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Admissibility of In-court Identifications; Unnecessarily Suggestive Out-of-court Identifications; Due Process; Manson v. Brathwaite

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CRIMINAL PROCEDURE

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Manson v. Brathwaite, 97 S.Ct. 2243 (1977).

PRIOR TO the Supreme Court's decision in *Manson v. Brathwaite,*[1] a substantial amount of confusion existed concerning the judicial test which was to be applied to in-court and out-of-court criminal identification procedures. The Court, in the case of *Stovall v. Denno,*[2] had first set forth a two stage test for determining whether such procedures were violative of due process. While later cases were somewhat unclear, the *Stovall* test continued to be used. When the Court again confronted the identification procedure question in the case of *Neil v. Biggers,*[3] a new "totality of the circumstances" test was set forth. However, since the *Neil* fact situation arose prior to *Stovall,* the Second Circuit Court of Appeals, when confronted with the instant case of *Manson,* assumed that the *Stovall* test still applied to fact situations arising after *Stovall,* and so ruled. The Supreme Court, however, reversed and held that the *Neil* test should have been applied, thus clarifying for the first time since *Stovall* the Court's view on identification procedures. While *Manson* undoubtedly will have a profound effect on the judicial view of criminal identification procedures, there is some question as to whether the Court chose the proper test in light of the goals the Court attempted to meet.

In May, 1970 Jimmy Glover, an undercover Connecticut state police officer, purchased heroin from a man whose name at that time was unknown to him. Later the same evening, Glover gave a physical description of the man to a local police detective who recognized the description given as that of Nowell Brathwaite. He obtained a photograph of Brathwaite from police headquarters and dropped it off at Glover's office. Two days after Glover had made the purchase, he viewed the photograph for the first time and identified the person shown as the same person from whom he had purchased the heroin. Brathwaite was arrested in August, 1970, in the same apartment at which the sale to Glover had taken place.

In January, 1971, during the trial of the case, the photograph from which Glover had identified Brathwaite was received into evidence without objection. Glover, who had not seen Brathwaite since the date of the sale, testified unequivocally that the person shown in the photograph was the

[1] 97 S.Ct. 2243 (1977).
[2] 388 U.S. 293 (1967).
[3] 409 U.S. 188 (1972).

same person from whom he had made the heroin purchase. Glover, also without defendant's objection, made a positive in-court identification of Brathwaite. The jury found Brathwaite guilty of both counts of a criminal information charging him with illegal possession and sale of narcotics.

On appeal to the Supreme Court of Connecticut, Brathwaite contended for the first time that the trial court erred in permitting Glover to make the in-court identification before it determined whether Glover's observance of Brathwaite's photograph two days after the sale was prejudicial.[4] The court affirmed the conviction[5] and did not consider the merits of Brathwaite's argument that the court erred in allowing an in-court identification without first having made a determination of whether or not the out-of-court identification was prejudicial.[6] The court based its affirmance on the ground that Brathwaite had not shown that substantial injustice resulted from admission of the evidence. Absent such a showing, a claim of error not made or passed upon by the trial court could not be considered on appeal.[7]

Upon petition for a writ of habeas corpus to the federal courts, the United States District Court for the District of Connecticut found that it could rule on the merits of the identification question based on the fact that Brathwaite had exhausted his state remedies on the question, as required by the habeas corpus statute.[8] The court, however, ruled that there had

[4] 97 S.Ct. at 2247 n.7 (1977).

[5] State v. Brathwaite, 164 Conn. 617, 325 A.2d 284 (1973).

[6] As used herein, an "in-court" identification is an identification made during the trial of the accused. An "out-of-court" identification is any identification made during the course of the police investigation.

[7] *See* Wainwright v. Sykes, 97 S.Ct. 2497 (1977), *rehearing denied*, 98 S.Ct. 241 (1978).

[8] The U.S. Supreme Court noted that both the district court and the circuit court of appeals had found that the merits of the case were properly before them, although each so found for different reasons. 97 S.Ct. 2247 n.7.

The district court concluded that Brathwaite's claim of impropriety of the identifications on appeal without first having objected to them at trial was sufficient to exhaust his state remedies in conformity with 28 U.S.C. § 2254(b) (1970), the habeas statute. The court also alluded to the fact that it appeared that Brathwaite may have deliberately by-passed state court procedures by failing to object to the identifications at trial, which would preclude objection at the federal level. But the court then concluded that the burden was upon the state to raise and prove the issue and the state's failure to do so precluded its consideration. 97 S.Ct. at 2247 n.7.

The court of appeals simply concluded that whether Brathwaite had exhausted state remedies was not at issue since the requirement was "not jurisdictional but merely a principle of comity, Fay v. Noia, 372 U.S. 391, 434-35 (1963)." Brathwaite v. Manson, 527 F.2d 363, 371 (2d Cir. 1975).

The Supreme Court noted that since the lower federal courts had found the issue to be properly before them, it was not inclined to rule otherwise. 97 S.Ct. at 2247 n.7. It could have, however, vacated the judgment of the court of appeals and remanded the matter to the district court for reconsideration in light of Wainwright v. Sykes, 97 S.Ct. 2497 (1977). The Supreme Court in *Wainwright* had held that absent a showing of actual prejudice and good cause for failing to make a timely objection in compliance with state law, federal habeas corpus relief was precluded. Although *Wainwright* dealt with a *Miranda*

been no deprivation of Brathwaite's due process rights as a result of the identification testimony.[9] The court denied the petition, holding that although the police used an impermissibly suggestive photographic identification procedure in obtaining the out-of-court identification from Glover, the procedure did not create a "substantial likelihood of irreparable misidentification" as required by the 1972 Supreme Court decision of *Neil v. Biggers*[10] in order to exclude the evidence. In conclusion, the district court held that "[s]o long as the prosecution can demonstrate that the witness had some opportunity to observe the offender at the time of the crime, the witness can make an in-court identification and can testify concerning the pre-trial identification regardless of the suggestiveness of the pre-trial proceedings."[11]

Brathwaite appealed and the court of appeals reversed the lower court.[12] In an opinion written by Judge Friendly, the court applied the test set forth in the 1967 case of *Stovall v. Denno*[13] rather than the *Neil* test used by the district court and held that the photographic identification procedure employed by the police was impermissibly suggestive and conducive to irreparable misidentification and, therefore, both the testimony with regard to the photographic identification and the in-court identification should have been excluded.

The appeals court, however, disregarded the *Neil* decision and determined that the rule set out by the Supreme Court in *Neil* applied only to factual situations which occurred prior to the *Stovall* decision.[14] The crime in question occurred after the *Stovall* decision was handed down. Thus, the importance of the appeals court decision was its conclusion that even though a new test had been set forth by the Supreme Court in *Neil,* the *Stovall* test still applied.

The state prosecution petitioned the Supreme Court and certiorari

violation, the Supreme Court could have applied the decision to the constitutional area at issue in *Manson,* or at least expressed a desire for the court of appeals to consider such an expansion of *Wainwright.* It did neither.

[9] Brathwaite v. Manson, No. H74-209 (D. Conn. May 13, 1975).

[10] 409 U.S. 188 (1972).

[11] Brathwaite v. Manson, No. H74-209 (D. Conn. May 13, 1975).

[12] 527 F.2d 363 (2d Cir. 1975). For a discussion of federal court authority to review claims not passed on by the state court due to failure of the accused to follow state procedural rules, see Wainwright v. Sykes, 97 S.Ct. 2497, 2504 (1977) where the Court (citing to Fay v. Noia, 372 U.S. 391, 439 (1963)) concluded that a federal judge has limited discretion to deny relief only where there has been "an intentional relinquishment or abandonment of a known right or privilege." *See also* Mullaney v. Wilbur, 421 U.S. 684, 687 n.7 (1975).

[13] 388 U.S. 293, 302 (1967).

[14] For other jurisdictions which have adopted this interpretation, see note 43 *infra.*

was granted.[15] After brief and oral argument, the Court held that the criteria formulated in *Neil* should be applied when determining admissibility of evidence obtained even during post-*Stovall* identification procedures and that reliability factors set forth in *Neil* were to be weighed against suggestiveness of the identification procedures.[16] The Court concluded that in Brathwaite's case, the reliability factors outweighed the corrupting effect of the suggestive photographic display and, therefore, there had been no violation of due process.[17]

In reaching its decision in *Manson,* the Supreme Court analyzed the approaches it had taken in the past with regard to identification procedures. While the Court had set forth a definite standard in *Stovall,* later cases using the *Stovall* test were somewhat unclear. The Court, in *Neil,* produced a different standard, but there remained some confusion as to whether the Court meant to replace the *Stovall* test with that put forth in *Neil.*

The *Stovall* decision gave the first inclination that due process was a necessary consideration in identification procedures.[18] In *Stovall* the Court

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[15] 425 U.S. 957 (1976).

[16] 97 S.Ct. 2243 (1977).

[17] The Court applied the *Neil* factors to the facts of *Manson* and concluded that reliability was not outweighed by the corrupting effect of the challenged identification. *Id.* at 2253-54.

In regard to reliability in *Manson,* the Court found that Glover had ample time and sufficient light to view the heroin seller and that as a trained police officer on duty, his degree of attention was much more scrupulous than that of a casual or passing observer. Glover's description of the seller, which was given to local police within minutes after the sale, was considered an accurate description of Brathwaite. His level of certainty was deemed high, as demonstrated by his unequivocal testimony that there was no doubt in his mind that Brathwaite had been the person who had sold him the heroin. Finally, the time between the crime and confrontation was brief, as the photographic identification was made only two days after the sale.

As to the suggestiveness of the procedure, the Court cited to Simmons v. United States, 390 U.S. 377, 383 (1968), where that Court had recognized that the danger that a witness may err in identifying a criminal "will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw...." After considering *Simmons,* the Court, however, concluded here that there was "little pressure on the witness to acquiesce in the suggestion that such a display entails. [The police] had left the photograph at Glover's office and [were] not present when Glover viewed it two days after the event.... And since Glover examined the photograph alone, there was little coercive pressure to make an identification arising from the presence of another." 97 S.Ct. at 2254.

After balancing the seemingly minimal corrupting effect of the identification procedure against the numerous factors found to indicate reliability, the Court determined that the reliability demonstrated was adequate to deny the respondent's claims of a due process violation.

[18] 388 U.S. 293 (1967). *Stovall* was a companion case decided along with United States v. Wade, 388 U.S. 218 (1967) and Gilbert v. California, 388 U.S. 263 (1967). In those two cases, the Supreme Court recognized that a post-indictment pre-trial identification procedure is a critical stage of the prosecution as recognized in Powell v. Alabama, 287 U.S. 45 (1932), which would entitle the accused to the aid of counsel. Absent counsel, the pre-trial identification testimony was inadmissible and the in-court identification was admissible only if based upon observations of the suspect other than that pre-trial confrontation. This inde-

held that if, while considering the totality of the circumstances, a pre-trial identification procedure is found to be "unnecessarily suggestive and conducive to irreparable mistaken identification,"[19] it violates due process. In applying this standard, the Court required that a two stage procedure be utilized. First, a determination had to be made as to whether the out-of-court identification procedure was unnecessarily suggestive. If it was found unnecessarily suggestive, no testimony with regard to it was admissible at trial and, in such a case, the second analysis was utilized. This analysis concerned whether the suggestiveness was conducive to irreparable mistaken identification. If it was, the in-court identification was also precluded. In *Stovall,* the witness was critically injured and no one knew how long she might live. The defendant was brought to her bedside where she identified him as her assailant. The Court admitted that such practices of showing suspects singly to persons for the purpose of identification was usually unacceptable but concluded that in view of the totality of the circumstances, the police followed the only feasible procedure by taking Stovall to the hospital room.[20] In effect, the Court was saying that even though an identification procedure may be suggestive, if it is necessary in light of the totality of the circumstances, it does not violate due process.

In three subsequent cases where the Supreme Court dealt with identification procedures, its conclusions were substantially consistent with those of *Stovall.* In *Simmons v. United States*[21] and *Coleman v. Alabama,*[22] the Court was confronted only with the issue as to whether an in-court identification procedure was correctly permitted by the trial court despite suggestiveness employed in the out-of-court identification.[23] The *Simmons* Court cited to *Stovall,* holding that an in-court identification could be made unless the pre-trial out-of-court identification was "so impermissibly

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pendent basis, which was to be shown by the prosecution by clear and convincing evidence, was determined by the use of factors similar to those used in *Neil* when considering due process issues.

[19] 388 U.S. at 302.

[20] *Id.*

[21] 390 U.S. 377 (1968).

[22] 399 U.S. 1 (1970).

[23] In *Simmons,* defendant was identified by witnesses, prior to trial, from photographs shown to them by FBI agents. At trial, the prosecution declined to introduce the photographs on direct examination of the identifying witness. The defense, in turn, attempted to obtain discovery of the photographs in order to cross-examine the witnesses with regard to his pre-trial identification. However, the Court denied the request for discovery. Therefore, no testimony was offered, nor was any testimony allowed, with regard to the out-of-court photographic identification. 390 U.S. at 380-81.

In *Coleman,* the pre-trial identification was made at a station-house lineup which the trial court concluded was unnecessarily suggestive. Although the court excluded the evidence as to the lineup, it permitted an in-court identification. 399 U.S. at 4-5.

suggestive as to give rise to a very substantial likelihood of irreparable misidentification."[24] The *Coleman* Court, citing to *Simmons,* held likewise.[25]

The third case, *Foster v. California,*[26] was decided after *Simmons* but before *Coleman. Foster,* as did *Stovall,* dealt with both pre-trial and in-court identification procedures.[27] The opinion set out the *Stovall* language, but did not discuss it further; the Court simply concluded that the pre-trial identification procedure was "so arranged as to make the resulting identifications virtually inevitable."[28] Inasmuch as the Court failed to apply per se the two stage procedure formulated in *Stovall,* it became unclear whether the *Stovall* procedure was the recognized test for constitutionality of identification procedures. Generally, however, lower courts when faced with the issue of due process claims with regard to identification procedures, read these four decisions as requiring a two stage analysis[29] which in fact was later utilized by Judge Friendly in the Second Circuit's decision of *Manson v. Brathwaite.*

Neil v. Biggers,[30] decided in 1972, created confusion in the lower courts as to exactly what test the Supreme Court had established. In *Neil,* a habeas corpus proceeding,[31] the Court was faced with a factual situation that arose prior to the Court's ruling in *Stovall.* The Court cited *Simmons,* stating that "the primary evil to be avoided is the substantial likelihood of

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[24] 390 U.S. at 384.

[25] 399 U.S. at 5.

[26] 394 U.S. 440 (1969).

[27] In *Foster,* police used repeated pre-trial confrontations in order to elicit a positive identification of the accused. The trial court found that the suggestive elements in the repeated confrontations "so undermined the reliability of the eyewitness identification as to violate due process." *Id.* at 443.

[28] *Id.*

[29] *See, e.g.,* Johnson v. Wainwright, 523 F.2d 1253 (5th Cir. 1975), where the circuit court affirmed the denial of habeas corpus relief by the district court. Petitioner had been identified prior to trial by a photographic display found to be "unnecessarily suggestive" by the trial court. The circuit court, in denying petitioner's appeal, cited to *Stovall* and *Simmons* and held that " 'impermissible suggestiveness' does not necessarily give rise to 'a very substantial likelihood of irreparable misidentification.' Such is the case when a witness' in-court identification is based upon a source independent of the suggestive photographic display(s)." *Id.* at 1255. The court concluded by citing to one of its earlier decisions, United States v. Rodriguez, 510 F.2d 1 (5th Cir. 1975), where it had set out the rule that "the existence of an independent basis of in-court identification obviates the necessity of considering the constitutionality of the pre-trial identification." 523 F.2d at 1255, *quoting* 510 F.2d at 3.

See also United States v Eatherton, 519 F.2d 603 (1st Cir. 1975); United States v. Clark, 499 F.2d 889 (6th Cir. 1974); United States v. Sanders, 479 F.2d 1193 (D.C. Cir. 1973); United States v. Cook, 464 F.2d 251 (8th Cir. 1972).

[30] 409 U.S. 188 (1972).

[31] The case had already been before the Supreme Court on direct appeal, Biggers v. Tennessee, 390 U.S. 404 (1968), but had been affirmed by an equally divided Court. Such a ruling does not operate as a judgment on the merits and therefore, did not preclude the defendant from petitioning for federal habeas corpus relief. *See* 409 U.S. at 190-92.

irreparable misidentification"[32] and then found that "[w]hile the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of 'irreparable' it serves equally well as a standard for the admission of testimony concerning the out-of-court identification itself."[33] In so holding, the Court was deviating from the *Stovall* test by adopting a *Simmons* approach to both in-court and out-of-court identifications. In other words, the Court concluded that only one stage of the *Stovall* test, *i.e.*, the "likelihood of misidentification" test,[34] had to be considered in determining whether the evidence should be excluded on due process grounds.

The Supreme Court in *Neil* said that the central question presented was "whether under the 'totality of the circumstances' the identification procedure was reliable even though the confrontation procedure was suggestive."[35] The Court also enumerated some of the factors that would indicate reliability: opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' 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.[36] In weighing these factors, the Court concluded that there had been no violation of due process.

The *Neil* Court's major concern centered around the likelihood of a misidentification of the defendant, rather than whether or not an unnecessarily suggestive procedure was used. The fact that the procedure was unnecessarily suggestive, by itself, did not violate due process.[37] Although the Court felt that the police did not necessarily use the best identification procedures at their disposal, the Court did not feel that the evidence should be excluded on that basis alone.[38] The district court in *Neil* had proposed an exclusionary rule which would require exclusion of the evidence where a more reliable procedure of identification had been available to the police and was not utilized. The Supreme Court noted that an exclusionary rule as proposed by the district court would have as its purpose deterrence and would not be based upon a finding of a violation of due process.[39] The Court rejected the proposal on the ground that the adoption of an exclusionary rule would

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[32] 409 U.S. at 198.

[33] *Id.*

[34] *Id.*

[35] *Id.* at 199.

[36] *Id.* at 199-200.

[37] *Id.* at 198.

[38] *Id.* at 199.

[39] *Id.*

be unwarranted since the fact situation in *Neil* arose prior to *Stovall* and *Stovall* was the first instance in which the Court indicated that due process limitations were to be considered in identification procedures.[40]

Thus, when the question of the due process implications of the identification procedures utilized by the Connecticut police was first presented to the Second Circuit in *Manson,* the court was faced with a dilemma of how best to reconcile these somewhat inconsistent decisions of the Supreme Court. Judge Friendly, writing for the Second Circuit, emphasized the Supreme Court's language in *Neil* that the rule set forth in *Stovall* would have no place in a case which preceded *Stovall.* Judge Friendly considered this language to be a reflection of the Court's desire not to place an unfair demand on the police, *i.e.,* to apply the two stage *Stovall* test to a situation which occurred prior to the formulation of the test, especially where that test represented such a break with past law.[41] But since the Court was now faced with a post-*Stovall* situation, Judge Friendly felt compelled to apply the two stage *Stovall* analysis. He distinguished the *Simmons-Coleman* approach by pointing out that the Court in those cases was only faced with the admissibility of an in-court identification which followed an unnecessarily suggestive out-of-court identification not presented to the jury.[42]

The Supreme Court in *Manson* recognized that the lower courts had developed two approaches to the admission of identification testimony after the *Neil* decision. The first, the *Stovall* two stage test which was adopted by the Second Circuit in *Manson,* was termed the "per se approach"[43] by Judge Friendly, and was characterized as "focus[ing] on the procedures employed and requir[ing] exclusion of the out-of-court identification evidence, without regard to reliability, whenever it has been obtained through unnecessarily suggestive confrontation procedures."[44] The second approach, which is more lenient, relied on the totality of the circumstances and was the approach set forth by the *Neil* Court.[45] This approach, the Court noted, would allow identification evidence which possessed certain qualities of

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[40] *Id.*

[41] 527 F.2d at 369.

[42] *Id.* at 369-72.

[43] This approach had also been adopted expressly in Smith v. Coiner, 473 F.2d 877, 880-81 (4th Cir. 1973), *cert. denied sub. nom.,* Wallace v. Smith, 414 U.S. 1115 (1973), and seemingly in Rudd v. Florida, 477 F.2d 805, 809 (5th Cir. 1973) and in Workman v. Cardwell, 471 F.2d 909, 910 (6th Cir. 1972), *cert. denied,* 417 U.S. 933 (1974). *See also* Webb v. Havener, 549 F.2d 1081, 1084-85, 1085 nn.5a, 6 (6th Cir. 1977).

[44] 97 S.Ct. at 2250-51.

[45] 409 U.S. at 199. *See also* United States v. Russell, 532 F.2d 1063 (6th Cir. 1976); United States *ex rel.* Kirby v. Sturges, 510 F.2d 397 (7th Cir. 1975); Stanley v. Cox, 486 F.2d 48 (4th Cir. 1973).

reliability to be admitted despite any suggestive aspects which might have arisen due to the manner in which the identification was obtained.[46]

It was at this stage in the development of a test for the constitutionality of identification procedures that the Supreme Court granted the state's petition for certiorari in the *Manson* case. The Supreme Court realized the need for clarification, but before deciding which approach to adopt, felt it must consider three distinct interests.

The first interest noted by the Court was the concern that only reliable evidence be introduced to a jury.[47] The Court acknowledged that although both approaches responded to this concern of reliability, the per se approach of *Stovall* was considered to be too strict since, in the Court's view, it automatically excluded identification testimony without the consideration of alleviating factors.[48]

This characterization of the per se approach would appear to be misleading. The approach is only "automatic" in the sense that once a finding is made that the identification procedure was unnecessarily suggestive, an out-of-court identification must be excluded. Furthermore, to declare that this finding is made "without regard to alleviating factors" is clearly incorrect since alleviating factors are considered at both stages of the two stage *Stovall* test. Once a court finds an identification procedure suggestive in the first stage of the *Stovall* analysis, all relevant factors are considered in the inquiry as to whether there was necessity for the procedures employed. Alleviating factors are also considered in the second stage of the inquiry, that is, when deciding whether or not the in-court identification will be admitted. In this second inquiry, a court, in effect, will consider the *Neil* factors to determine if the suggestiveness employed has irreparably tainted the witness' testimony. Although the Supreme Court did not list in *Manson* what it felt would be appropriate "alleviating factors," given the Court's consideration of these circumstances in its earlier cases, it would appear that the two stage analysis adequately confronts them.

As to the criticism that the per se rule "keeps evidence from the jury that is reliable and relevant," it should be noted that the reason for the inquiry into due process limitations of identification testimony is that such evidence, by its very nature, is of questionable reliability. This problem is compounded, as recognized in *Neil*, where suggestive identification procedures increase the possibility of misidentification.[49] Even in *Manson* the

[46] 97 S.Ct. at 2251.
[47] *Id.* at 2252.
[48] *Id.*
[49] 409 U.S. at 198.

Court recognized that the reliability of an identification procedure may be diminished not only because the witness, who is usually under emotional stress, is called upon to testify about an encounter with a total stranger, but also because of actions taken by the police.[50] Thus, the first stage of the *Stovall* analysis, which would exclude evidence obtained through a suggestive identification procedure, would serve to prevent the admission of evidence which is of questionable "reliability."[51] In addition, there arose a question as to whether the evidence would even be relevant. Relevant evidence is evidence which has probative value.[52] If there is a question as to the reliability of the evidence, it logically follows that there is a question as to its probative value as well, and, consequently, a question as to its relevance.[53]

The second interest identified by the Court in determining which approach to adopt was to deter the police from using prejudicial procedures in obtaining identifications. The Court recognized that the per se approach has a more significant deterrent effect on police behavior than the totality approach but concluded that "the totality approach also has an *influence* on police behavior."[54] The Court, apparently recognizing the frailty of this stance, attempted to justify it by noting that the desire on the part of the police to obtain convictions would result in the adoption of accurate identification procedures.[55] It appears inconsistent that the Court would put forth such a conclusion after the position it has taken in recent years on the

[50] 97 S.Ct. at 2252-53. This was the central concern of the Court in U.S. v. Wade, 388 U.S. 218 (1967) and Gilbert v. California, 388 U.S. 263 (1967) (where it found presence of counsel at identification procedures necessary to protect against suggestiveness).

[51] Mr. Justice Stevens, writing for the Seventh Circuit, clearly recognized the point that "[t]he primary purpose of such a [per se] rule would be to enhance the reliability of the trial process in its search for truth....[T]his rule would be designed to minimize the danger of convicting the innocent.... There is surprising unanimity among scholars in regarding such a rule as essential to avoid serious risk of miscarriage of justice." United States *ex rel.* Kirby v. Sturges, 510 F.2d 397, 405 (7th Cir. 1975).

[52] *See* Stauffer v. McCrory Stores Corp., 155 F. Supp. 710 (W.D. Pa. 1957); People v. Curtis, 232 Cal. App. 2d 859, 43 Cal. Rptr. 286 (1965).

[53] Even if the evidence is found to be relevant despite consideration of the above proposition, there arises a question as to whether its probative value is worth its cost. To answer this question, probative value must be weighed against the probative dangers of prejudice, confusion, time consumption and surprise; and if the probative value is found to be outweighed by the probative dangers, then the evidence may be ruled inadmissible. C. MCCORMICK, EVIDENCE § 185 (1972).

[54] 97 S.Ct. at 2252. It is interesting to note that the Court would accept an approach which merely has an "influence" on police behavior while recognizing that the other available approach, the per se approach, has a "more significant deterrent effect" when the police activities have a direct bearing upon the degree of reliability of the witness' identification which in turn may well be the foundation for the jury's verdict. *Id.* The dissent recognized the majority's view as "totally ignor[ing] the lessons of *Wade*" where "the impetus for *Stovall* and *Wade* was repeated miscarriages of justice resulting from juries' willingness to credit inaccurate eyewitness testimony." *Id.* at 2259.

[55] *Id.* at 2252 n.12.

exclusionary rule in regard to the fourth amendment. When required to deal with the exclusionary rule, the Court has repeatedly expressed doubts as to whether the police are deterred at all, *i.e.*, whether the police officer on the street, upon whose actions the exclusionary rule will most often operate, really has any significant interest in obtaining convictions.[56] If, as the Court infers, there actually is any deterrent influence on the police achieved by the operation of an exclusionary rule in the identification area, when one appropriately considers the importance of the activities which are being encouraged, *i.e.*, the use of the most reliable means of identification,[57] then adoption of the per se approach would seem the much wiser choice by the Court. As Justice Marshall pointed out in his dissent in *Manson*, "[the per se] rule would make it unquestionably clear to police they must never use a suggestive procedure when a fairer alternative is available. I have no doubt that [police] conduct would quickly conform to the rule."[58]

The Court's third and final concern was the "effect on the administration of justice" which the chosen approach would have.[59] Here again the Court's argument is not sound. The Court concluded that under the per se approach, the trier of fact is being denied reliable evidence and this may result "in the guilty going free." Aside from the serious question of whether the jury is being denied reliable evidence, there is some difficulty with the Court's assertion that this may result in the "guilty going free."[60] If both the out-of-court and the in-court identification testimony is admitted at trial, and then it is found on appeal under the per se approach that the trial court erred in admitting the out-of-court identification because the procedure utilized was unnecessarily suggestive, reversal would be necessary unless the appellate court found the error to be harmless. The "guilty," however, would not go free since a retrial could be had and an in-court identification could be made so long as there had not been any "substantial likelihood of irreparable misidentification"[61] engendered by the out-of-court identification procedure. Since this test would then be substantially the same test set forth

[56] *See, e.g.*, Stone v. Powell, 428 U.S. 465 (1976). The Court's doubts are perhaps justified with regard to the fourth amendment considerations. At the conclusion of a study made by the Washington-based Institute for Law and Research which showed that over fifty percent of the 17,000 felony and serious misdemeanor arrests made by Washington, D.C. police in 1974 were so "flimsy" that the city law department refused to press charges, FBI Director Clarence Kelley noted that the study showed "an obsession with the idea of measuring crime fighting efficiency only by the number of arrests. . . ." TIME, *The Law, The Pinch Must Really Sting*, Sept. 26, 1977, at 59-60.

[57] *See* text accompanying note 51 *supra*.

[58] 97 S.Ct. at 2258.

[59] *Id.* at 2252.

[60] *Id.*

[61] Simmons v. United States, 390 U.S. 377, 384 (1968).

in *Manson*, it is difficult to understand why the per se rule would not serve the interest of preventing the guilty from going free as well as, if not better than, the totality approach. In fact, since the per se rule allows the court to scrutinize closely the identification procedure, that rule would seem to insure that only the innocent person who had been subjected to an identification procedure fraught with grave risks of misidentification would go free.[62]

The Court's concern with the trier of fact being denied reliable evidence and the guilty thereby going free is remarkably similar to the sentiment espoused by the Court in dealing with the exclusionary rule in the fourth amendment search and seizure cases.[63] In utilizing this analysis, however, the Court fails to recognize that interests being protected by the exclusionary rules in the search and seizure and identification contexts are grossly dissimilar. Under the fourth amendment the exclusionary rule often excludes the most reliable, relevant and probative evidence of the individual's guilt in order to protect his interest in being free from unreasonable searches and seizures. This can result in a severe social cost, especially when there has been a good faith mistake on the part of the police which results in evidence being excluded. Furthermore, the deterrent effect of the exclusionary rule is as yet unproven.[64] But the exclusionary rule, when applied in situations such as *Manson*, excludes not the most reliable, relevant and probative evidence, but prevents the use of evidence gathered as a result of improper police conduct or evidence where there is a substantial question as to its reliability. The Court, therefore, seems to be mistaken in its belief that it must limit the societal costs of allowing the "guilty to go free" because, in fact, these costs may not be present in the context of the identification procedure; or if they are, they are only present to a comparatively minimal degree.

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[62] It is possible, however, that the Court was attempting to give consideration to the possible strategic problem of the jury's diminished willingness to accept the in-court identification testimony given by the witness as a basis for conviction, when a substantial period of time has elapsed between the crime and the new trial occasioned by the reversal. This issue may have been suggested by the Court in the facts in *Manson* as the first trial itself did not take place until eight months after the crime and the delay between the out-of-court identification and the trial may have possibly entered the Court's considerations of the desirability of excluding out-of-court identification testimony. The only difficulty presented by this strategic concern (if one accepts its premise) is that under the Court's decision in *Manson*, the Court allows the jury to make a guilt determination based principally on the most unreliable identification evidence.

[63] *See* Stone v. Powell, 428 U.S. 465 (1976); United States v. Janis, 428 U.S. 433 (1976).

[64] There have been no studies which have been accepted by the Court as proof that there actually is any deterrent effect, and the once approved aim of judicial integrity, (*see* Mapp v. Ohio, 367 U.S. 643 (1961)) has been given minimal recognition by the Court. *See, e.g.*, United States v. Peltier, 422 U.S. 531 (1975). Therefore, the balance of social costs versus benefits to be gained is decidedly tipped against exclusion in the Court's mind at this time.

The Court also failed to recognize, as noted earlier, that a finding that the out-of-court identification procedure was unnecessarily suggestive does not necessarily preclude an in-court identification if the prosecution can show an independent basis for the in-court identification. This lessens the social costs of the per se approach. In contrast to exclusion of evidence in the fourth amendment search and seizure cases, where a finding of a violation of defendant's rights totally and forever precludes the use against defendant of evidence obtained, here if the prosecution can show this independent basis, some identification evidence may still be admitted. A conviction is therefore not foreclosed and the social costs are significantly decreased.

The *Manson* Court, however, came to the conclusion that given these three interests, insuring that the jury hear all reliable and relevant evidence, deterring the police officer from using prejudicial procedures in obtaining identifications, and minimizing the detrimental effects on the administration of justice, the fairness required by due process was met by the *Neil v. Biggers* rule. Thus, in the future, the governing inquiry will be whether or not the corruption effect of the suggestive identification procedure is outweighed by the reliability factors set forth in *Neil*. If suggestiveness does outweigh reliability, both the out-of-court and in-court identifications will be excluded and the witness will be foreclosed from testifying altogether. But if reliability outweighs suggestiveness, both of these identifications will be admitted.

Considering the persuasive analysis of Justice Marshall's dissent and Judge Friendly's opinion for the Second Circuit, however, some states may feel a desire to depart from the majority's rule in *Manson*, and establish under their state constitutions[65] a rule which requires that the most reliable identification procedure must be utilized in their jurisdiction.

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[65] *See* People v. Anderson, 44 Mich. App. 222, 205 N.W.2d 81 (1972) and State v. Opperman, 247 N.W.2d 673 (S.D. 1976) in which Michigan and South Dakota declined to limit themselves to the Supreme Court's decision. *See also* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977).