provides that "[t]he individuals who accompany the person being identified must be of a similar class, taking into account his education, breeding and special circumstances."[305] In England, as well as providing that the suspect should be placed among persons "who are as far as possible of the same age, height, general appearance ... and position in life as the suspect".[306]

Case Law

The courts insist that lineup participants be similar in appearance.[307] However, it is not clear exactly how similar the participants must be, nor what the consequences of holding an unfair lineup are.[308]

Even when the lineup has been conducted unfairly, in that the participants have not been of similar appearance, the courts have been reluctant to set aside a conviction on the basis of such evidence. For example, in *R.* v. *Armstrong*,[309] a conviction was not set aside even though the accused, who was an Oriental, was placed in a line consisting of five others, all of whom were Occidentals. And in *R.* v. *Jones*[310] the accused, who was Indian, was placed in a lineup composed of people who bore no resemblance to him in age or appearance, except for a man who

was part Indian. In dismissing the accused's appeal, the Ontario Court of Appeal noted that "it would be very apparent to the jury that the line-up evidence was, at best, very weak and no instruction from the trial Judge would be required to enable them to reach this conclusion."[311]

The opposite conclusion was reached by the English Court of Criminal Appeal in an earlier case. The two accused persons were dishevelled and unshaven, unlike the other lineup participants. Despite an impeccable direction from the trial judge, the jury convicted the accused. The appeal court considered it unsafe to allow the verdicts to stand, and quashed the convictions.[312]

(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.**

COMMENT

If the suspect has a prominent distinguishing feature, such as only one arm, a lineup is of little value. The suspect would be so easy to distinguish from the other participants that the lineup would, in effect, simply amount to a confrontation. The need to disguise the distinguishing features of a suspect is particularly urgent, since witnesses who view a person with an unusual characteristic might remember this feature of the person but very little else. Thus, there is a danger that they will subsequently identify someone as the offender simply because they possess this characteristic.[313]

A reported case that illustrates this potential danger involved ten eyewitnesses, all of whom had described the offender as having a scar over his ear. They all picked out the only member of the lineup with such a scar. He was acquitted at trial when he was able to prove that, at the relevant time, he was over one thousand miles from the scene of the crime.[314]

In some cases, it might be possible to obscure the suspect's distinguishing feature by making it appear that all the lineup participants had similar features. Since the witness will be able to view the suspect in the same condition as he or she was when first observed (if the suspect is the offender), the witness would, to some extent, still be able to use the distinguishing feature as a cue in making an identification.

In many cases, however, disguising all the distractors to resemble the suspect in some distinguishing manner will be inconvenient or impossible. In these cases, it may still be possible to obscure the distinguishing mark simply by covering it. In order not to attract attention to the suspect, all distractors would obviously have to be similarly covered. Even though the witness will thus be presented with an array of persons of unnatural appearances, and will be denied access to the most likely means he or she would use to identify the suspect, the information gained in knowing whether the witness was, nevertheless, able to identify the suspect could be of substantial value.

Although the need to conceal distinctive marks may be most compelling where the witness mentioned them in describing the offender, it should be done in all cases. The witness may, for example, have observed and subconsciously registered the fact that the offender bore a particular mark. When faced with a lineup of people, only one of whom bears such a mark, the witness's subconscious memory may be triggered. An identification may result from the witness's implicit, but perhaps erroneous judgment that any person bearing such a mark is likely to be the criminal.

There is an additional concern in cases where the witness has not included the suspect's distinguishing features in the description given to the police. In the case where the witness described the feature to the police, there is some independent evidence linking the accused with the offender. But where such a mark is not mentioned by the witness prior to viewing the suspect, no such independent evidence exists.

In addition to the argument mentioned above for disguising distinguishing features even where the witnesses have not mentioned them in their descriptions, there is also the concern that the distinctive mark may lead to an identification for reasons totally unrelated to a resemblance between the suspect and the witness's image — conscious or unconscious — of the offender. For example, the witness may notice a scar, tattoo or unattractive feature possessed by the suspect alone, and conclude that he or she is probably the offender because the witness associates unattractiveness or tattoos with criminality, or scars with violent tendencies.

In some cases, due to the unusual appearance of the suspect, it will be necessary to forego a lineup altogether. Rule 501(b) provides for some form of identification test to be used in these circumstances.

Case Law

There are reported instances of lineups in which the police have attempted to conceal distinguishing features of the suspect. For example,

it is reported that in an old English case in which the suspect had a club foot, the feet of all members of the lineup were covered by rugs.[315] However, there are no English or Canadian cases in which the courts have criticized the police for failing to disguise the suspect's distinguishing characteristics, even though in a number of cases the suspect clearly had distinguishing marks.[316]

In India, magistrates who conduct lineups are instructed by a provision of the *Manual of Government Orders* as follows:

> If any of the suspects is possessed of a scar, a mole, a pierced nose, pierced ears, a blinded eye, a split lip or any other distinctive mark efforts should be made to conceal it by pasting slips of paper of suitable size over it, similar slips being pasted at corresponding places on the faces of a number of other under-trials [stand-ins] standing in different places in the parade.[317]

Failure to comply with this provision has resulted in acquittal. In *Babu* v. *State*, [318] the accused was the only lineup member with a large scar on his neck. The court stated:

> It is the duty of the magistrate to satisfy himself and not for the accused to point out to him how his duty is to be performed. It seems to me that this failure on the part of the magistrate holding identification proceedings to take steps to cover the scar on the neck of [the accused] ... is sufficient to discredit the identification evidence. Babu must get the benefit of the doubt and be acquitted.[319]

In *Asharfi* v. *State*[320] it was pointed out that the rule was not only observed but was sometimes followed so literally that so many slips of papers are pasted on the lineup members that they look "like a scarecrow and what the witnesses are called upon to identify is not a human face but a mask."[321]

Present Practice

The police in virtually all Canadian cities report that they make no effort to disguise distinguishing characteristics of the suspect, such as scars and tattoos. Generally, they report that those are often the very characteristics the witness looks for in identifying the suspect. Some cities report that if the suspect was wearing glasses, for example, they might attempt to have all lineup participants wear glasses, and indeed some police forces have a stock of glass frames that they use for this purpose.

(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.

COMMENT

A witness's attention may be drawn towards the lineup participant whose clothing is noticeably different from that of the others; hence the necessity that the participants' clothing be as similar as possible. A suspect dressed in jeans and a T-shirt would undoubtedly attract the critical attention of the witness if other distractors wore suits. Although it is impractical for the lineup participants to wear identical clothing, it should be possible to find distractors who are dressed in a fashion roughly similar to the suspect, or to instruct them to dress in such a fashion. If the suspect does not own clothes that are similar to those worn by the other participants, the police should see that they are provided. The clothes must fit the accused properly, and not be conspicuous in comparison with those worn by others.

One method of achieving uniformity in dress would be for the police to issue each participant with special standardized clothing. However, it is questionable whether absolute uniformity of dress is necessary at lineups. A number of obvious practical problems would also attach to such a requirement. First, many of the lineup participants would resent being required to don a uniform. This might exacerbate the problems already facing the authorities responsible for assembling a lineup. Second, because of variations in human size, virtually the only uniform clothing that would be appropriate for this purpose are coveralls, which might inhibit the witness's recognition of a person previously seen in closer fitting street clothing. Finally, the costs of such a proposal might be large, particularly to the police departments in smaller communities.

Normally, the suspect should not wear the same clothes as it is alleged that the offender wore at the time of the crime. The reason for this is that the witness might identify the suspect simply on the basis of the clothing worn. This would defeat the purpose of the lineup, which is to see whether the witness can identify the suspect on the basis of physical appearance and characteristics.

If the suspect is wearing clothes at the time of the lineup that are similar to the clothes allegedly worn by the offender, it would be better police practice to have the suspect remove these clothes and don others. Then the witness could identify the clothes that the offender was alleged to have worn, and separately attempt to identify the suspect on the basis of physical appearance. In this way the police can obtain, in effect, two items of identification evidence. If the police do not have a set of street clothes for the suspect to wear in this situation, all lineup participants might be requested to wear coveralls.

In some cases, it might be important to the identification of the offender that an item of clothing worn at the time of the offence be worn by the lineup participants. This situation is dealt with in Rule 505(12).

Interestingly, some countries require the suspect to be dressed as he or she was when seen by the witness. For example, the Italian *Code of Penal Procedure* dictates that a suspect is to be "presented in the same condition in which he could have been seen by the person summoned."[322] On the other hand, a provision in the Mexican *Code of Criminal Procedure* requires that lineup participants wear similar clothing.[323]

Case Law

In many reported cases, it seems highly probable that the witness was greatly aided in identifying the accused by the fact that the accused was wearing either the same clothes or clothes similar to those said to have been worn by the offender. Yet rarely have the courts commmented adversely upon this practice.[324] In particularly flagrant cases, however, the courts have criticized the police practice of placing the suspect in a lineup, wearing clothes similar to those allegedly worn by the offender, and in some cases, have quashed a conviction.[325]

In some cases, it is clear that the police have recognized that the case against the accused would be strengthened if the witness identified the accused and his or her clothing separately. In *Sommer* v. *The Queen*,[326] the witness separately identified the hat and coat of the appellant. Unfortunately, the police then had the accused wear the clothing in the lineup. The lineup evidence was ruled inadmissible.

In *R.* v. *Smith*[327] the police properly had the witness identify the appellant and his windbreaker jacket separately. This proved useful in evaluating the evidence, since the witness was forced to admit: "I cannot identify the right man like because he did not wear a jacket, if he wear a jacket I could identify him."[328] The conviction in this case was quashed because the identification evidence was too tenuous to support a conviction.

Present Practice

Police in virtually all cities report that, in most cases, the accused would wear the same clothes that he or she wore when arrested, which in some cases would be similar to the clothes that the witness described the offender as wearing. However, if the suspect's clothes are very distinctive, police in some cities will attempt to have the suspect appear in other clothes. Some police forces will go to the suspect's home to obtain other clothes; others will get a change of clothes from organiza-

tions such as the Salvation Army, and yet others will dress all the lineup participants in overalls or smocks.

All police forces report that they attempt to achieve uniformity with respect to articles such as ties and suit jackets.

No police force cautions suspects that they can change their clothing if they wish, but normally the suspects will be permitted to, if they request it. In a few cities, the suspects are invited to exchange jackets with other lineup participants.

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

COMMENT

The psychological data suggesting that police officers might unknowingly transmit their knowledge of who the suspect is, to the eyewitness, would also tend to suggest that distractors with the same knowledge could transmit similar cues. The methods by which this would be done might differ, but the end result would be the same. Whereas officers might direct their attention to the accused by changing their tone of voice or facial expression when referring to a certain person, the distractors might identify the suspect by unconsciously staring or taking side-glances at the person they know "should be picked", inadvertently pointing their bodies in his or her direction, or by moving away from the suspect, perhaps because they feel nervous being near him or her.

Although in some cases there might be practical difficulties in guarding the anonymity of the suspect, normally these should not be too difficult to overcome. It will simply require treating the suspect as any other distractor. Of course, if the suspect insists on changing positions in the lineup after one witness has viewed the lineup, his or her identity will become known. This could be avoided by making the changing of positions automatic and mandatory, involving all the members of the lineup, not just the suspect. Also, if suspects wish to voice objections concerning the composition of the lineup, it would be extremely difficult to have them do so without the distractors becoming aware of their identity.

Present Practice

It would appear that under present practices, distractors usually know who the suspect in the lineup is. No special effort is made to conceal his or her identity in most cities. However, some police forces

report that, in some cases, distractors would not know who the suspect is. In at least one city, distractors are interviewed separately, so that they will not know 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.**

COMMENT

The right of a suspect to determine where to stand in the lineup is important for two reasons. First, a witness who has viewed the lineup and who, in spite of the precautions taken, is able to communicate with another witness who has not yet viewed the lineup, might remark on the position of the suspect. A suspect is protected against this danger by changing positions after each viewing. Second, the suspect who is accorded this right will be more inclined to view the lineup as a fair proceeding. All possible steps should be taken to remove any suspicion that witnesses have been told in advance whom they are to identify. A suspect may also believe, rightly or wrongly, that there are particular strategic locations in a lineup more likely than others to attract the witness's attention. The suspect might think, for example, that the middle and end positions would be particularly eye-catching. Suspects will invariably feel that the lineup has been fairer if they are able to choose a position they feel is innocuous. As well as making the proceedings more acceptable, allowing suspects to choose their position in the lineup might put them more at ease, and hence make them less conspicuous.

Many jurisdictions specifically provide in legislation that suspects may choose their position in the lineup.[329]

Case Law

No reported case discusses the right of suspects to choose their lineup position. However, in *Nepton* v. *The Queen*,[330] the court commented adversely on the fact that the accused "was placed in the centre with two other persons on each side."[331]

Present Practice

The police in virtually all cities surveyed permitted suspects to choose their position in the lineup. In most cities, suspects are also invited to change their position if there is more than one witness, and apparently they frequently do so.

(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.**

COMMENT

If it is necessary for the distractors to know the identity of the suspect, steps should nonetheless be taken to minimize the likelihood that their behaviour will bias the witness towards selecting the suspect. Thus, all lineup participants should be instructed to look straight ahead and not to talk. They should also be instructed not to convey any hints or suggestions as to who among them is suspected by the police, and not to behave in a manner that would attract the witness's attention. Most importantly, they should be cautioned about the seriousness of the proceeding and should be told not to assume an air of levity or an appearance of calm or relaxation inappropriate to the occasion. If they can be impressed with the seriousness of the occasion, it is more likely that they will assume a demeanour similar to that of the suspect.

(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.**

COMMENT

This guideline has been drawn up so that any unfairness or irregularity overlooked by the supervising officer can be corrected before the entry of the witness.[332] If a faulty procedure takes place, it could result in evidence that is unreliable and prejudicial to the accused, or at the very least, a waste of time and effort.

It is also important that the suspect be given an opportunity to object to the arrangements before the actual viewing, in order to assist the court later in determining whether the lineup was conducted fairly. On the one hand, if the suspect makes no objection, this would strengthen the credibility of the procedure and lessen the possibility that its fairness might be impugned at trial. Presumably, a suspect who objected at trial would be asked why he or she did not object at the lineup, when there might have been some opportunity to correct the procedures. On the other hand, if an objection with full particulars was lodged at the time of the lineup, that information would be available to the court to aid it in deciding what weight to give to the identification evidence.

(11) ***Photograph of Lineup.*** **A colour photograph or videotape shall be taken of all lineups before or while 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.**

COMMENT

To assess the value of a witness's identification evidence, the court must determine whether the suspect was identified at a fairly-conducted lineup. The fairness of the lineup will depend, in part, upon the similarity of the lineup participants. A written description of the physical appearance of each of the lineup participants can provide the court with only a rough idea of whether the distractors were similar in appearance to the suspect. However, photographs should enable the trier of fact to make an informed judgment as to whether there was any possible sources of bias in the lineup caused by the dissimilarity of the participants. Indeed, bias could be tested with the aid of a photograph, by giving uninvolved people a general description of the suspect, and by asking them to pick the suspect from the photograph.[333]

If the authorities are required to photograph lineups, they may be more diligent in assembling participants bearing a close resemblance to the suspect. This will be due to a concern that they might be criticized at trial if they fail to do so, and because the photographs will be reviewable by their supervisors, even if they are not produced at trial.

In exceptional situations, a photograph taken of a lineup containing a suspect may be used for subsequent identification purposes. For example, if a suspect is identified by one witness at a lineup and then refuses to participate in another, a photograph of the lineup may be shown to the other witnesses.

It has been suggested that it would be costly and inconvenient to require police in smaller communities to photograph lineups, and that such a practice would make it more difficult to obtain volunteer distractors — they would object to being photographed because someone might wrongly conclude that they had been in trouble. Some people might also be concerned about the possible misuse of the photographs. In these cases, the volunteer's fears can be allayed by explaining the reason for the photograph, and by assuring him or her that the photographs are kept secure and are eventually destroyed. In any event, the experience of those police departments that routinely photograph lineups does not appear to substantiate these apprehensions.

The guideline provides that where more than one witness views the same lineup, separate photographs should be taken. This may be

important since the suspect may have changed positions, or other participants may have in some way changed their appearance between viewings.

Naturally, if the police department has videotape equipment, a video of the lineup is preferable to a photograph.

Case Law

There are no cases in which the court has held that the police must take photographs of lineups. However, in a number of cases where such photographs have been introduced into evidence, the courts have noted their usefulness.[334]

Present Practice

Photographs of lineups are taken in all cities surveyed except Hamilton, Toronto, Trois-Rivières, and Saint John. These cities reported that the major reason photographs are not taken is that it would be too difficult to obtain volunteers for the lineup. However, police in Vancouver, Edmonton, St. John's and Calgary report that objections to a photograph are rarely made by lineup participants. Other cities report that members of the public never object to having their photographs taken. The police in all cities except Ottawa report that if the accused changes position in the lineup, another photograph is taken. Except for Ottawa, Sherbrooke, and Montréal, the police in all cities that took photographs took them in colour.

Colour photographs, although perhaps not significant in most cases, might be crucial where the suspect's skin pigmentation or hair colour, for example, is different from that of the other lineup participants in a way that would not be discernible in a black and white photograph.

A photograph only captures an image of the lineup at one instant in time. During the course of the proceedings, distractors or even the suspect may behave in a manner that would provide some cues as to who the suspect is. Only a videotape of the entire proceedings would reveal these biases. Although it might be too expensive at this time to require a videotape to be made of every lineup, since in some police departments videotapes are not yet readily accessible, the guidelines explicitly permit the use of videotapes.

(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.

COMMENT

There is some evidence suggesting that witnesses, aside from simply being able to identify the clothing, may be better able to identify the offender if he or she is dressed in the clothes worn at the time of the offense. The theory is that the suspect's features may only assume significance to the witness when they are shown in conjunction with the other stimuli present at the original observation. There are two possible explanations for this phenomenon. First, there might be something about the offender's facial features which the witness has associated with the clothing worn by the offender. This information would be stored in the witness's subconscious memory and would be retrievable only by the simultaneous presentation of the offender's face and the related object. Second, if the offender wore clothing that served to obscure aspects of his or her facial features at the scene of the crime, but did not wear them at the lineup, the witness's recognition might be impaired by the presence of extraneous stimuli. For example, the sight of hair on a person who had previously worn a hat might serve to confuse the witness and distract his or her attention from the features that might, if presented by themselves, stimulate recognition.

However, although simulation of clothing may sometimes assist accurate identification, it can substantially increase the risk of mistaken identification, if the proper precautions are not observed. A suspect should never be required to don clothing similar to that worn by the offender, unless the other lineup members are required to do the same. As explained in the commentary to Rule 505(6), if only the suspect is wearing the clothes worn by the person the witness saw, the witness may simply recognize the clothes worn by the suspect as being similar to those of the offender, and conclude that he or she must be the offender.

Case Law

From the reported cases, it would not appear to be uncommon for the police to request the suspect to don certain clothing at the request of the witness. The courts have not commented adversely on this practice, even though other lineup participants were not invited to don the clothing.[335]

Present Practice

Police in about half of the cities reported that if, for example, the offender was wearing a mask at the time of the alleged offence, at the request of a witness, they would ask all participants in the lineup to don masks. In some cities, all participants would don masks together; in other cities, they would don the mask in turn. The police in Kingston reported a case in which all those in the lineup were required to wear nylon stockings over their faces.

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

COMMENT

The use of one-way mirrors in conducting identification parades is now common in Canada. This procedure contributes to the fair and effective conduct of the lineup in a number of ways.

First, viewing the lineup from behind a one-way mirror reduces the anxiety that a witness might otherwise feel in a face-to-face confrontation. It also encourages the witness to undertake a longer and more careful study of all the lineup members. A witness might feel uneasy about having to stare face-to-face at the participants and may, therefore, make a hasty identification. Particularly if the witness is the victim of a violent crime, he or she may feel uneasy about the possible presence of the attacker in the lineup. Numerous studies have shown that it may take considerable time to recall faces from long-term memory; therefore, procedures that encourage witnesses to take more time, such as one-way mirrors, are likely to enhance recognition. Indeed, it has been found that identification performance is improved when witnesses are distanced from the lineup by the use of a one-way mirror. Dent and Stephenson report that "identification performance was best in the one-way screen condition, with 40 per cent correct identifications, and worst in the conventional parade condition, with 18 per cent correct identifications."[336] The reduction of stress was given by the experimentors as an explanation for these results.

A second way in which one-way mirrors may serve to reduce incorrect identifications is by ensuring that suspects will not know exactly when they are being subjected to the witness's attention — something that causes even innocent suspects considerable tension. This tension might well be evident, and the witness might incorrectly interpret the innocent suspect's nervousness as evidence of guilt. If suspects are less aware of

the eyewitness's presence, they are less liable to display what witnesses might mistake for consciousness of guilt.

A final advantage of one-way mirrors is that some witnesses, who might otherwise refuse to attend a lineup or be reluctant to identify a suspect when they do attend, will be more inclined to make an identification, because their identity can remain unknown. Of course, witnesses will be required to testify in open court during the prosecution of any identified person, but by then their fears might have diminished, the suspect might be in custody, or in some cases the person might not be placed on trial.

The use of one-way mirrors raises at least two dangers. First, although stress might affect perception and the decision-making process, in some instances this may be beneficial. The stress and the personal interaction present in a face-to-face confrontation might tend to inhibit a witness while making an identification. That is, by becoming personally involved, witnesses, particularly those who have been victims and are anxious to achieve retribution, may be more reluctant to make an identification that may ultimately send a person to prison, unless they are absolutely certain of their choice. The use of a one-way mirror removes this personal interaction and thus makes the identification decision that much easier.

Second, the use of one-way mirrors prevents suspects from observing the procedure by which the witness actually selects a suspect. This danger may be partially alleviated by having the suspect's counsel present, and by using an accompanying officer who is not involved in the case and is unaware of the suspect's identity.

Present Practice

Police in all cities, except Guelph, report that they use one-way mirrors.

(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.

COMMENT

If the lineup is to serve as a genuine test of the witness's ability to identify the offender, the witness should be asked to attempt the

identification under conditions similar to those under which the original observation took place. Thus, if witnesses saw the offender at a distance and under poor lighting conditions, they should view a lineup under approximately the same lighting conditions and at the same distance. That is to say, witnesses should only be permitted to see the suspect's features as clearly as they saw those of the offender.

If the conditions of the first observation are simulated, the only cues the witness will be able to use are those characteristics of the offender that were observed at the scene of the crime. Witnesses who, for example, caught only a fleeting glimpse of the offender, or who saw him at a distance of 100 feet, should not necessarily be allowed to engage in a close study of the suspect in a lineup only ten feet away. The danger of such close scrutiny is that such witnesses might identify a suspect on the basis of mannerisms they think reflect unconscious signs of guilt, or on the basis of a characteristic they imagined the accused had, or about which someone else informed them.

Although the case for attempting to simulate the conditions at the scene of the original observation seems obvious, there are some practical difficulties. First, a simulation of the earlier conditions might only serve to compound the problems of imperfect perception. If a witness was prone to err during the first observation, his or her identification might be even more unreliable if obstacles to careful and complete viewing are deliberately erected at the lineup. This might not be true if uncertain witnesses could be trusted to refuse to make an identification. However, experience has shown that many witnesses will readily identify the lineup member who bears the closest resemblance to their sometimes vague and incomplete memory of the offender. Given the pressure on witnesses, it might be dangerous to deprive them of a clear view of the suspect. On the other hand, there is a possibility that witnesses will be less inclined to guess if the original conditions are simulated, provided they have been properly instructed, and they may indeed be more inclined to admit frankly that their original observation must have been too inadequate to permit subsequent identification.

A second practical problem involved, in attempting to simulate conditions under which the original observation was made, is that it will be impossible to provide a perfect re-creation of the crime. The witness may not be able to judge accurately or describe factors such as light, time and distance. Moreover, it will not be possible to re-enact the crime or to re-create the witness's emotional state. Any attempt at simulation will be, at best, approximate. If the conditions created at the lineup are less favourable to accurate observation than those prevailing at the scene of the crime, the witness may not be able to identify the offender. If they are more favourable, a suspect who is identified will be less able to argue

at trial that the witness is unreliable because his or her original opportunities for observation were poor.

A third danger of simulating the conditions of the original observation is that the jury may assume that the lineup was conducted under precisely the same conditions as existed at the scene of the crime. In other words, the simulation might contribute to the erroneous but understandable belief on the part of some jury members that the lineup procedure is a far more precise, scientific and reliable test than it actually is. However, this misapprehension can perhaps be cured by a careful instruction to the jury.

Fourth, often when there are two or more witnesses who viewed the offence from the same distance and at the same time, they will disagree on what the distance, period of observation and lighting conditions were. It would be illogical to create different viewing conditions at the lineups viewed by these witnesses, since that would necessarily mean that at least one of them would view the lineup under conditions unlike those present at the scene of the crime. Yet, on what basis will it be decided that the conditions described by one witness will be preferred to those described by the other?

Finally, many lineup facilities do not lend themselves to re-creating the original viewing conditions.

Thus, there are a number of obvious difficulties and dangers in attempting to simulate the conditions of the original observation. However, in some cases even a crude approximation of these conditions might improve the reliability of the identification test.

The guideline also suggests that aspects of the suspect's appearance that would not be visible to the witness at the original viewing should be concealed at the lineup. For example, it sometimes happens that the witness does not see the offender's face at all, yet claims to be able to identify the suspect's body type or hands, for example. There would appear to be no reason to show the suspect's face to such a witness. It could only distract the witness and give rise to the possibility of the identification's being based upon some extraneous factor such as criminal stereotyping.

Case Law

The facts of the reported cases reveal no instances in which attempts were made at the lineup to simulate the conditions at the scene of the crime. However, an Indian case touched on the danger of permitting a witness to engage in a close study of the suspect:

> [W]e should like to emphasise that during the commission of an actual offence a witness seldom has a chance of peering closely into the face of the offender, so that if at an identification an identifier was found doing so the Magistrate should not hesitate to make a note of this in his memo, in which case the Court will immediately view the witness' identification with deep suspicion.[337]

There are also many reported cases where arguably the conditions at the scene of the crime, including the condition of the eyewitness at the time, should have been simulated. For example, in *R.* v. *Zarichney*[338] the witness was a 77 year-old woman who ordinarily wore glasses, but was not wearing them when she observed the three offenders at night. She picked the three accused out of separate lineups, but there is no suggestion that she was asked to view the lineups without her glasses. In *R.* v. *Baldwin*[339] the robber wore a mask through which only his eyes could be seen. The witness said that she identified the accused at a lineup by his "eyes, and his build".[340] There was no suggestion that the accused and the other lineup participants ought to have been required to wear masks.[341]

Present Practice

Because of the lack of facilities, only a small number of police forces are able to simulate lighting conditions at the identification. The majority of police reported that the lighting and the distance of the eyewitnesses from the lineup are set. None reported any special efforts made to simulate the conditions of the original observation.

(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.**

COMMENT

A witness may be able to identify the offender because of his or her physical appearance or because of some other characteristic such as a peculiar mannerism or voice inflection. A lineup, however, is designed solely to test the witness's ability to recognize the offender's physical appearance. Therefore, it is important that nothing be done at the lineup which might cause the witness to identify the suspect on some basis other than physical appearance. The details of this guideline follow from this premise.

Voice Identification[342]

Occasionally, people can identify others by the sounds of their voices, but the ability is generally overrated. However, if a witness asserts that the offender had a very distinctive voice, his or her ability to recognize the voice is of some probative value.

A number of rules apply to voice identification. First, a lineup participant should only be asked to speak when a witness requests it. A witness who does not express the desire probably did not take any particular note of the offender's voice. If the police, on their own initiative, ask one of the lineup participants to speak, that could be taken as a cue to the identity of the police suspect. If the police ask all lineup participants to speak, not only might it not be helpful to identification efforts, but also it might serve to confuse the witness and possibly prejudice a suspect whose voice is distinctive.

Second, if a witness asks to hear the voice of some or all of the lineup participants, he or she should first have to state whether it is possible to identify any lineup participant on the basis of physical appearance. The danger inherent in allowing a witness to hear a lineup participant's voice before making an identification on the basis of appearance is that the two matters might become permanently merged in the witness's mind. It will not later be possible for the witness to assert with any confidence that the identification was based on the suspect's voice or appearance. If the witness's identification of the accused relates only to voice resemblance, it should be the jury that determines whether this is sufficiently probative to conclude safely that an identity exists between the accused and the offender. The question should not be confused with the witness's ability to identify the accused on the basis of physical appearance. Also there is a danger, in hearing the suspect's voice, that is similar to the danger raised when witnesses observe the suspect's distinctive marks. Just as witnesses might attach too much significance to the fact that the suspect bore a scar, they might be unduly influenced by the fact that the suspect spoke with an accent, for example.

If the witness identifies a person in the lineup and then wishes to hear that person's voice, the witness should be asked to identify the voice without knowing the identity of the speaker. Ideally, witnesses who claim an ability to recognize the offender's voice should be required to attend two separate lineups — one would serve as a test for likeness in appearance, and the other for likeness in voice. The lineup was presumably assembled because of the similarity in the physical appearances of the participants, not the similarity in the sounds of their voices. However, at the very least, when the lineup participants are asked to speak, the identity of the speaker should be obscured by turning off the lights, or by some other way.

If a lineup participant is requested to speak after being identified by the witness, another question arises: What words or phrases should be uttered? It is usually thought that the witness will most readily recognize a voice that repeats the words used by the offender. On the other hand, it can be argued that the witness's emotional reaction on hearing these words might impair voice recognition, or that the witness might identify the person simply because of the words spoken. Because of these dangers, it is suggested that if members of the lineup are to be required to speak, they should not repeat the words allegedly used by the offender, but should rather repeat similar-sounding words.

Compelled Actions

Much of the discussion concerning voice identifications at lineups is equally applicable to the question of whether some or all of the lineup members should be required, at the request of the witness, to walk or perform other gestures or bodily movements. The objection to this practice, once again, is that the lineup is composed of people whose only similarity relates to appearance. The suspect who happens to walk with a limp may, therefore, be identified on the basis of this characteristic, even though his or her appearance stirred no recognition in the witness's mind. On the other hand, the witness who, on the basis of appearance alone, would have identified a suspect may not do so after observing, for example, that unlike the offender, he or she does not have a peculiar gait. Therefore, it is proposed that the witnesses who request to see the lineup members walk or engage in similar action should first be required to state whether they can identify someone in the lineup on the basis of physical appearance. They can then request all persons to engage in some action.

There is, of course, some question about whether it is very useful for the witness to identify a suspect on this basis at all. If a witness described some peculiarity in the offender's walk, for example, which is also possessed by the accused, this would serve as independent evidence of the suspect's identity irrespective of the witness's identification. The fact that the witness, after viewing a lineup, states that the suspect's manner of walking resembled the offender's is not particularly helpful, unless it is particularly difficult to describe the suspect's gait.

Case Law

It is clear that evidence of any actions by the accused that might assist in identifying him or her are admissible. In *Attorney General of Quebec* v. *Begin*,[343] Fauteux J. offered the following *obiter* remarks:

> [T]o my knowledge there has never been ... exclusion, as inadmissible, from the evidence at trial, of the report of facts definitely incriminating the accused and which he supplies involuntarily, as for example: his bearing, his walk, his

clothing, his manner of speaking, his state of sobriety or intoxication; his calmness, his nervousness or hesitation, his marks of identity, his identification when for this purpose he is lined up with other persons ....[344]

In *Marcoux and Solomon* v. *The Queen*,[345] Mr. Justice Dickson considered whether forced participation in a lineup violated the privilege against self-incrimination. In concluding that it did not, he went on to say:

> An accused cannot be forced to disclose any knowledge he may have about an alleged offence and thereby supply proof against himself but (i) *bodily condition*, such as features, exhibited in a courtroom or in a police line-up, clothing, fingerprints, photographs, measurements ... and (ii) *conduct* which the accused cannot control, such as compulsion to submit to a search of his clothing for concealed articles or his person for body markings or taking shoe impressions or compulsion to appear in Court do not violate the principle.[346]

The use of voice as a means of identification has been held admissible in several cases,[347] and has been held to be particularly relevant in cases in which the suspect's voice is distinctive.[348] In a case in which a witness identified the accused by his voice for the first time in court, the court stated that such evidence alone was sufficient to support a conviction.[349]

The Ontario case of *R.* v. *Olbey*[350] illustrates how a witness's visual identification of the suspect may be supported by voice recognition. At the lineup, the witness, at a distance of five or six feet from the suspect, said: "I think that's him". As she drew closer, she trembled. The suspect said, "I am not going to hurt you", whereupon the witness said, "that's him". At trial she testified that she recognized his voice.[351] Similarly, in *Craig* v. *The King*,[352] the witness tentatively identified the accused by pointing to him and saying: "This is the type of man so far as I can recollect."[353] He then asked the accused to speak and afterwards made a more positive identification.

There are no Canadian cases that have addressed the issue of whether compelling a suspect to speak for the purpose of voice identification is a violation of a person's privilege against self-incrimination. However, in *Marcoux* v. *The Queen*[354] Mr. Justice Dickson referred with apparent approval to several American cases that suggest the accused could be forced to speak at a lineup:

> [I]n the more recent case of *United States* v. *Wade*, [the U.S. Supreme Court] considered whether a suspect's privilege against self-incrimination had been violated when he was forced to stand in a line-up, wear stripes on his face and speak certain words. The majority of the court held that neither the line-up itself nor anything shown by the record that Wade was required to do in the line-up violated his privilege against self-incrimination.[355]

Present Practice

In most cities the police will ask someone in the lineup to speak, walk or make some other gesture, or engage in some other activity if the witness requests it, even before the witness has stated whether he or she can identify someone on the basis of physical appearance. However, where the witness asks a particular person in the lineup to do something, everyone in the lineup is asked to do it.

(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.**

COMMENT

The traditional view is that witnesses should be instructed to signify any identification they wish to make by walking up to and touching the person. Touching is regarded as the best method of identification because it will remove all possibility that witnesses may incorrectly communicate their selection to the identification officer. In addition it might be argued, that witnesses who are required to touch the person whom they wish to identify will be less inclined to make an identification just because they believe it is expected of them, or on the basis of mere resemblance. On the other hand, some people might fail to make an identification because they are afraid to touch the person whom they believe to be the criminal.[356]

Whatever the advantages or disadvantages of touching as a means of identification, it will not of course be possible without considerable inconvenience if lineups are viewed through one-way mirrors.

The alternatives to touching are pointing, describing the position of the suspect (for example, "third from left"), or referring to a number that identifies the suspect. It is suggested that the best practice, because it is the most unambiguous, is to ask the witness to identify the offender by reference to a number either pinned on the clothing of the lineup members or marked on the wall above, or floor in front of them. As a precaution against mistaken communication, the supervising officer should request the person signified to step forward and should then ask the witness if this is the person whom he or she wishes to identify.

(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.**

COMMENT

Inviting the suspect to make objections at this point might permit the identification officer to correct any errors in the procedure. It will also preserve for the record any objections the suspect might have, so that they can be referred to in evaluating the reliability of the lineup procedure at trial.

(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.**

COMMENT

Care should be taken that the witnesses view the lineup in an orderly and controlled fashion, under circumstances designed to avoid any suggestion of the suspect's identity. If the witness should happen to see the suspect or distractors before the lineup is conducted, the opportunity to test the witness's ability to make an independent identification might be lost.

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

COMMENT

If there are a number of witnesses to a particular crime, it would be extremely inconvenient for the police to arrange a lineup composed of different distractors for each witness. However, if it is possible for the witnesses to attend at different times, then this is the preferred practice.

It is extremely difficult, even under ideal conditions, to determine whether a lineup is unbiased. By placing the suspect in differently composed lineups, there is some opportunity to verify independently the fairness of the lineups. If the suspect is independently selected from two different lineups, it is less likely that he or she has been selected because of a bias in the lineups.

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

COMMENT

Witnesses and jurors are both provided with an honorarium as partial compensation for the inconvience caused them. There would appear to be

no reason for not extending this courtesy to lineup distractors. Even a minimal fee may make it easier to obtain distractors.

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.

COMMENT

The rationale for this rule derives from psychological evidence that suggests a witness may be better able to identify the suspect who is presented for viewing in a context similar to that in which he or she was purportedly originally seen.[357] The underlying theory is that the witness's recognition may be triggered by the presence of objects which may have become subconsciously associated with the offender during the initial viewing. This phenomenon has been labelled "contextual cueing" by psychologists and has been well documented. For example, it has been found that photographs originally presented to the viewer in pairs were more accurately identified when they were subsequently presented together, rather than separately or with different photographs.[358]

The guideline provides no clear standard as to when a lineup should be held at location; it leaves the matter to the discretion of the supervising officer. Reviewable standards cannot be formulated at this time, since there is no clear evidence as to when contextual viewing is likely to be most helpful to witnesses. For example, some experimenters have concluded that although accuracy of recall is greater when an object's context is presented, this only holds true if the context is appropriate to the object; use of an inappropriate context results in more false identifications than non-contextual presentations. A recent study[359] has distinguished between "intrinsic context", referring to "aspects of a stimulus which are inevitably processed when the stimulus is perceived and comprehended"[360] and "extrinsic context", involving the irrelevant aspects of processing a stimulus situation. The authors concluded that only the intrinsic context influences one's recognition memory, "because the context determines what is learned, and subsequently guides the subject back to the interpretation of the stimulus that occurred during acquisition."[361]

Certainly, contextual cueing is a subject that requires further experimental testing before any conclusions can be reached about the

efficacy of particular lineup designs. Nonetheless, since the preliminary evidence clearly suggests that it might assist the witness, Rule 506 provides that, in appropriate cases, the lineup may be held at the location where the witness first observed the offender.[362]

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.

COMMENT

In a blank lineup procedure, the witness views at least two separate lineups.[363] A suspect is not present in one or more of these lineups.

Such a lineup procedure may be helpful in assessing the credibility of witnesses who are so anxious to assist the police in a criminal investigation that they will identify the lineup participant bearing the closest resemblance to the alleged offender. A decoy is in effect provided to screen out such witnesses. The credibility of witnesses who choose a member of a blank lineup would be open to attack at trial, whereas the evidence of witnesses who resist identification of a member of the blank lineup would be strengthened. The ultimate result would be a reduction in the number of innocent persons subjected to the criminal justice process on the basis of inaccurate identification, and perhaps an increase in the number of guilty people convicted because of the added strength of the evidence.

Nevertheless, objections may be made to this practice. First, there is the practical difficulty of assembling a sufficient number of volunteers to form two lineups. However, it is not mandatory that the blank lineup's numerical composition be as great as that required of single lineups in which a suspect appears — the guideline provides that a blank lineup need only consist of five participants.

Another objection is that it is unfair to trick witnesses or to make their task too difficult, particularly since the witness is cooperating with the police in attending the lineup. However, the hardship suffered by a misidentified accused far outweighs the embarrassment or disappointment experienced by witnesses who discover that they have identified a lineup volunteer or have been shown a "blank" lineup. In addition, all witnesses will have received a warning or caution before viewing the lineup, and an admonition that they should not feel compelled to identify someone. Furthermore, the conducting of blank lineups as envisaged by these rules would not be deceptive. The first lineup is a blank lineup, the second is a "real" lineup. In the procedure contemplated by these rules, witnesses would be told that they will be viewing more than one lineup, each one of which may or may not contain the suspect, but they will not be told how many lineups they will be viewing.

The final major objection is that blank lineups may ultimately operate to exacerbate the problem they were intended to solve. This concern was expressed by the Devlin Committee:

> If the suspect were not on the first parade but on the second and the witness had failed to identify anyone on the first parade, he might feel, as the psychologists agree, under even more pressure to identify someone in the second parade than may not be the case with just one parade.[36]

This argument is quite logical, since the Committee contemplated that the witness "be told that he would be required to view two parades in only one of which a suspect would be standing". If, however, witnesses are not told how many lineups they shall view, the problems perceived by the Devlin Committee should not arise.

The increased reliability of identifications derived from a blank lineup procedure, and the resultant enhanced efficacy of the pretrial identification procedure, should outweigh the mainly practical objections made to the use of blank lineups.

The use of blank lineups is not made mandatory, since it might appear to be a radical change from the present practices and there might be considerable police resistance to it. Furthermore, although it would appear to be a more reliable identification test than the present lineup procedure, there is insufficient empirical evidence to confirm that it is demonstrably better.

It was not possible to draft a reviewable standard as to when blank lineups should be used. Therefore, their use is left to the discretion of the supervising officer. As administrative and other experience as to the value of blank lineups is gained, it might be possible at some future date to draft standards as to when they must be used, or perhaps make their use mandatory.

Case Law

There is no record of blank lineups being used in any Canadian or Commonwealth cases. However, American courts have approved the use of blank lineup procedures.[365] In an American case the procedure was described as follows:

> ...Brown was tentatively identified by a witness from a profile view in a photo. Rather than compound a possible error by allowing a suggestive in-court identification of the defendant sitting at counsel table, Judge Peter McQuillan first conducted an in-court blank line-up without the defendant present, followed quickly by a line-up containing the defendant. The witness picked a police officer out of the blank line-up as the person who perpetrated the crime. The witness was then removed from the courtroom and another line-up including the police officer the witness picked out, the defendant, and two participants from the first line-up, as well as three additional stand-ins, were presented to the witness. The witness again picked out the police officer as the person most resembling the perpetrator and the defendant was subsequently acquitted.[366]

In some American cases, the police have tested a witness's identification of the accused by deliberately suggesting that another person was, in fact, the offender. For instance, in *Commonwealth* v. *Robinson*,[367] the accused occupied position number 2 in a lineup consisting of five men. In order to establish certainty, one of the police officers told the witness that "No. 1 is your man". When the participants filed in, the witness denied this and identified No. 2 as the man.[368] Similarly, in *People* v. *Kennedy*,[369] a police officer took the witness to a room and instructed him to look around the room carefully and see if he could identify a particular man. The officer added the following words of admonishment: "Mr. Davis, be awful careful in your judgment. This is a serious matter. It may involve the life of a man, and, if you ever exercised care in your life, do it now". The witness walked over and pointed to the accused without hesitation. The officer immediately stopped him and said, while pointing to another man, "You have made a mistake. Ain't it that man? Get up and look at him. Ain't that the man?" The witness replied, "No", and confirmed his identification of the accused.[370]

Yet, in *People* v. *Guerea*,[371] a reported case actually dealing with blank lineups, the defendant's request for a blank lineup was denied on the ground that the court did not have the authority to order such a

procedure without a corresponding legislative power. Nevertheless, the court did recognize the advantage of a blank lineup in reducing the suggestiveness of the standard lineup procedure where a witness expects to view the suspect. Moreover, the court acknowledged that an identification of a defendant in a second lineup, after a blank lineup was first presented to the witness, would be "strong evidence of independent recollection of the individual identified."[372]

Present Practice

Although police in a few cities reported that they had heard of blank lineups, only in Montréal had they ever been used.

Most police departments reported that they could foresee a number of problems with blank lineups. Blank lineups, it was suggested, would confuse the witness, increase the number of distractors, be unfair to the witness, and increase the distrust of the police. Finally, it was suggested that they were unnecessary.

Two police departments reported that they could see no difficulties with blank lineups and that they might be advantageous in certain circumstances. In Montréal, where blank lineups have been used, the police reported no problems in conducting them, and said that this procedure assisted in gauging the credibility of witnesses. They also noted that if a witness was truly able to make an identification, he or she should not be influenced by a blank lineup.

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.

COMMENT

As mentioned many times in these commentaries, in traditional lineups there is always the danger that the suspect will choose the most likely-looking person. Blank lineups were suggested as one technique to minimize the danger. Another and perhaps preferable technique is the use of a sequential presentation.

Using this technique, each participant (who would otherwise be a participant in a conventional lineup) enters the viewing room alone, stands facing the witness for a certain period of time, and then leaves. Thus witnesses would see each participant in turn and would have no basis for comparing which one most closely resembles the person they saw. Since witnesses would not be told how many participants they would be seeing, there would be no temptation to select one of the last participants.

This technique has a number of advantages over the conventional lineup. First and most importantly, for the reasons mentioned above, it would reduce the danger that the witness would simply select the most likely-looking participant, whether this is done on the basis of who best resembles the witness's memory of the person he or she saw, or on the basis of other cues, such as the relative nervousness of the participants. Second, it removes the bias inherent in a lineup when the distractors know who the suspect is, which is often difficult to control. Third, it would provide better information on how readily witnesses made their choice, and how certain they were of the choice. Fourth, since the lineup participants would walk into the room and face the witness, this technique provides a more realistic test of the witness's ability to identify the suspect. (Of course, if the suspect has, for example, a peculiar gait, then each participant would have to be stationed before the witnesses were allowed to view the person or they might select a suspect simply because of his or her gait.)

The guideline provides that if the witness does not choose anyone from the sequential presentation, then he or she should be invited to view all the participants standing in a lineup. If the witness then identifies someone as the suspect, that will be some evidence of the accused's identity, but not particularly probative evidence. The justification for this procedure is described in more detail following the guideline which permits the police to hold a confrontation if the suspect is not chosen from the lineup by the witness.[373]

The difficulties in drafting a standard as to when a sequential presentation should be used are the same as those in attempting to draft such a standard for the use of blank lineups. With experience, it might be

possible to gain sufficient facts so that a final judgment can be made about the superiority of the traditional lineup, blank lineups or sequential presentation.

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.

COMMENT

It would obviously be improper to allow a witness to view one lineup containing the suspect and then, if the witness does not identify the suspect, subsequently to permit him or her to view another lineup containing the suspect and an entirely new group of distractors. The fact that the suspect would be the only person appearing in both lineups would be a cue to the witness as to who the police suspect is. In addition, the witness might select the suspect out of the second lineup in part because he or she "looked familiar".[374]

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.

COMMENT

The reasons why lineups are generally to be preferred to photographic displays were discussed under the general comment to Rule 501. However, a lineup will be impractical if the police do not have a suspect, if they are unable to obtain suitable distractors, if it is inconvenient to hold a lineup, if there is a need for an immediate identification, if the witness is unwilling to view a lineup, if the suspect refuses to participate in a lineup, if the suspect's whereabouts are unknown or if the suspect has altered his or her appearance. In these situations, the police may provide a display of photographs in an attempt to have the suspect identified.

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.

COMMENT

In the instances enumerated in Rule 501 (for example, when the police do not have a suspect), a lineup will be impossible or impracticable, and a photographic display will have to be used. The purpose of this rule, however, is to ensure that even, in these instances, a photographic display is used only when necessary. If the suspect is unknown and one witness identifies a suspect from photographs, then all other witnesses should view the suspect in a lineup and should not be shown a photographic display. The reason for this rule is obvious. Rule 501 provides that the lineup is the preferred mode of identification. If the police were permitted to continue to display photographs after a suspect has been determined, then the intent of Rule 501 would be avoided. In a sense, this guideline is unnecessary — if a suspect is chosen from photographs, the exceptions in Rule 501 are no longer satisfied and a lineup should be held under that general rule.

This guideline also provides that if a witness selects a suspect from a photographic display, that witness should view a lineup with the suspect present, in order to confirm (or reject) the identification of the suspect's photograph. A photograph does not furnish a perfect likeness and thus a witness may withdraw a tentative identification upon viewing the suspect in person. The risk in this procedure, as discussed in the comment to Rule 502, is that witnesses at such lineups may likely make an identification based upon their memory of the photograph, rather than their recollection of the suspect's features at the scene of the crime. However, since the witness will be called upon to make a corporeal identification of the accused at trial in any event, it is preferable that the witness view a lineup first. The witness will be under less pressure, in this setting, to confirm the original photograph identification and will also face a more challenging test of his or her recall.

Several safeguards should limit the potential dangers of this procedure. First, this rule anticipates that only one eyewitness will undergo this double identification process, since once a witness identifies

a suspect, the remaining witnesses are required to view a lineup. Second, there should be some time-lag between the photographic display and the subsequent lineup identification. In this way, the image of the photograph will not be as fresh in the witness's memory. Third, witnesses should be cautioned at the lineup not to identify the person whose photograph they saw, but the person they saw at the scene of the crime. Finally, defence counsel at trial will be entitled to challenge the probative value of the lineup identification, and the trial judge will likely warn the jury about the dangers inherent in the subsequent identification.

Case Law

There are a number of cases in which it appears that the police exposed an unnecessary number of witnesses to a photograph of the accused. However, in no reported Commonwealth case has this practice been the subject of criticism by the courts.[375] In an American case where this issue was noted, however, the judge stated:

> The reliability of the identification procedure could have been increased by allowing only one or two of the five eyewitnesses to view the pictures of Simmons. If thus identified, Simmons could later have been displayed to the other eyewitnesses in a lineup, thus permitting the photographic identification to be supplemented by a corporeal identification, which is normally more accurate.[376]

There are, of course, numerous cases in which the courts have criticized the police for showing photographs to witnesses, when the proper course was to hold a lineup.[377] Similarly, the practice of preparing witnesses for a lineup procedure by showing them photographs has been strongly condemned.[378]

When the police were justified in showing photographs, the courts have never suggested that this procedure ought to be followed by a corporeal identification test.[379] In an Australian case, where defence counsel argued that the witness who had first identified the accused's photograph should later have been shown a lineup containing the accused, the Supreme Court of Australia stated: "If she had identified him in a line-up it would have been impossible to say how far she was relying on the photograph and how far on her recollection of her assailant on 17th June, and a line-up might have been harmful to his case. It was certainly not necessary."[380]

The only reported Canadian case in which the police did arrange a lineup after the witness had picked the accused's photo from a properly-shown array is rather exceptional on its facts.[381] The witness identified the accused's photograph from an array shown shortly after an assault, at which time the accused was not a definite suspect. The accused was apprehended two years later and a lineup was arranged. Although the court did not comment on the value of holding a lineup after a photograph identification, it did criticize the police for showing the witness a group of

photographs, including the accused's, immediately before he viewed the lineup.

Present Practice

Police practices with respect to "saving" witnesses to view lineups appear to vary greatly. In cities such as London, where photographic displays are routinely used instead of lineups, all witnesses will view the display. In Kingston, Montréal, Toronto and Calgary, attempts are made to "save" witnesses for lineup viewing by presenting photographs to only one witness at a time. Whether a subsequent lineup or photographic display is held for the remaining witnesses will depend, in Calgary, upon the practicality of holding a lineup, and in Kingston and Toronto, upon the degree of certainty that the original identifying witness exhibits. In Ottawa, however, only one witness at a time will view the photographs, and if the suspect is picked from the photographs, the police will invariably run a lineup which all witnesses will observe.

In most cities, lineups are not held to confirm identifications made from photographs. In Ottawa, however, such a witness would be subjected to a further identification test in the form of a lineup. In fact, this city cited instances in which identifications made on the basis of photographs were revoked when a lineup was viewed. In Toronto, such a lineup will only be held if the accused insists upon it.

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.

COMMENT

There are three reasons why the photographs used in a display should not consist entirely of photographs of convicted persons. First, using some other photographs may encourage witnesses to be more careful in making the identification. If the witnesses know that all pictures are of previously convicted persons, they might be less careful in picking someone out than they would be if they knew that some of the people in the display had never been convicted. Furthermore, mug shots, for

example, are usually taken by the police at the time of a person's arrest. They usually depict dishevelled, unshaven and deadly serious people. Often the pictures make the person look like a most unsavoury character, the kind of person who would be suspected of committing virtually any offence.

A second reason for not using mug shots exclusively is that, in some cases, this will increase the suggestiveness of the display. This danger is most obvious where the police do not have a mug shot of the suspect and are using an ordinary photograph of him or her.

The third and most compelling reason for the rule that photographic displays should not exclusively depict mug shots is that the jury might then become aware of the accused's criminal record, and permit this information to prejudice their verdict. If defence counsel contends that the photographic identification was unfair because the accused's photograph stood out from the rest of the array, the photographic display may have to be produced for the jury's examination. But the defence will be reluctant to do this if the fact that the accused has a record can be inferred from the photograph. Indeed, if it is known that the police only use mug shots in photographic displays, the mere fact that the accused was selected from a photographic display might be sufficient to prejudice the jury.

It was noted earlier that there are very few cases reporting defence challenges to the fairness of the photographic array. This may be due, in part, to the fact that most photographs used by the police are mug shots and thus, the fact that the accused has a criminal record can be inferred from them. The defence often does not wish to inform the jury that the accused has been previously convicted; consequently, improprieties in the identification process may go unchecked.

Although it is clearly desirable that photographic arrays not consist entirely of mug-shot photographs, this rule nonetheless allows such a display to be utilized because of practical difficulties. In some instances, it will be difficult for the police to obtain other suitable photographs. A random inclusion of photographs of members of the public, without their consent, would constitute a serious violation of personal privacy, and it is unlikely that many people would readily consent to allowing pictures of themselves to be used in such a manner. There would be an understandable concern that a witness or juror, viewing the array, might wrongly conclude that the person depicted has a criminal record. There would also be a danger that the person might be mistakenly identified by a witness, and suffer considerable embarrassment and inconvenience, and even a slight risk of wrongful conviction.

Nevertheless, the difficulties in obtaining photographs of people who have never been arrested or convicted may not be insurmountable. If it is

made clear to witnesses and jurors that the photographic displays are not composed entirely from mug shot albums, it may be no more difficult to secure the consent of members of the public to become photograph subjects than it is to secure lineup participants. Since the police practices survey indicates that some police departments do include photographs of persons not previously convicted in their photographic array, it appears that this is not an impossible task.

The photographs used should not bear any notations indicating that the persons depicted have a criminal record. If this requirement were not complied with, the suspect who did have a criminal record noted on his or her photograph would stand out from the others. Also, even if only mugshot photographs were used, the photograph of a suspect who had no record would be conspicuous among other photographs bearing notations indicating previous convictions.

The photographs should also not indicate the date that they were taken or received by the police, since a witness's attention will naturally be drawn to the ones of more recent date.[382] Thus, all notations on such photographs should be removed or covered up; otherwise, there will always be the potential for prejudice to the suspect caused by what may have been considered innocuous markings on photographs.

Case Law

There are no reported cases dealing with these problems.

Present Practice

Virtually all police forces reported that they only made use of photographs of persons with criminal records. However, in most cities, the numbers are cut off the photographs so that it will not be obvious to the witness that they are mug shots. The police in Calgary, however, report that they do not always use mug shots for photographic identifications.

(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.

COMMENT

A witness may be unable to identify the offender's photograph because of changes in the offender's appearance between the date of the

photograph and the date of the offence. For example, the offender may have had a mustache at the time of the offence, or may have been wearing glasses, but not when the photograph was taken. Consequently, to allow the witness a better opportunity to make a correct identification, alterations to copies of photographs are permitted.

However, the photographs should not be altered until the witness has had an opportunity to examine the unaltered photographs. Otherwise, the alterations might disguise the subjects' other facial features so as to inhibit, rather than assist, in the identification. Consequently, the witness should first be shown an unaltered photographic array and subsequently should be shown the same array in its altered form.

If a photograph is altered, a number of other photographs should be similarly altered. This will ensure that a witness does not identify the altered photograph simply because the alteration itself makes the photograph appear like the person the witness saw at the scene of the crime. In addition, by requiring the alteration to be made to other photographs, the witness is presented with a wider selection of altered photographs and, presumably, will feel less compelled to confirm his or her tentative selection.

If the police have a suspect, and the witness is viewing a photographic display, the alteration should be made to all photographs. In this way, the police will not steer the witness by narrowing down his or her selection in altering only some of the photographs.

A related issue is whether, prior to a viewing, the photographs should be altered so as to conform to the alleged condition of the offender at the time of the original viewing. For example, the lower half of the photographs could be blacked out if the offender were wearing a mask over the lower half of his or her face.

The rationale for doing this is obvious: the witness should not see, or be influenced by, any features seen at the initial observation. This recommendation was made with respect to lineups in Rule 505(5). However, the arguments for disguising lineup participants do not apply with equal force to photographic identification proceedings. First, it is impossible, by altering photographs, to re-create many disguises commonly used by criminals. For example, a semi-transparent silk stocking is a common disguise, but it is impossible to mask photographs in a way that will re-create such a disguise. Second, and most importantly, because a photograph presents human features in only two dimensions, a disguised photograph can never replicate the offender's appearance. Masking the lower part of a photographic subject's face, for example, will remove features the witness may have originally perceived. For example, in spite

of the mask, the witness might have some idea of the shape of the offender's chin, mouth or nose.

It is therefore concluded that photographs should not be altered to conform with the viewing conditions that prevailed at the scene of the crime, unless the witness requests it. Since Rule 602 requires that photographic identifications be followed by a lineup identification procedure, this aspect of the witness's identification evidence can presumably be tested if necessary.

The guidelines require that if any alterations are made to a photograph, they should be made to copies of the photographs. In this way, the originals of all photographs shown to the witness, as well as the altered photographs, can be preserved for trial.

Case Law

Although there is no Commonwealth case law dealing with the alteration of identification photographs, the American case law seems to be in accordance with these guidelines. In one case, it was held to be improper for the police to alter only one photograph in an array of seventeen, by drawing upon it a mustache and a goatee, as described by the identifying witness.[383] It has been held however, that it is permissible for the police to alter only two of six photographs at the request of the witness.[384] The court, in approving of this practice, distinguished between situations in which the police do something to single out the accused, and those in which the police merely seek to assist the witness through techniques designed to stimulate association, after the witness has narrowed his or her choice to two or three subjects.[385]

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

COMMENT

A witness who sees a photograph of the same person in separate arrays will be more inclined to identify that person for two reasons. First, the witness may recall seeing the photograph in a previous array and infer that it must be a photograph of the person whom the police suspect. Second, the face of the person depicted in the photograph may, at the first viewing, unconsciously register in the mind of the witness. Subsequent exposure to the same or another photograph of that person will trigger a flash of recognition in the mind of the witness, who might conclude that he or she must previously have seen the person at the scene of the crime.

Consideration was given to permitting witnesses to be reshown the entire array on another occasion if, for example, they were under severe emotional stress at the time of the earlier identification procedure. However, it was concluded that the better way to deal with this problem is for the police to exercise good judgment, and refrain from conducting the procedure until the witness appears to be emotionally stable. This exception to the rule would not be in conformity with Rule 509 which stipulates that the same suspect shall not appear in subsequent lineups, and could clearly invite abuse of the rule. It should also be noted that this problem is dealt with by Rule 602, where a suspect who has been selected from a photographic display will be shown to the witness in a lineup, and Rule 801(b), where the witness may be confronted with a suspect whom he or she has failed to identify from a photographic procedure.

There might be certain problems in achieving compliance with this rule, but they should not prove insuperable. It will require that a log-book be maintained to record all the photographs shown to each individual witness. However, this should not prove too difficult, since every photograph used by the police should bear a coded number on its back. Beside the name of every witness contained in the log-book, a listing of the photographs seen by that witness can be recorded. Indeed, this is required of the record-keeper in Rule 206(2)(c).

Case Law

There has been at least one Commonwealth case in which the police have managed to secure identification evidence by displaying a photograph of the same suspect in several photographic displays to the same witness. However, while the courts have recognized that the showing of photographs prior to witnesses' viewing a lineup may taint the proceedings, they do not seem to be aware that the repeated showing of a particular person in several photographic arrays may result in an erroneous identification. Thus, in *R.* v. *Sutton*,[386] where the witness was shown three photographic displays, at least two of which contained a photograph of the accused, in ordering a new trial, the court relied upon the trial judge's failure to caution the jury about the improprieties of displaying a single photograph to the witness, and ignored the fact that comparable dangers were presented by the multiple showings of the accused's photograph.

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.

COMMENT

Where the police have no definite suspect, they often must rely upon the witness's description of the offender. In these circumstances, it is common for the witness to be shown a number, often hundreds, of photographs of potential suspects who generally fit the witness's description of the offender.

In this connection, psychologists have studied the effect that exposure to a large number of photographs has on the ability of a witness accurately to identify the single photograph of the target person. One study found that as the number of decoys preceding the target in a facial recognition test increased from forty to 140, the witness's recognition accuracy decreased.[387] In an earlier study, it was found that witnesses, given a series of 150 photographs, identified the target 47 per cent of the time, whereas witnesses given only five photographs in an inspection series, identified the target 86 per cent of the time that the photograph appeared.[388] These findings may be attributed to the fact that a witness who is asked to examine a large number of photographs becomes fatigued and confused by the photographs of people who, in varying degree, resemble the offender. The clarity of the witness's mental image of the offender may therefore become clouded by exposure to an excessive number of similar faces.

It is not known at precisely what point a witness's recognition ability becomes impaired by continued exposure to photographs. However, on the basis of the available evidence, it seems that a witness will become particularly prone to error if he or she is shown more than 100 photographs in succession. Since several studies have also postulated that recognition ability may begin to decline after a showing of forty or fifty photographs,[389] it is recommended that a maximum of fifty photographs be shown at one time. If the police wish to continue the photographic display, the witness should be given a rest period of at least one day. This rest period may allow the witness's recognition faculties an opportunity to recuperate. Of course, when the photographic identification procedure is resumed, Rule 603(3) must be adhered to: the witness shall not be asked to examine any of the photographs seen the previous day.

This rule should not impose an undue burden on the police, provided that they pre-screen photographs and select only those that fall within the witness's general description. In this way, they should be able to reduce

substantially the number of potential photograph subjects that need to be shown. Although it is possible for the police to hand-pick fifty photos from their mug-shot books or photographic selection, the use of a computer to locate photographs of persons with similar features is becoming more common.[390]

Finally, this rule requires the police to show a reasonable number of photographs, even if a suspect is selected by the witness almost immediately. It is hoped that this aspect of the rule may ensure that the best identification evidence is obtained, since psychological studies report that recognition of the target will be facilitated if the target is presented earlier in the display.[391] It may be that witnesses will be inclined to identify a photograph relatively early in the procedure. Therefore, it will be important for the trier of fact to know whether such a witness subsequently wavers in his or her confidence after viewing further photographs. Evidence that the witness viewed the remainder of the display, and did not retract his or her original identification, will also strengthen the probative values of the Crown witness's identification evidence.

Present Practice

The police in most cities simply scan their mug-shot files looking for photographs that roughly fit the description by the witness. In a number of cities, the mug shots are pre-arranged according to basic physical descriptions. In Toronto, mug shots are retrieved by descriptions from a large base of photographs kept in a computer bank.

(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.**

COMMENT

Obviously, when the police do not have a suspect, there is no danger of their conveying the identity of a suspect to the witness. Furthermore, since the purpose of the showing is to assist the police in their search for possible suspects, and not to test the witness's ability to identify a suspect, it will not be necessary that there be any similarity in the appearances of the subjects portrayed in the photographs. Indeed, at this stage, it would be desirable that the witness be presented with a range of somewhat dissimilar subjects. However, some care should be taken, even at this point, to ensure that no single photograph is so dissimilar to the others as to attract the witness's attention. For example, there should be more than one photograph of a person wearing glasses, particularly where

the witness has described the offender as having worn glasses. The studies reported in the following comment illustrate that witnesses are more likely to select unusual or dissimilar photographs from an array.

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.**

COMMENT

The rationale for this rule is obvious: the witness will not face a challenging test of recall, unless the photographic display depicts similarly-featured persons. The comment following Rule 505(4), the rule that requires lineup participants to be physically similar, discusses this rationale in detail. With respect to photographic displays in particular, psychological studies have confirmed that the photographs used must be of similar-featured persons in order to be a fair test of the witness's ability to identify the suspect.[392]

This rule also requires that the photographs in the array be similar in format. That is, the photographs should be of the same size and colour (i.e., one colour photograph should not be used in an otherwise black-and-white array), and the distractors should be portrayed in similar poses, at the same angle, using the same degree of focus, etc. This is important, because as mentioned above, witnesses will tend to select a photograph that stands out markedly from the others. For instance, one study found that even non-witnesses could select the suspect's photograph from a six-photograph array at a rate "well above the chance level" when the suspect's photograph was displayed on two different angles from the others, and showed him wearing a different facial expression from the other subjects.[393]

The guideline also requires that the photograph be in colour, if possible. Intuitively one would suspect that a colour photograph would lead to better recognition performance than a black-and-white photograph. Colour adds information which could provide a cue for identification. Somewhat surprisingly, some studies have found that the type of photograph (colour or black-and-white) does not affect recognition.[394] The

authors of one study speculated that "although certain cues are available in color pictures, they simply are not used in the identification process."[395] However, in at least one study that replicated a fairly realistic law enforcement situation the authors found that colour was an important aid to identification.[396] Additional research should be undertaken on the kind of photographs that contribute generally to accurate identifications.[397]

Case Law

Somewhat suprisingly, there are few reported Commonwealth cases in which the courts have criticized differences between the appearance of the accused and that of the other subjects in the photographic display, although they often note the similarity in the photographs, and appear to attach significance to this fact.[398] Probably the strongest criticism can be found in a Canadian case where there were numerous defects in the photograph identification procedure, not the least of which was the fact that, of the ten other photographs used, "only one or two resemble[d] the accused and then only remotely."[399] Although the conviction in this case was upheld, because of independent identification evidence, the court stated that the photographic identification evidence was "seriously weakened" by the improprieties and noted that the photographs used in such a procedure should be "all of different people who bear some resemblance to each other."[400]

The American courts have similarly been hesitant to scrutinize the resemblance between the accused and the other photograph distractors. In numerous reported cases, this issue should have provoked strong criticism,[401] but did not.

The courts also appear to be reticent when the complaint is that the accused's photograph was conspicuous in its technical aspects.[402] However, it is clear that some courts will have regard to the types of photographs used when they evaluate the weight to be given to the identification. For example, in *R.* v. *Chadwick, Matthews and Johnson*,[403] it was apparent that the accused's photographs had been more recently taken, and they were mounted on backing cards different from those on which the other photographs were mounted. The verdict of the jury was set aside on the grounds that it could not be supported by the evidence.

(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.

COMMENT

This rule in effect provides that the witness be shown a "lineup" of photographs, and prohibits the police from displaying a single photograph to the witness. The showing of a single photograph raises all of the dangers inherent in a corporeal confrontation, which were discussed in the general comment following Rule 501. In particular, it is highly suggestive and therefore does not provide an adequate test of the witnesses' ability to recognize the offender. The practice of showing prospective witnesses a single photograph of a suspect has been universally condemned by courts, lawyers, psychologists and text writers.

While it is clear that there should be more than one photograph shown to prospective witnesses, there is no magic number of photographs that should be included in the group shown to the witness. Ideally, the number should be large enough to present a fair test of the witness's ability to make an identification. Since presumably it is easier for the police to obtain photographs resembling the suspect than it is to secure lineup participants, the rule stipulates that at least eleven other photographs shall be displayed along with that of the suspect. Rule 505(1) provides that the suspect should be accompanied by at least six distractors in a lineup. The comment following that rule discusses the interests involved in making this choice.

Case Law

Most courts have condemned, in the strongest terms, the practice of showing a witness a single photograph of the accused.[404]

In many Commonwealth cases, convictions have been quashed in part because of the practice of showing the witness a single photograph.[405] However, in a number of cases, the court either failed to comment upon this practice or stated that the identification evidence had been cured by the fact that the procedure used had been disclosed to the jury.[406] Thus, in one such case, the court commented:

> We are all of opinion that there was nothing in the course taken that could be called improper, and nothing that should have led the learned Judge to reject the evidence of Mrs. Abbott or to direct the jury that they should reject it. The fact that she had seen a photograph of the accused before identifying him was something of which the jury were quite rightly informed. It ought to have been disclosed to them and it was disclosed. It was for the jury alone to say how far it influenced them in relying on Mrs. Abbott's memory and powers of observation.[407]

The American courts have also strongly criticized the showing of single photographs to prospective witnesses. However, they have not held that such a practice is impermissible *per se*: single photograph

displays are to be critically scrutinized by the courts, the evidence will be admissible but it may not be considered to be particularly weighty,[408] and the conviction will be upheld if there is other independent identification evidence supporting the conviction.

Although there have been numerous cases in which an accused's photograph was displayed in an undersized photographic array,[409] it appears that only one Commonwealth court has criticized this practice and recommended that a particular number of photographs be used in an array. In *R.* v. *Pace*, sixteen photographs were used, but the effective number of distractors was in fact much lower since six of the photographs were of the accused, only one or two of the other subjects even remotely resembled the accused, and only one of the photographs in the array, that of the accused, was in colour. The court remarked: "[I]f the police deem it necessary to show photographs to witnesses in the course of their investigation of a crime, then they should produce at least a dozen, all of different people who bear some resemblance to each other." [410]

Similarly, the American courts have rarely offered constructive guidance on this issue. It has been clearly stated that there is no requirement that a certain number of photographs be shown to the witness[411] and in fact, one court stated that twelve to fifteen pictures of other individuals would be more than sufficient for a proper photographic display.[412]

Present Practice

Most police forces appear to use twelve to twenty-four photographs in a photographic display.

(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.

COMMENT

This rule is designed to minimize the danger that the accompanying officer might inadvertently provide the witness with a cue as to the identity of the suspect, by the manner in which individual photographs are provided to the witness; by the officer's becoming more tense when the witness examines the photograph of the suspect; or by allowing witnesses a particularly long period to examine one photograph before handing them the next photograph in the series. There are two possible

ways to minimize this problem. The use of a display board is to be preferred, since the photographs should all be affixed in the same manner and the officer will usually be unaware of which photograph is being examined by the witness. In addition, the exact presentation can be preserved for trial. If this manner of presentation is not feasible, all of the photographs shall be handed to the witness at once, so that the witness and officer will not be influenced by each other's reaction as each photograph is passed. This rule will be less significant if the accompanying officer is unaware of the suspect's identity.

Case Law

The above procedure conforms with that laid down in *R.* v. *Bagley*[413] in which it was held:

> There is no objection to the showing, without any suggestion, a bundle of photographs to an eyewitness of a crime in order that he may identify from them the photograph of the person who committed the crime. But, a witness must not be shown the single photograph of the person accused in order that he may be assisted thereby in making a physical identification in the usual way.[414]

The case law discussed under Rule 203 is also relevant here.

Present Practice

Police in most cities paste the photographs to be displayed onto a display board or hand the photographs to witnesses and let them sort through them. However, a significant minority of police forces report that they hand the photographs to the witness one at a time.

(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.

COMMENT

A detailed justification for and description of the use of blank lineups is given in the commentary following Rule 507. That discussion is relevant here.

A matter of grave concern with respect to all identification proceedings is that witnesses will experience pressure to make an identification, even if they are unsure. There are a number of cases in

which witnesses admitted on cross-examination that they identified the accused because he or she most closely resembled the offender. It is to guard against this tendency that witnesses should first be presented with an array in which the photograph of the accused does not appear. The witness who selects a photograph from this blank array will, therefore, be revealed as somewhat unreliable. The difficulties facing the police in obtaining a sufficient number of photographs to conduct effective blank arrays will not be nearly as great as those involved in assembling sufficient people to participate in blank lineups.

(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.

COMMENT

The suspect may be prejudiced in two ways if more than one photograph of him or her appears in an array otherwise consisting of only one photograph of other people. First, simply as a matter of chance, the likelihood of the suspect being chosen is increased. A second way in which the accused is prejudiced is by the suggestiveness created by the presence of two photographs of the suspect in the array, and only one of all or most of the other people photographed.

Case Law

In *R.* v. *Kervin*[415] the witness, who had previously identified another photograph of the accused, was presented with an array of twenty-five photographs of which two were of the accused. She selected both pictures of the accused. She subsequently picked the accused out of a lineup. The Nova Scotia Court of Appeal, however, dismissed the accused's appeal from conviction, and no comment was made about the suggestiveness of the photographic display. Although in *R.* v. *Pace*[416] the appeal from conviction was dismissed because the conviction was supported by other identification evidence, the evidence of most of the witnesses was not considered by the appeal court because the photographic display was not particularly probative. One factor which weakened the identification evidence was that "of the sixteen photographs, six were of the appellant".

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

COMMENT

See Rule 505(19).

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.**

COMMENT

An informal identification procedure involves arranging for a witness to view the suspect in a natural setting. It is to be distinguished from a purely accidental or happenstance confrontation. For the reasons given in the general comment to Rule 501, an informal identification procedure is normally not a satisfactory test of a witness's ability to identify the person he or she saw. However, in the two circumstances described in this guideline, an informal viewing might be used as a test of identification.

First, an informal identification procedure may be used when a suspect is not known. The police may be searching for the suspect and have reason to believe that he or she is in the vicinity of the crime or at a particular locale. In those circumstances, they might accompany the witness to such a location to see if the witness can identify a suspect. In effect, this procedure serves the same purpose as the viewing of

photographs in police albums. Obviously, this can be an important law enforcement technique.

The second situation in which an informal viewing might be used is where the suspect is known, but is unable to attend a lineup. In this circumstance, the witness might be taken to view the suspect at the place where the suspect is located, such as a hospital. Even in these circumstances, however, a photographic display will normally be a better test of the witness's recall if one is possible. In addition to being able usually to secure a greater number of similar-looking distractors, a photographic display is to be preferred since it is much easier to control and reconstruct at trial than an informal viewing. However, if the suspect is hospitalized, for example, it may be preferable to escort the witness to the hospital, where the witness can view a number of wards containing people similar in appearance to the suspect.

Present Practice

The use of informal identification procedures varies greatly across the country. Some police forces appear to favour them over a lineup. The suspect will routinely be identified seated in a crowded courtroom or in a holding cell. Other police forces will only use them where a lineup is not possible (for example, the suspect refuses to participate). Even in these circumstances, some police forces prefer to use a photographic display because it provides them with more control over the proceedings.

Case Law

The courts have not criticized the police practice of returning to the scene of the crime with witnesses, to see if they can make an identification. One Commonwealth case in which the accused was identified in this way is *R.* v. *Maarroui*.[417] The friend of a person who had been stabbed in a café returned there shortly afterwards with the police and identified the accused as the attacker.

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, a photographic display, or informal viewing.**

COMMENT

Witnesses are sometimes presented with a suspect who is either standing alone or in the company of police officers, and are asked if they are able to identify the suspect as the offender. This is the most unsatisfactory method of pretrial identification. It does nothing to obviate the unfairness inherent in dock identifications. The witness who confronts a single suspect will find it difficult to resist the almost overpowering suggestion that he or she is the offender. In effect, confrontations "eliminate" the problems associated with dock identifications by shifting them to the pretrial stage. In the comment to Rule 501, all the reasons why confrontations should be avoided are discussed in detail.

Confrontations are prohibited under the rules, even if they are conducted promptly after the offence has been committed, if requested by the suspect, and even if the suspect refuses to attend a lineup. In each of these circumstances, a confrontation might be held under present practices. The guidelines provide for confrontations only in two circumstances: where there is urgent necessity, and where the witness has been unable to identify the suspect at other identification tests. These circumstances will be discussed below.

Prompt Confrontations

Under present practices, if the police obtain a suspect within two or three hours after the crime, they will frequently hold a confrontation. It is thought that the interest in getting a prompt identification outweighs the inherent suggestiveness of the confrontation.

It is argued that a prompt identification serves two important law enforcement interests.[418] First, the identification can be made while the image of the offender's appearance is fresh in the witness's memory. The increase in the reliability of identifications made while the witness's memory is fresh outweighs the potential decrease in reliability attributable to these procedures' suggestiveness. However, recent research has shown that at least after the first few seconds, the memory of faces fades very gradually.[419] Thus, there is no need for a prompt confrontation for this

reason. Another reason sometimes given for the need of prompt on-the-scene confrontations is that if the police do not have the correct person, they can resume their search. However, the likelihood of this being a consideration in more than a few of cases is small. If the police have found one suspect near the scene, the likelihood of finding another, in most cases, would be minimal. Furthermore, in some cases even if an identification of the suspect is not made, the police will have other evidence, for example, the possession of stolen goods, which suggests they have the right person. Thus there would appear to be no great law enforcement advantage for prompt on-the-scene confrontations, and thus no reason to deny the suspect the right to a fair and unsuggestive identification test.

Confrontations at Request of Suspect

Should a confrontation be permitted when one is requested by the suspect?[420] Innocent suspects might prefer to be immediately confronted by the witness instead of going through the trouble of appearing in a lineup, under the naive belief that the witness will invariably clear them of all suspicion. To permit a confrontation at the suspect's request would have perverse results. It would imperil the innocent — the very people for whose protection pretrial identification procedures were designed. Furthermore, guilty suspects might request a confrontation in order to weaken the probative value of the identification test. Thus, confrontations should not be permitted at the suspect's request, even where the police have given a warning of the dangers associated with such a procedure or where the advice of counsel has been obtained.

Other Identification Procedures Impractical

It has been suggested that if the suspect refuses to participate in a lineup, a confrontation should be held. In these circumstances, it will invariably be possible to hold a photographic display or an informal viewing; and both of these forms of identification tests are preferable to confrontations.

Urgent Necessity

The guidelines provide that a confrontation can be held in cases of urgent necessity. The need for this exception is illustrated by an American case. In *Stovall* v. *Denno*,[421] Dr. Behrendt and his wife were stabbed while in their kitchen on August 23rd. The husband died and the wife was hospitalized for major surgery to save her life. On the 25th, the day after the surgery, the accused was brought to Mrs. Behrendt's hospital room, handcuffed to a police officer. Mrs. Behrendt identified the accused after being asked by a police officer whether he "was the man". She later

identified him at trial. In commenting on the identification procedure the Supreme Court stated:

> [A] claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it, and the record in the present case reveals that the showing of Stovall to Mrs. Behrendt in an immediate hospital confrontation was imperative.
>
> Here was the only person in the world who could possibly exonerate Stovall. Her words, and only her words, "He is not the man" could have resulted in freedom for Stovall. The hospital was not far distant from the courthouse and jail. No one knew how long Mrs. Behrendt might live. Faced with the responsibility of identifying the attacker, with the need for immediate action and with the knowedge that Mrs. Behrendt could not visit the jail, the police followed the only feasible procedure and took Stovall to the hospital room. Under these circumstances, the usual police station lineup which Stovall now argues he should have had, was out of the question.[422]

Lineup or Photographic Display Attempted

If the witness cannot pick the suspect out of a properly-conducted lineup or photographic display, but the police still strongly suspect a particular person of the crime, it is permissible under these guidelines for the police simply to confront the witness with the suspect. If the witness identifies the suspect, this identification will likely be of little value. However, if the witness is adamant that the suspect is not the person, this will be relevant evidence for the defence.

Present Practice

Particularly in Ontario, if the police apprehend the suspect soon after the crime, they will frequently return to the scene of the crime immediately and have eyewitnesses attempt to identify him. However, in a significant number of other cities, this is not normal practice. In some cities, it would never be done; in others, it would be done only at the request of the suspect and if the witness agreed to it.

Case Law

Generally the courts have been very critical of the police when a confrontation is held in a situation where a lineup could have been arranged.[423] The courts have even been critical of confrontations when they are promptly held.[424] In the one case, *R.* v. *Denning and Crawley*,[425] where the court failed to object to the police's returning the suspect to the scene of the crime to be identified by the victims, it seems that the accused had, in fact, requested that such a procedure be followed: "The police told him that there had been an attempted robbery.... Crawley denied being concerned with it and asked to be taken there."[426] Even then, the court attached little weight to this identification evidence, since

the descriptions were contradictory and confused: "If it had been the only evidence identifying the applicants with the crime no jury could be allowed to convict on it."[427]

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.

COMMENT

If confrontations are to be tolerated, they should be conducted with as little prejudice to the accused as possible. Thus, the police should not encourage witnesses to identify the suspect as the person they saw by suggesting that they have other evidence against the suspect or that he or she has confessed. Nor should the suspect be presented to the witness in handcuffs. In fact, it would probably be advisable for the police not to say anything to the witness at this point. They should simply appear with the suspect, and let the witness take the initiative in making an identification. In case the witness recognizes the suspect but does not make an identification because he or she does not know it is expected, the police might ask the witness to provide another description of the offender.