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Constitutional Law - Due Process - Defendant's Rights During Extra-Judicial Identification Defined

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analogy to be drawn between the present situation and that of a child conceived in a bigamous marriage. In this instance the Illinois legislature enacted a statute making the child legitimate.[36] So long as the Illinois legislature refuses to take any action regarding the legal status of artificial insemination, no reason can be seen for not enacting a statute, as in Georgia,[37] legitimizing the children so conceived in an effort to protect these innocents.

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[36] ILL. REV. STAT. ch. 89, § 17(a) (1967).

[37] *Supra* note 32.

CONSTITUTIONAL LAW—DUE PROCESS—DEFENDANT'S RIGHTS DURING EXTRA-JUDICIAL IDENTIFICATION DEFINED

Ernest Crume was arrested by the Houston, Texas police for drunkenness on December 14, 1956. Later the police questioned him concerning a robbery which had occurred four days earlier, and in pursuit of their suspicions, had him appear in several lineups. As a result of one of these lineups and an individual confrontation, he was identified by the victim of the robbery and subsequently convicted. During the lineup in which the identification was made, the officers singled the defendant out from the other participants, forced him to wear a hat and to repeat the words, "This is a stickup." In the later confrontation, which occurred in a private office, he was asked to wear a jacket which matched the description of that worn by the robber and to walk alone past the witness, again repeating the words he had spoken in the lineup. In both instances, the individual attention focused on the defendant was not police-instigated, but was arranged at the request of the witness in order that she might be as certain as possible before making a positive identification. In a federal habeas corpus proceeding, the United States District Court for the Southern District of Texas denied the defendant relief. In affirming that decision, the United States Courts of Appeals addressed itself primarily to Crume's contention that the police, by exerting a suggestive influence on the witness, had rendered the means of identification so unfair as to be in violation of his right to due process. *Crume v. Beto*, 383 F.2d 36 (5th Cir. 1967).[1]

[1] Circuit Judge Rives specially concurred in the result only, on the grounds that the prisoner had not exhausted his state remedies as to the question of due process and that the question was not properly before the court since it had not been considered or decided by the Federal District Court. Crume v. Beto, 383 F.2d 36, 41 (5th Cir. 1967).

The *Crume* case's clearest claim to distinction lies in the fact that it deals with the question of pre-trial identifications in terms of due process requirements. In writing the opinion of the Supreme Court in *Rochin v. California*, Justice Frankfurter observed, "Due Process of law as a historic and generative principle, precludes defining, and thereby confining these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend a 'sense of justice.' "[2] In recent years, this generative quality of due process has been manifest. The judicial conception of those immunities, that "are so rooted in the traditions and conscience of our people as to be ranked as fundamental,"[3] has been expanded to other areas of criminal procedure and to other factual situations devoid of the brutality involved in *Rochin*. The Supreme Court has declared that deprivation of human liberty is essentially a decision for the judiciary. Therefore, absent a judicial warrant or probable cause, there cannot be a lawful arrest.[4] Further the Court has stated that the right to be confronted by an accuser and to be allowed effectively to cross-examine him is fundamental.[5] In *Gideon v. Wainwright* the Court held that indigent defendants have a right to counsel in at least all felony prosecutions.[6] In *Escobedo v. Illinois*[7] it was held that an accused has a right to consult a lawyer during interrogation, and in *Miranda v. Arizona*[8] the Court warned that the accused must be advised of his rights. The most recent extensions of the right to counsel were announced in *United States v. Wade*[9] and *Gilbert v. California*[10] wherein the court declared that a suspect has the right to counsel at an identification lineup.

Frankfurter's reference to due process as a "generative principle" proves apt as applied to these cases, but his advice against "defining and thereby confining"[11] the bounds of due process has not been followed. The court was quite explicit, for instance, in the *Miranda*[12] decision, in its explanation of

[2] Rochin v. California, 342 U.S. 165, 173 (1952).

[3] *Id.* at 169.

[4] Mallory v. United States, 354 U.S. 449 (1957), McNabb v. United States, 318 U.S. 332 (1943).

[5] Jencks v. United States, 353 U.S. 657 (1957).

[6] Gideon v. Wainwright, 372 U.S. 335 (1963).

[7] 378 U.S. 478 (1964).

[8] 384 U.S. 436 (1966).

[9] 388 U.S. 218 (1967).

[10] 388 U.S. 263 (1967).

[11] Rochin v. California, *supra* note 2, at 173.

[12] The court held that a suspect must be warned of his right to remain silent and that anything he says may be used as evidence against him. He must also be advised that he has the right to the assistance of a lawyer and that if he cannot afford it, one will be appointed. Miranda v. Arizona, 384 U.S. 346 (1966).

exactly what must be done to insure that a suspect is not deprived of due process. The *Crume* case might possibly mark an intermediate stage in the evolutionary development of due process as it applies to extra-judicial identifications. It is at once a clarification of what is now required, and an indication of future developments.

An appreciation of the present trend would be facilitated by a general look at what has been the law in most jurisdictions regarding extra-judicial identifications. The majority of courts dealing with the problem have held that questions as to the means whereby a particular identification has been made should be treated as relating merely to the weight and sufficiency of the evidence and not to its admissibility.[13] The situation in *People v. Hicks*[14] serves to demonstrate the practical results of this holding. The police told the witness that they had caught the burglar and that his name was Hicks. During the subsequent lineup, Hicks was asked to state his name. The court declared that means used in gaining the identification did not render the testimony of that identification incompetent and that it went to the weight and sufficiency of the evidence rather than to its admissibility. In *United States v. Johnson*,[15] defendant questioned the method of his identification since it took place as he stood alone before the witness rather than in a lineup. In answer to this question, the court expressed what has been the holding of most courts: "We know of no case, constitutional provision or statute which requires a lineup for identification of suspects. . . ."[16] Thus, regardless of the procedure used to secure the identification, the decision as to its validity is left to the jury who are often unduly receptive to evidence of identification.[17] "The only type of evidence more damning than personal identification is a confession."[18] Consideration of the damning nature of eyewitness identifications in conjunction with the proven unreliability of such identifications in the past[19]

[13] People v. Branch, 127 Cal. App. 2d 438, 274 P.2d 31 (1954); People v. Parham, 60 Cal. 2d 378, 384 P.2d 1001, *cert. denied*, 377 U.S. 945 (1964), *rehearing denied*, 379 U.S. 873 (1964); People v. Boney, 28 Ill. 2d 505, 192 N.E.2d 920 (1963); People v. Hicks, 22 Ill. 2d 364, 176 N.E.2d 810 (1961); Redmon v. Commonwealth, 321 S.W.2d 397 (Ky. 1959). *But see* People v. Cotton, 117 Cal. App. 469 (1931); Johnson v. State, 44 Okla. Crim. 113, 279 P. 933 (1929); People v. Conley, 275 App. Div. 743, 87 N.Y.2d 745 (1949).

[14] People v. Hicks, *supra* note 13.

[15] United States v. Johnson, 362 F.2d 43 (8th Cir. 1966).

[16] *Id.* at 47.

[17] Comment, *Due Process In Extra-Judicial Identifications*, 24 WASH. & LEE L. REV. 107, 108 (1967).

[18] Comment, *Possible Procedural Safeguards Against Mistaken Identification By Eyewitnesses*, 2 U.C.L.A. L. REV. 552, 556 (1955).

[19] BORCHARD, CONVICTING THE INNOCENT xii (1932); Williams and Hammelmann, *Identification Parades*, 1963 CRIM. L. REV. 479; 2 U.C.L.A. L. REV., *supra* note 18.

must, upon reflection, lead to serious doubts concerning the validity of any conviction based upon such evidence. "It is impossible to estimate the number of persons wrongly convicted whose innocence is never established."[20]

The Fourth Circuit Court of Appeals, in deciding the case of *Palmer v. Peyton*,[21] acknowledged the existence of the problem and, by its decision, paved the way for future due process attacks on unfair identifications. The witness involved here was the victim of a rape, and the identification was made of the defendant's voice. Before hearing the suspect's voice, the witness was told that the police had a Negro suspect in custody, and had been shown the suspect's shirt, which was similar to that worn by her assailant. The witness was permitted to hear only Palmer's voice which she identified as that of her attacker, even though that assailant had worn a hood over his head which must have muffled his voice. "The opportunity for suggestion inherent in the procedure used to secure this identification is manifest."[22] The significance of the case lies in the holding that the procedure used to identify defendant had deprived him of due process. "A state may not rely . . . upon evidence secured by a process in which the search for truth is made secondary to the quest for a conviction."[23] This case parallels *Rochin*[24] in that the procedure used was held so unfair as to offend a sense of justice, yet, as in *Rochin*, no particular standard was offered to define due process.

In the *Wade*[25] and *Gilbert*[26] decisions the Supreme Court addressed itself directly to the problem. In the *Wade* opinion, which was documented extensively by outside sources, the Court focused its attention upon the inherent dangers of identification confrontations in a lineup or otherwise. Quoting with approval, the Court observed that "the influence of improper suggestion upon identifying witnesses probably accounts for more miscarriage of justice than any other single factor–perhaps it is responsible for more such errors than all other factors combined."[27]Numerous examples of police suggestion were recounted. Ultimately, the Court held that the identification is a critical stage of the prosecution and the right to counsel was extended to those in lineups. "In short, the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity

[20] 2 U.C.L.A. L. REV. *supra* note 18, at 553.

[21] Palmer v. Peyton, 359 F.2d 199 (4th Cir. 1966).

[22] *Id.* at 201.

[23] *Id.* at 202.

[24] *Supra* note 2.

[25] United States v. Wade, 388 U.S. 218 (1967).

[26] Gilbert v. California, 388 U.S. 263 (1967).

[27] *Supra* note 25, at 229.

meaningfully to attack the credibility of the witness' courtroom identification."[28]

Stovall v. Denno,[29] decided the same day as *Wade* and *Gilbert*, declared that the rules announced in those cases would be applied prospectively only. Thus after June 12, 1967, all participants in confrontations conducted for identification purposes have a right to the advice of counsel; but those convicted on evidence gained through identifications before that date may not attack their convictions on the ground that they were denied the aid of counsel. More pertinent to the instant case is the fact that, in *Stovall*, the Supreme Court recognized the due process clause as a legitimate means of attack on the method of identification, independent of the sixth amendment right to counsel. The confrontation in *Stovall* occurred in the hospital room of the witness who had been stabbed after witnessing the murder of her husband. The identification was made as the suspect, a Negro, stood flanked by five white police officers. Referring in the *Wade* opinion to these circumstances, the court observed that, "It is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police."[30] Despite this, the court held that petitioner had not been deprived of due process. The question of whether a particular identification has been made in violation of due process depends on, "the totality of circumstances surrounding it." Here, due to the critical condition of the witness and the fact that she was the only witness to the crime, "an immediate hospital confrontation was imperative."[31]

In the *Crume* case the court cited the holding in *Stovall* as to prospective application of the *Wade* and *Gilbert* rules in answer to petitioner's contention that the absence of counsel had deprived him of due process. Then, following the lead of *Peyton v. Palmer*[32] and *Stovall*, the court acknowledged the fact that the danger of suggestion may be so great in a particular identification as to deprive the suspect of due process of law. Applying the *Stovall* "totality of circumstances" test, the court dealt separately with the occasions on which the petitioner was singled out. As to the occurrences in the lineup itself, much significance was attached to the fact that the witness herself instigated the individual attention focused on the defendant, indicating that she "thought she recognized Crume as the robber but . . . could not be sure unless she could see him wearing a hat."[33] The court felt that the danger of

[28] *Supra* note 25, at 231-233.

[29] Stovall v. Denno, 388 U.S. 293 (1967).

[30] *Supra* note 25, at 234.

[31] *Supra* note 29, at 302.

[32] *Supra* note 21.

[33] *Supra* note 1, at 37.

suggesting a suspect to the witness was diminished because she had already settled firmly on one of them. "Nonetheless when the witness' original identification is as strong as it was here, we think the danger of suggestion so small as not to violate due process."[34] As to the later confrontation in a detective's office, the court thought it ". . . the most difficult question we find in this case."[35] Well aware of the possibility of injustice in such a situation, the court quotes from the *Peyton* opinion that "there is . . . a strong predisposition to overcome doubts and to fasten guilt upon the lone suspect."[36] Yet it was held that in this case "the circumstances indicate that this irregularity did not have the proscribed suggestive effect on the witness."[37]

In assessing the importance of the *Crume* case as an extension of the *Peyton* and *Stovall* decisions, the dicta used is too significant to be overlooked. The court regarded this as "an exceptionally close case."[38] "We have no doubt that there would have been a denial of due process had the police initiated these procedures without any prior indication from [the witness] that *Crume* was the bandit."[39] Suggesting that all the participants in a lineup should say the same words or try on the same hat, even when the witness has indicated an interest in a particular suspect the court hints that, "When the witness' original identification is tentative or is for some other reason suspect, such a procedure could easily rise to the dignity of a due process requirement."[40] Such statements appear to be strong language upon consideration of the traditional "weight of the evidence" rule which admitted evidence of an identification secured by any method.

By its dicta, the court has given further definition to the requirements guaranteed by the due process clause. Thus it may be said that any singling out of a particular suspect in a lineup is a violation of due process unless the witness has requested it or there is some other reason to believe that the danger of suggestion is minimal. Similarly, any identification of the suspect without the protection afforded by comparison with other persons of similar appearance may or may not be a violation of due process, depending on the circumstances. If the confrontation is conducted due to the critical condition of the witness or is imperative for some other reason, or if the witness is already fairly certain of the suspect's identity, there will be no deprivation of due process.

[34] *Supra* note 1, at 40.

[35] *Id.*

[36] *Supra* note 1, at 39.

[37] *Supra* note 1, at 41.

[38] *Id.*

[39] *Supra* note 1, at 40.

[40] *Id.*

In consideration of the recent concern with the reliability of the guilt determining process,[41] the dicta of this case bears obvious importance for those convicted by evidence of an identification, but unable to benefit by the decisions of the *Wade* and *Gilbert* cases. By several times mentioning the closeness of the decision and the difficulty with which it was made, the *Crume* court may be deemed to have implied that an identification secured as a result of police suggestion would be in violation of due process without some mitigating circumstances. Hence cases where such evidence was admitted might be subject to reversal on the basis of "due process" without regard to the sixth amendment "right to counsel." By quoting with approval the Supreme Court statement that, "The practice of showing suspects singly to persons for the purpose of identification and not as part of a lineup has been widely condemned," the court left the inference that any such identification might well have been a violation of due process, absent some qualifying circumstances.

But the further delineation of those rights that are fundamental raises another question. Should not the same standards be applied to cases after June 12, 1967? Does the presence of a lawyer guarantee that a suspect will not be the victim of police suggestion? Certainly not every lawyer is equally skilled at ferreting out the suggestive influence of police officers before or during the lineup, nor is every lawyer as proficient in relating such abuses to the jury who are "often unduly receptive to evidence of identification."[42] Are "principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" to depend upon one's choice of a lawyer? If the right to be identified by a procedure devoid of intentional or unintentional police suggestion is indeed fundamental and separate from the right to counsel, it should not hinge upon the ability of one's lawyer to detect abuses and present them to the jury as part of the evidence. Rather the abuses themselves should be abolished. The recognition of such practices as violative of due process in themselves, apart from the right to the assistance of counsel, may ultimately lead to standardization of the means of identification to be used. As the Supreme Court suggested in the *Wade* decision, "Legislative or other regulations, such as those of local police departments, which eliminate the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial may also remove the basis for regarding the stage as critical."[43] If not a critical stage, there would be no need for counsel. *Crume v. Beto* by further defining the once amorphous structure of due process may be likened to a small chisel mark on a large

[41] *See* Mishkin, *The Supreme Court 1964 Term*, 79 HARV. L. REV. 56, 77-92 (1965).

[42] *Supra* note 17, at 108.

[43] *Supra* note 25, at 239.

marble stone, perhaps not making a noticeable difference in the immediate appearance of the due process structure, but no less essential to the emerging form than the larger areas chiseled out by such cases as *Escobedo*[44] and *Wade*.[45]

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[44] Escobedo v. Illinois, 378 U.S. 478 (1964).

[45] *Supra* note 25.

CONSTITUTIONAL LAW—EXCEPTIONS TO THE PROHIBITION AGAINST CONSIDERING MOOT QUESTIONS

Eviction proceedings under the Georgia Code were instituted against petitioners, two indigent Negroes living in low rental apartments. Under the Georgia Code a defendant is required to post a security bond as a condition precedent to any offer of defense in such an action.[1] Yet, because of their indigency, defendants were unable to post the bond. The Superior Court of Fulton County denied a petition for an injunction staying the dispossessory proceedings and the Supreme Court of Georgia dismissed the complaint for declaratory judgment on the constitutionality of the statute as moot because the sheriff of Fulton County had already evicted the tenants in the interim. The Supreme Court of the United States denied certiorari, Justices Douglas, Warren and Brennan dissenting. *Williams v. Shaffer*, 385 U.S. 1037 (1967).

In its dismissal of the complaint, the Georgia Supreme Court stated:

> Where, as here, the petition shows that the rights of the parties have already accrued and no facts or circumstances are alleged which show that an adjudication of the plaintiffs' rights is necessary in order to relieve the plaintiffs from the risk of taking any future undirected action incident to their rights, which action without direction would jeopardise their interests, the petition fails to state a cause of action for declaratory judgment.[2]

The petition was dismissed because the Georgia court was of the opinion that there were no longer rights in question subject to adjudication; the denial of certiorari by the United States Supreme Court was based on the same premise. Justice Douglas, in his dissenting opinion, glossed over any legal rebuttal to this argument, stating only that, "The finding of mootness

[1] GA. CODE ANN. § 61-303 (1966): "The tenant may arrest the proceedings and prevent the removal of himself and his goods . . . . Provided, such tenant shall at the same time tender a bond with good security, payable to the landlord, for the payment of such sum, with costs, as may be recovered against him on the trial of the case."

[2] Williams v. Shaffer, 222 Ga. 334, 149 S.E.2d 668 (1966).