PRIOR IDENTIFICATIONS IN CRIMINAL CASES: HEARSAY AND CONFRONTATION ISSUES

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The issue of offender identification is an element of every criminal charge and is central to determining guilt or innocence in criminal trials. Disproving the sufficiency of the identification evidence is probably the most commonly employed defense[1] in criminal cases. It is critical that criminal trial lawyers, both prosecution and defense, have a clear understanding of any potential evidentiary obstacles that may bar or limit the admissibility of identification evidence.

Rule 801(d)(1)(C) of the Federal Rules of Evidence states in pertinent part: "A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is one of identification of a person made after perceiving him."[2] Most jurisdictions have adopted similar provisions, either statutorily or through case law, which permit the introduction of prior identification evidence at trial.[3] Regardless of the source of the rule, however, several evidentiary uncertainties arise. First, what kinds of identifications fall within the scope of the rule? Does the rule admit only evidence from lineups, showups, and photographic procedures, or does it encompass such modern identification methods as police artist sketches and Identi-kit[4]

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1. Since the identification issue is not an affirmative defense, it is not a "true" defense. Nonetheless, criminal trial lawyers commonly characterize the identification issue as a defense to a criminal charge.

2. FED. R. EVID. 801(d)(1)(C), as submitted by the Supreme Court and passed by the House, was deleted by the Senate Judiciary Committee and was not part of the original Federal Rules of Evidence enacted by Congress on Jan. 2, 1975, Rules of Evidence, Pub. L. 93-595, 88 Stat. 1926 (1974), to take effect on July 1, 1975. *See* S. REP. NO. 93-1277, 93d Cong., 2d Sess. 12, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7051, 7063.

3. Twenty states, the military, and Puerto Rico have adopted the Federal Rules of Evidence. Most have retained original subsection (d)(1)(C) in identical or nearly identical form. 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE, 801-132 to 134 (1979). In addition, while almost all other jurisdictions permit some evidence of prior identifications, they vary substantially in the scope of admissible evidence and the uses to which such evidence may be put. These differences are discussed at text & notes 43-125 *infra*.

4. See text & notes 50-52 *infra*.

composites? Second, who may testify to these kinds of identification? Does the rule permit only the victim-witness to testify in court about his prior identification, or may third persons such as police officers testify? Does the unavailability of the victim-witness affect the admissibility of testimony from third persons? Third, what effect does the sixth amendment's confrontation clause have on the admissibility of prior identifications? Does the unavailability of the victim-witness limit the admissibility of prior identification testimony from third persons? This article will analyze the admissibility of prior identifications evidence, with particular emphasis on the hearsay and confrontation issues which arise from the use of various methods of identifications at the police investigative stage and at trial.[5]

HISTORICAL BACKGROUND

Prior identifications have been made admissible in criminal cases for a number of years. Initially admitted into evidence in England in the nineteenth century,[6] prior identifications became admissible in various American jurisdictions during the 1920s.[7] This case law acknowledged a proposition that seemed at odds with the conceptual rationale[8] of the hearsay rule itself: While regarded as hearsay, a prior identification made out-of-court by a witness closer in time to the crime's occurrence was usually more reliable than a later in-court identification. Following the lead of these courts, some jurisdictions enacted statutes that admitted prior identifications, usually on hearsay exception grounds.[9]

Due Process Decisions

With increasing legislative acceptance of prior identifications as a hearsay exception, the principal focus of the courts turned to the reliability of pretrial identification procedures themselves. This shift culminated in a series of landmark United States Supreme Court decisions in the 1960s and 1970s. Beginning in 1967 with *United States v. Wade*,[10] *Gilbert v. Cali-*

5. Neither the federal rules nor parallel state versions distinguish between civil and criminal cases where prior identification evidence is concerned. Such evidence, however, is rarely disputed in civil cases, and the sixth amendment's confrontation clause applies only to criminal cases. Since the modern identification techniques are principally used by police in solving crimes, this article focuses on prior identification evidentiary issues in the criminal context.

6. *See* Annesley v. Anglesea, 17 State Trials 1139, 1150 (1843); R. v. Burke, 2 Cox Crim. Law Cases 295, 295 (1847).

7. *See* Bolling v. United States, 18 F.2d 863, 864 (4th Cir. 1927); DiCarlo v. United States, 6 F.2d 364, 367 (2d Cir. 1925); Bierndt v. United States, 3 F.2d 141, 142 (7th Cir. 1924); People v. Ghalem, 336 Ill. 399, 403, 168 N.E. 306, 307 (1929); Commonwealth v. Powers, 294 Mass. 59, 60-61, 200 N.E. 562, 563-64 (1936); Commonwealth v. Goetz, 129 Pa. Super. Ct. 22, 29, 195 A. 144, 147 (1937). Other cases are collected in 4 J. WIGMORE, EVIDENCE § 1130 (Chadbourn rev. ed. 1972).

8. The basic underlying premise of the rule against admitting hearsay at trial is that hearsay is usually unreliable. Since its reliability cannot be adequately tested, principally through cross-examination, it is excluded. *See* C. MCCORMICK, THE LAW OF EVIDENCE §§ 244-46 (2d ed. 1972).

9. *See* CAL. EVID. CODE §§ 1235 & 1238 (West 1966); N.J. R. EVID. 63(1); N.Y. Laws ch. 336 (current version at N.Y. CRIM. PROC. LAW § 60.25 (McKinney 1981)).

10. 388 U.S. 218 (1967).

fornia,[11] and *Stovall v. Denno*,[12] and ending in 1977 with *Manson v. Braithwaite*,[13] the Court detailed with remarkable clarity the applicable assistance of counsel and due process standards for both prior and in-court identification testimony.

In *United States v. Wade*, the defendant was placed in a lineup after being arrested, indicted, and appointed counsel. The Court, in ruling that evidence of the lineup identification was inadmissible at trial, grounded its decision upon the sixth amendment's assistance of counsel clause. Holding that a post-indictment lineup is a critical stage of the prosecution, the court adopted a per se rule barring the admission of the lineup identification at trial where the defendant's right to counsel has been violated. The Court also ruled that in such circumstances the in-court identification was admissible under due process only if it had an independent origin separate from the primary taint of the inadmissible pre-trial identification procedure. Similarly decided was the companion case of *Gilbert v. California*.[14]

Stovall v. Denno,[15] decided the same day as *Wade* and *Gilbert*, involved the admissibility of showup identifications. There, the defendant, handcuffed to a police officer, was brought to a hospital to be identified by a seriously wounded stabbing victim. The victim identified the defendant, the only black person in the room, as her assailant. The Court, while holding that the one-man showup under these emergency circumstances did not violate the due process clause of the fourteenth amendment, held that an accused is entitled to relief if the confrontation conducted is "so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law," which "depends on the totality of the circumstances surrounding it."[16]

Although the *Wade-Gilbert-Stovall* trilogy articulated the basic due process tests for pre-trial identifications, the Court continued to decide identification cases. In *Simmons v. United States*,[17] the Court applied the *Stovall* "totality of the circumstances" test to pretrial photographic identification procedures.[18] *Foster v. California*,[19] decided in 1969, is the only case in which the Court held that an identification procedure failed to meet minimum due process standards.[20]

In *Foster*, the robbery victim viewed a three-man lineup in which the defendant stood with two substantially shorter men. Only the defendant

11. 388 U.S. 263 (1967).
12. 388 U.S. 293 (1967).
13. 432 U.S. 98 (1977).
14. The Supreme Court subsequently retreated from its right to counsel holdings. *See* United States v. Moore, 434 U.S. 220 (1977); United States v. Ash, 413 U.S. 300 (1973); Kirby v. Illinois, 406 U.S. 682 (1972).
15. 388 U.S. 293 (1967).
16. *Id.* at 302.
17. 390 U.S. 377 (1968).
18. *Id.* at 384.
19. 394 U.S. 440 (1969).
20. Of course, both *Wade and Gilbert* involved suggestive pretrial identification procedures. However, since both cases were decided on sixth amendment right to counsel basis, it was unnecessary to reach the due process issue, although the Court in *Wade* clearly expressed disapproval of the suggestive procedures the police used in both cases.

wore a leather jacket of the kind worn by the robber. Despite this suggestiveness, the victim could make no positive identification.[21] The victim was then brought into a small room for a face-to-face confrontation with the defendant, but was still unable to make a positive identification.[22] About one week later the victim viewed another lineup in which the defendant was the only person who had appeared in any of the earlier identification procedures. This time the defendant was positively identified.[23] Applying the *Stovall-Simmons* test, the Court held that these identification procedures violated due process. This case is noteworthy because it indicates the extent to which prior identification must be suggestively prejudicial before due process will be held to be violated.

In subsequent cases, the Court reviewed various factual situations in which pretrial identifications were challenged and upheld. In *Coleman v. Alabama*,[24] the Court upheld the admissibility of the victim's lineup identification at trial when the victim spontaneously identified one of the six men in a lineup before the formal procedure began, although it was suggestively conducted. In *Neil v. Biggers*,[25] the victim was abducted from her home and raped in a nearby woods by a large youth. Over the next few months, she viewed suspects at her home and at the police station in lineups, showups, and photographs. The victim then tentatively identified her assailant from one of the photographs and was brought to the station. When the police could not readily find suitable men for a lineup, they held a showup which consisted of two detectives walking the defendant past the victim and having the defendant say "shut up or I'll kill you," the words spoken during the abduction. The victim then identified the defendant as her assailant.[26] The Court posed the central question as "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive,"[27] and rejected the argument that unnecessary suggestiveness by itself required suppression of the showup identification.[28] The Court again detailed the factual considerations relevant to this analysis:

> [T]he 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.[29]

Employing this approach, the Court found no substantial likelihood of misidentification under the facts and held that evidence of the prior identification was properly admissible at trial.[30]

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21. 394 U.S. at 441.
22. *Id.*
23. *Id.* at 442.
24. 399 U.S. 1 (1970).
25. 409 U.S. 188 (1972).
26. *Id.* at 193-96.
27. *Id.* at 199.
28. *Id.*
29. *Id.* at 199-200.
30. *Id.* at 200-01.

Finally, *Manson v. Braithwaite*,[31] decided in 1977, addressed an unresolved issue: whether due process requires the exclusion of pretrial identifications where "obtained by a police procedure that was both suggestive and unnecessary,"[32] regardless of its reliability. The facts involved the purchase of narcotics through a partly opened door by an undercover police officer. That same day another officer, based on the undercover officer's description of the seller, obtained a photograph of the defendant and left it on the undercover officer's desk. Upon returning to his desk, the undercover officer identified the photograph as that of the narcotics seller.[33] Although this identification procedure was both suggestive (being a one-person photographic showup) and unnecessary (there was no exigency which would have validated the procedure), the Court rejected any per se rule barring such identification evidence at trial.[34] Instead, the Court applied the "totality of the circumstances" test to determine if the identification was nonetheless reliable, using the *Biggers* factual analysis, and concluded that there was not "a very substantial likelihood of irreparable misidentification."[35] Hence, the evidence was properly admissible.

Manson was the last case in which the Supreme Court considered the due process requirements of pretrial identifications. Considering the *Wade-Manson* progression as a whole, the Court expressly set forth the minimum due process requirements for the admission of out-of-court and in-court identifications. The facts of these cases also demonstrate how egregious suggestive police practices must be before the due process safeguards will be deemed violated. The impact of these cases was hardly surprising. Since their holdings were all based on the due process clause, the minimum constitutional standards for admission of these identifications became identical in federal and state jurisdictions.[36] Criminal defense lawyers became well versed in presenting pretrial motions to suppress allegedly suggestive identifications. The police in turn became increasingly adept at meeting the Court's standards in conducting pretrial confrontations between victims and suspects. In short, the admissibility of prior identifications was largely determined by pretrial motions to suppress, which necessarily focused on the fairness of the pretrial confrontations. The inevitable by-product of this development was that the older evidentiary barriers to such evidence, based principally on hearsay grounds, were largely overlooked.[37]

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31. 432 U.S. 98 (1977).
32. *Id.* at 99.
33. *Id.* at 99-101.
34. *Id.* at 112.
35. *Id.* at 116.
36. Of course, the jurisdictions were still free to apply any statutory procedural requirements that satisfied minimum due process standards. In addition, state courts were still free to interpret state statutory and constitutional law more stringently than is required under federal due process requirements.
37. In part this neglect may have been caused by the nature of the hearing on the motion to suppress identification evidence. Since the hearing necessarily focuses on the manner in which the identification procedures are conducted, and the prosecution has the burden of persuasion, the usual approach is for the prosecution to call as witnesses at the hearing those police officers who conducted or attended the identification procedure. Moreover, in most jurisdictions the hearsay rule is significantly relaxed if not altogether discarded at hearings on pretrial motions. Finally, in

Recent Changes

The trend away from evidentiary objections to pretrial motions to suppress was reinforced by the most important American evidentiary event of this century, the 1975 enactment of the Federal Rules of Evidence. Rule 801, defining hearsay and non-hearsay, included prior identifications in the non-hearsay category.[38] In so doing, the drafters of the rule accepted, to a limited extent, Professor Morgan's view that the hearsay bar should not apply when the witness making the out-of-court statement is in court, under oath, and available for cross examination.[39] The net effect of Rule 801(d)(1)(C), however, was solely to redesignate prior identifications from hearsay exception to non-hearsay status, without making any significant changes in the admissibility of such evidence as previously determined by federal case law.[40]

The codification of the federal evidence rules is not the only noteworthy evidentiary event of the past twenty years. First, the types of identifications being employed and offered at trial have significantly expanded. No longer are lineups, showups, and photographic displays the only types of identifications utilized. Police artist sketches, Identi-kits, and other composite methods are frequently employed during the investigative stages and later offered as evidence at trial. Second, the sources of the identification testimony have expanded. Whereas initially only the victim of the crime could testify to the identification, more recently the prosecution has offered as evidence testimony from third parties to the identifications, usually a police officer conducting or attending the identification procedure. Third, the Supreme Court, beginning in 1965 with *Pointer v. Texas*,[41] decided a line of cases involving the nature and scope of the sixth amendment confrontation clause and its connection to hearsay.

None of the *Wade-Manson* decisions dealt with any of these three developments. To date the Supreme Court has not reviewed any cases expressly involving permissible types of pretrial identifications, the hearsay issues raised when a witness other than the victim testifies at trial to the victim's prior identification, or the confrontation issues that arise when such evidence is offered at trial.[42] Lower federal appellate courts have not generated the mass of case law that might be expected, given the signifi-

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some jurisdictions it is common practice, particularly where a bench trial immediately follows the denial of a motion to suppress, for the prosecution and defense to stipulate that the evidence presented at the motion to suppress will be deemed evidence at the trial of the case.

There exist no statistics to support my contention that the defense too infrequently raises evidentiary objections to identification testimony offered by the prosecution at trial. It is based on two grounds. First, the number of reported cases after 1975 raising these issues in the identification area is surprisingly small. Second, in 10 years of trial practice, principally as a prosecutor in both state and federal courts, I rarely saw such objections raised at trial, despite the substantial number of cases raising identification as the principal issue.

38. FED. R. EVID. 801(d)(1)(C) was not included in the originally enacted Code, although it was in the United States Supreme Court drafts. See note 1 *supra*.

39. *See* Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 175, 192 (1948).

40. Indeed, the Federal Rules of Evidence are customarily viewed as permitting the admission of any evidence that was held admissible under previously existing federal case law.

41. 380 U.S. 400 (1965).

42. Given the nature of these issues, it is not surprising that a case involving Rule

cance of identification evidence in criminal trials. It is the thesis of this article that Rule 801(d)(1)(C) and other comparable state evidentiary provisions should not be interpreted to permit the wholesale introduction of any kind of prior identification from any source, that such identifications may raise additional hearsay issues, and that the sixth amendment's confrontation clause raises additional limitations to the admissibility of such evidence at trial.

PERMISSIBLE IDENTIFICATION METHODS

Case law evolving before the enactment of the Federal Rules of Evidence accepted the admission of prior identifications as hearsay exceptions.[43] This case law was generated, however, in the context of traditional police methods of conducting pretrial identification procedures, which principally were: a) lineups[44] and showups;[45] b) photographic arrays[46] and single photograph showups;[47] and c) other sensory identifications, principally voice identifications.[48] The admissibility concept was carried forward into prior identifications under Federal Rule 801(d)(1)(C), though its characterization was changed from hearsay exception to non-hearsay. Numerous cases decided both in federal courts and courts of states which have adopted Rule 801 have upheld these traditional pretrial identification

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801(d)(1)(C) has not been decided by the Court. These issues, with the exception of the confrontation issue, are evidentiary in nature, and the Court rarely hears such matters.

43. *See* text & notes 6-42 *supra*.

44. In a lineup procedure, several participants, including one or more suspects, are selected on the basis of general similarity in appearance to the offender based principally on the latter's sex, race, age, height, weight, hair, and clothing. The participants are usually placed in a row, often in a formally arranged lineup room. They may be directed to turn, move, or speak. The victim present during this activity is then asked if he recognizes anyone in the lineup as the offender.

45. In a show-up procedure, the victim is brought face to face with the suspect. The victim is then asked if the suspect is the offender. Since this procedure is inherently suggestive, due process requirements generally permit it in only two situations: when the victim has been seriously injured and his survival is questionable, *see* Stovall v. Denno, 388 U.S. 293, 301-02 (1967); and when a suspect is quickly apprehended near the crime scene, and a confrontation between victim and accused occurs on the street. *See* Allen v. Estelle, 568 F.2d 1108, 1112 (5th Cir. 1978); Bates v. United States, 405 F.2d 1104, 1106 (D.C. Cir. 1968); People v. Higgins, 50 Ill. 2d 221, 228, 278 N.E.2d 68, 72, *cert. denied*, 409 U.S. 855 (1972).

46. In a photographic array, the victim is shown several photographs and asked if one depicts the offender. The selection of the photographs should follow the same procedure as a lineup composition to ensure that the persons in the photographs are similar in appearance. In some instances, the victim is asked to look through a "mug book," a book containing numerous photographs of previous offenders. These books are often classified by offense, race, sex, age, or other descriptive characteristics. Alternatively, a victim may be shown a photograph of a previous lineup in which the suspect participated.

47. A photographic showup is analogous to the face-to-face showup. The victim is simply shown one or more photographs of the suspect and asked if the person depicted is the offender. As in the face-to-face showup, such photographic showups are inherently suggestive and admissible only in limited circumstances. *See* Manson v. Braithwaite, 432 U.S. 98, 111 (1977).

48. Although this occurs infrequently, identifications can be made through senses other than visual. Most commonly, voice identifications are encountered as part of lineup procedures when the participants are directed to speak certain words, usually words spoken by the offender to or in the presence of the victim. Identifications based substantially or solely on hearing or other senses have been held admissible. *See* People v. Sullivan, 290 Mich. 414, 419, 287 N.W. 567, 569 (1939); Ramon v. State, 162 Tex. Crim. 365, 366, 285 S.W.2d 225, 226 (1955).

procedures as admissible at trial under the rule.[49]

New Identification Techniques

In recent years, however, new police techniques in the identification area have significantly broadened the types of prior identifications that might be offered at trial. Two newer basic techniques are police artist sketches and composite identification systems. In police artist sketches, the victim or other witness describes the offender to the artist, who uses the description to prepare a freehand sketch. Through repeated alterations and modifications a final sketch is produced that purports to resemble the basic facial characteristics of the offender.[50]

The Identi-kit uses plastic overlays to produce a composite image of the suspect's facial characteristics. Each overlay contains a basic facial feature such as hair, eyes, nose, mouth, or chin. The victim or other witness selects the overlay that best approximates that particular feature of the suspect's appearance. When each individual characteristic has been selected the composite should closely resemble the suspect's facial appearance.[51] The advantage of this method is twofold. First, a composite can be prepared and reproduced much more quickly than a sketch. Second, since any police officer can easily be taught to use the method, it is especially useful for small police departments which usually do not employ sketch artists. For evidentiary purposes, however, sketches and Identi-kit composites involve the same process. Since both sketches and composites are based solely on the description communicated, usually orally, by the victim[52] to the artist or officer, any hearsay difficulties encountered in one method also would be encountered by the other.

Hearsay Issues

Do sketches and composites violate the hearsay rule? Arguably such evidence, when introduced as an exhibit at trial, is the functional equivalent for hearsay purposes of the artist or officer testifying to the victim's prior out-of-court description. Where the artist or officer orally testifies at trial to the victim's prior out-of-court description, the testimony is necessarily being elicited to show prior consistency in the description and such testimony is often held inadmissible hearsay in jurisdictions that have not adopted the federal rules.[53] So why not the exhibit as well? Is not the

49. *See* United States v. Lewis, 565 F.2d 1248, 1252 (2nd Cir. 1977), *cert. denied*, 435 U.S. 973 (1978); United States v. Sacasos, 381 F.2d 451, 453-54 (2d Cir. 1967); People v. Kerns, 181 Cal. App. 2d 1, 3, 4 Cal. Rptr. 925, 926 (1960); People v. Jiles, 13 Ill. App. 3d 245, 249, 300 N.E.2d 803, 806 (1973). *See also* 4 J. WEINSTEIN & M. BERGER, *supra* note 3, at 801-129.

50. A. MOENSSENS & F. INBAU, SCIENTIFIC EVIDENCE IN CRIMINAL CASES 665-66 (2d ed. 1978).

51. *Id.* at 666-67.

52. Of course, how the victim or witness communicates the description to the artist or officer—whether orally, in writing, or in some other fashion—will have no bearing on the hearsay analysis. It is the fact of the communication, regardless of its mode, that raises hearsay issues.

53. Of course, where the statement is being offered to impeach or to rebut a charge of recent fabrication, the federal rules expressly allow its introduction as non-hearsay if the requirements of Rule 801(d)(1)(A) and (B) are met. Text & notes 84-125 *infra* discuss situations under which some

sketch or composite simply a visual rendition of that prior description? Does not the jury necessarily infer from the sketch or composite's mere existence and introduction that it incorporates the witness's description to the police? If so, it is then the functional equivalent of a prior consistent statement and should be deemed inadmissible hearsay, according to the exclusionary argument.

The contrary argument is that the jury, rather than viewing the sketch or composite as the equivalent of the victim's prior description, perceives the sketch or composite more as a lineup photograph or the photograph of a suspect from a photo array, admissible evidence where due process standards are met. If a sketch or composite is in fact received by the jury in essentially the same fashion as a pre-existing photograph, the jury does not translate this evidence into a prior consistent statement, and hearsay objections should be rejected.

Cases Rejecting Admissibility

These newer identification methods have been commonly used by the police for at least twenty years, but case law that seriously analyzes the inherent hearsay issues is surprisingly sparse. That which exists is confusing and inconsistent. An older line of cases uniformly held such evidence inadmissible on hearsay grounds. For example, in the 1962 Pennsylvania case of *Commonwealth v. Rothlisberger*,[54] one of the earliest reported cases, the prosecution introduced in evidence a commercial artist's sketches of two offenders made four days after the crime. These sketches were based on the prosecutrix's description. She testified at trial; the artist did not. The trial court admitted the sketches over objection. A divided appellate court held that the admission was reversible error on hearsay grounds, noting that "the only use for the sketch was to corroborate and support her testimony. . . . Such declarations are mere hearsay and are not admissible unless used to rebut testimony offered to impeach the witness by showing inconsistent statements or that the testimony given by the witness is a recent fabrication."[55] The *Rothlisberger* court's rationale appeared again in *People v. Jennings*,[56] a 1965 New York Appellate Division decision. In *Jennings*, the court reversed a conviction where the trial court admitted a police artist sketch that had been made from the victim's description.[57]

In *Commonwealth v. McKenna*,[58] a 1969 decision, the Massachusetts Supreme Judicial Court held improper the admission in evidence of an

courts have held prior consistent statements to be admissible as "corroboration" of the victim. In the same vein, a sketch or composite can be characterized as "mere corroboration" as well.

54. 197 Pa. Super. Ct. 451, 178 A.2d 853 (1962).

55. *Id.* at 454, 178 A.2d at 855. The court also rejected contentions that the sketches were admissible as spontaneous declarations or refreshed recollection.

56. 23 App. Div. 2d 621, 257 N.Y.S. 2d 456 (1965).

57. The court noted the same exception cited in *Rothlisberger*, rebuttal of impeachment testimony, for admitting sketches. *See* People v. Coffey, 11 N.Y.2d 142, 145-46, 182 N.E.2d 92, 94 (1962), where the New York Court of Appeals approved the admission of a police artist sketch after cross-examination of the only eyewitness suggested recent fabrication. This court likewise observed that ordinarily such evidence was inadmissible hearsay. *Id.*

58. 355 Mass. 313, 244 N.E.2d 560 (1969).

Identi-kit composite of the offender's face prepared the day after the crime by a police officer and identified by the witness at trial as resembling the offender. The court held that the sketch was "a recording in graphic form of statements made by [a witness] to the police in the absence of the defendants. . . . [I]t had no standing as evidence of the truth or accuracy of the matter contained in it."[59]

Finally, the Illinois courts also have considered the admissibility of sketches and composites on several occasions. In *People v. Turner*,[60] the appellate court reversed a conviction in part on the erroneous admission of a police artist sketch. In holding that the sketch was inadmissible hearsay, the court regarded the police artist's rendition as his out-of-court belief as to the likeness of the assailant based on information provided by the prosecutrix. The court refused to find that an artist's sketch based upon the observations of another amounted to a photograph.[61] Following *Turner*, the Illinois appellate court had several further opportunities to review the admissibility issue and, until 1980, ruled that such evidence was hearsay, although the courts often held the erroneous admission harmless.[62]

Cases Favoring Admissibility

The recent trend in the state courts, however, has favored the admission of sketches and composites over hearsay objections. *State v. Ginardi*,[63] a 1970 New Jersey opinion, signaled the movement away from strict enforcement of the hearsay rule against admission of sketches and is the leading case rejecting the hearsay objections to such exhibits. In *Ginardi*, police using an Identi-kit developed composites of the offender based on descriptions obtained from the victim and another witness. At trial, both victim and witness identified the composites as resembling the offender. The composites and photographs were admitted in evidence. After reviewing the facts surrounding the preparation of the composites as well as existing case and statutory precedent from other jurisdictions, the court held the composites were properly admitted in evidence at trial. Expressly rejecting the line of cases holding to the contrary, the majority reasoned that a composite was the functional equivalent of a photograph, and that therefore an identification of a composite was merely an identification of a party. Hence the court concluded that composites, photographs of the composites, and testimony relating to their creations from the victim-witness and police officers were properly admissible.[64]

59. *Id.* at 327, 244 N.E.2d at 567.

60. 91 Ill. App. 2d 436, 235 N.E.2d 317 (1968).

61. *Id.* at 444, 235 N.E.2d at 320.

62. *See* People v. Pickins, 63 Ill. App. 3d 857, 861, 380 N.E.2d 868, 871 (1978) (error waived); People v. Fair, 45 Ill. App. 3d 301, 305, 359 N.E.2d 848, 851 (1977) (reversible error); People v. Castillo, 40 Ill. App. 3d 413, 420, 352 N.E.2d 340, 347 (1976) (harmless error); People v. Jones, 34 Ill. App. 3d 103, 106, 339 N.E.2d 485, 488 (1975) (harmless error); *accord*, State v. Padgett, 300 N.W.2d 145, 147 (Iowa 1981).

63. 111 N.J. Super. 435, 268 A.2d 534 (1970).

64. The court observed that "[i]n this state, a pretrial identification, if made under circumstances precluding unfairness and unreliability, is admissible where the person who made the identification is in court as a witness; and both the identifying witness and third persons can testify about such an identification." *Id.* at 453-54, 268 A.2d at 544. The court also noted that this case-

Ginardi marked the beginning of the trend away from strict enforcement of the hearsay rule against sketches and composites. Other jurisdictions began to follow suit. In *People v. Bills*,[65] the Michigan Court of Appeals, citing *Ginardi* with approval, upheld the admission of the sketch. The court, however, appeared to be more concerned with the reliability of the sketch procedure than with the hearsay issues presented.[66] The Ohio Supreme Court in *State v. Lancaster*[67] likewise upheld the admission in evidence of a police artist's sketch of the assailant and a poster reproduction of the sketch, but restricted its use to "indicating the process by which the accused was identified, where said process is under attack, and to corroborate that identification."[68] It is unclear from *Lancaster* whether the primary basis for admissibility was a hearsay exception or as rebuttal to an attack on the reliability of the identification, although the court necessarily relied on an Ohio statute which expressly permits prior identifications to be introduced at trial where identification is an issue.[69] The supreme courts of Georgia and Louisiana have similarly upheld the admissibility of composites and accompanying testimony, but with little treatment of the hearsay issues involved.[70]

The most significant change in the state courts occurred recently in Illinois when its supreme court reexamined the admissibility of sketches and composites. In *People v. Rogers*,[71] the Illinois Supreme Court reversed the line of lower court holdings and for the first time upheld the admission of police artist sketches. There, the victim of a robbery testified at trial that he assisted in preparing an Identi-kit composite of the offender. A photocopy of the composite was then admitted in evidence. A police officer also testified at trial to the victim's description of the offender, identified the photocopy of the composite admitted in evidence, and reconstructed the composite in court using an Identi-kit.[72]

In a lengthy analysis of the hearsay issues presented by the composite and the related testimony, the court noted the divergence on these issues in the various jurisdictions. Observing that sketches and Identi-kit composites are out-of-court identifications, the court observed that their admissibility is governed by the hearsay rule, but that the "rule does not,

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made rule was the basis for Rule 63(1) of the New Jersey Rules of Evidence, effective in 1967. Rule 63(1) provides in pertinent part:

> A statement is admissible if previously made by a person who is a witness at a hearing, provided that it would have been admissible if made by him while testifying and the statement—(c) is a prior identification of a party where identity is in issue, if made under circumstances precluding unfairness or reliability.

This rule, of course, bears a remarkable resemblance to Federal Rule 801(d)(1)(C).

65. 53 Mich. App. 339, 220 N.W.2d 101 (1974).

66. *See id.* at 349, 220 N.W.2d at 106.

67. 25 Ohio St. 2d 83, 267 N.E.2d 291 (1971).

68. *Id.* at 92, 267 N.E.2d at 297.

69. OHIO REV. CODE ANN. § 2945.55 (Page 1975). This statute permits, where identification is an issue, evidence of a prior out-of-court identification by the witness as well as by third party witnesses to the primary identification.

70. Butler v. State, 226 Ga. 56, 59, 172 S.E.2d 399, 402 (1970); State v. Nix, 327 So. 2d 301, 344 (La. 1975); State v. Edgecombe, 275 So. 2d 740, 754 (La. 1973).

71. 81 Ill. 2d 571, 411 N.E.2d 223 (1980).

72. *Id.* at 574, 411 N.E.2d at 225.

however, apply to statements of identification. The justification for this exception is based on the notion that, by the time of trial, the witness's mind has become so conditioned that there is little likelihood that he would not identify the person in court." [73] The court delineated this operative distinction:

> If a third person were to testify that he saw or heard A identify B as the person who committed the offense, that would obviously and clearly be hearsay testimony and would not be admissible. However, if A testifies that he previously identified B and his veracity is tested by cross examination, the reason for excluding the third person's testimony has been removed. The third person should then be permitted to testify that he heard or saw A identify B because A and the third person would be subject to cross examination concerning the out of court identification. Evidence of such out of court identification by both A and the third person should be admissible but should be used only in corroboration of in court identifications and not as substantive evidence. Before the third person is permitted to testify as to A's identification of B, A should first testify as to his out of court identification.[74]

The court held the testimony admissible and, since the composite was essentially identical to the situation where a victim identifies a suspect from a photograph or lineup, the composite was itself admissible. However, the court restricted the evidence's use to that of prior identification evidence to corroborate the prosecuting witness's in-court identification of the defendant.[75] How this limited use of the evidence could be effectively conveyed to a jury was not discussed.[76]

The *Rogers* decision is significant for several reasons. First, it is the first major non-code state to admit sketches, composites, and related testimony from both the victim and police officers over hearsay objections. Second, it accepts as persuasive the analysis of federal cases admitting such evidence under Rule 801(d)(1)(C). Finally, it appears to be the first jurisdiction to rule that, while admissible, such evidence is solely corroborative of the victim's in-court identification of the defendant, and is hence non-substantive evidence.

Federal Rules Cases

Arizona, which has adopted the Federal Rules of Evidence,[77] appears to be the only adopting state jurisdiction which has recently reviewed the admissibility of composites. In *State v. Grier*,[78] an investigating officer

73. *Id.* at 578, 411 N.E.2d at 227.

74. *Id.* at 579, 411 N.E.2d at 227.

75. *Id.* at 580-81, 411 N.E.2d at 228. The court found support for its conclusion in the Federal Rules of Evidence: "While we do not hold such evidence to constitute substantive proof of identity, we find the federal law to be supportive of our holding that prior identification evidence is admissible where the declarant is available for cross examination and the evidence satisfied constitutional and other evidentiary requirements." *Id.* at 582, 411 N.E.2d at 229.

76. Whether a jury is capable of understanding, or is willing to follow, a limiting instruction on the proper use of such evidence must be seriously questioned.

77. ARIZ. R. EVID. 801(d)(1)(C) is identical to the federal rule.

78. 129 Ariz. 279, 630 P.2d 575 (Ct. App. 1981).

prepared an "identity-kit" composite of the assailant from the victim's directions. At trial, over objection, the investigator was allowed to recreate the composite and the duplicate was admitted in evidence. The court of appeals held the composite was properly admissible under either subsection (B) or (C) of Rule 801(d)(1). It also held that the victim's testimony at trial describing how the composite was created was admissible under subsection (B) since the charge of recent fabrication had been raised by the defense.

Federal case decisions since adoption of the federal rules have also favored the admission of sketches and composites, but only the Second Circuit has seriously analysed the hearsay issues involved. In *United States v. Marchand*,[79] an accomplice prepared a sketch of the alleged offender which was consistent with earlier descriptions he provided to federal agents. At trial, the accomplice, who could not (or refused to) make an in-court identification of the defendant, testified to his previous description of the offender given to the federal agents and identified the sketch as the one he had previously prepared. The sketch was admitted over objection. The defendant argued on appeal that the sketch was improperly admitted under Rule 801(d)(1)(C), taking the position that the rule allowed only corporeal prior identifications. The Second Circuit rejected this position as too restrictive and upheld the admission of the sketch, adopting Judge Weinstein's interpretation of Rule 801(d)(1)(C).[80]

The following year the same court reviewed another case involving sketches. In *United States v. Moskowitz*,[81] a police artist made a sketch of a bank robber based on the collective descriptions of two witnesses to the crime. At trial the sketch was admitted in evidence, as well as testimony of the two witnesses that they had previously stated that the sketch looked like the robber. The Second Circuit held proper the admission of both the sketch and prior statements. The prior statements were admissible, it reasoned, under Rule 801(d)(1)(C). The court reasoned that the sketch was not a "statement," so that the rule was inapplicable, reducing the issue to whether, like any photograph, the sketch had been properly authenticated under Rule 901. For this purpose, the testimony of the artist was unnecessary, just as a photographer's testimony is unnecessary to establish the authenticity of a photograph.[82] This appears to be the only court to hold that the admission of a sketch or composite is not controlled by hearsay analysis.

Conclusion

The number of reported cases discussing the hearsay aspects of sketches and composites is surprisingly small, and the case law diverges

79. 564 F.2d 983 (2d Cir. 1977).
80. *Id.* at 996, *citing* 4 J. WEINSTEIN & M. BERGER, *supra* note 3, at 801-107 to 108.
81. 581 F.2d 14 (2d Cir. 1978).
82. Interestingly, the court also observed that under Rule 801(d)(1)(E), "evidence of the prior identification [the sketch] is admissible only if the witness [who identified it] testifies at trial," *id.* at 21, apparently rejecting the position of some courts that third parties may also testify and qualify the exhibit for admission in evidence.

widely in its treatment of such evidence. One line of cases treats such evidence as inadmissible hearsay. Except for the Illinois decision in *Rogers*, states adopting this position have not codified their evidentiary rules and take a common law approach to the admissibility issue.[83] Another line of state cases admitting such evidence usually does so on the basis of an existing statutory provision.[84] Finally, the federal cases have uniformly admitted such evidence under the federal rules.[85]

The present disparity among the jurisdictions in their treatment of the admissibility of sketches and composites is unsatisfactory. While it is apparent that the principal impetus for the trend favoring the admissibility of such evidence has been the parallel trend toward state codification of evidentiary rules, by itself this reasoning fails to justify the result. While the jurisdictions have the power to change evidentiary rules to expand admissibility, the desirability of this trend is arguable, particularly since the federal rules were intended to incorporate existing evidentiary concepts. A comparison of earlier drafts of article VIII, the hearsay section, reveals that the initial expansive drafts were curtailed to reflect existing law.[86] Hence, to admit sketches and composites on the summary assertion that such evidence constitutes a "prior identification" is inadequate reasoning. To classify, as *Moskowitz* did, a sketch as the equivalent of a photograph rather than of a statement, fails to take into account the significant differences in how those exhibits are created.

Analytically, it is useful to separate the sketch or composite from the testimony relating to its creation. If a victim at trial is merely shown a sketch or composite and asked whether he previously identified it, the exhibits are essentially identical to photographs, and their admission, like photographs, cannot be seriously questioned. By contrast, when the victim or police officer is asked at trial how the sketch or composite was created, the testimony will necessarily be a prior consistent statement which the jury will interpret as corroboration of the in-court identification. In this sense the testimony may well confuse and mislead the jury, a balancing consideration under Federal Rule 403.

An analogy to lineups is instructive. Based on a previous description from the victim, the police arrest the defendant and place him in a lineup where the victim identifies him. At trial the victim identifies the defendant in court, then testifies that he previously identified the defendant at a lineup and identifies the defendant in the lineup photograph. All of this evidence is clearly admissible as a prior identification. Suppose the prosecutor asks the witness to state the description of the offender he initially gave to the police. Is this proper? The answer is no, because the initial description to the police is a prior consistent statement, and the prosecutor is using it to corroborate the lineup and in-court identifications. If a prior consistent statement, however, cannot be used to bootstrap the credibility of a subsequent lineup identification, why should it be admissible simply if

83. See text at notes 54-62 *supra*.
84. See text at notes 63-70 *supra*.
85. See text at notes 77-82 *supra*.
86. 4 J. WEINSTEIN & M. BERGER, *supra* note 3, at 801-11 to 17.

the latter identification process involves a sketch or composite rather than a lineup? This question has not been addressed by those cases permitting the admission of sketches and composites as well as testimony about their creation. Instead of cavalierly admitting such evidence as prior identifications or as analogous to photographs, future cases should take a harder look at the hearsay aspects of sketches and composites, particularly at the proffered testimony about their creation, so that the rules of admissibility will be logically consistent with the other accepted modes of pretrial identifications.

PERMISSIBLE IDENTIFICATION WITNESSES

By its very language, Rule 801(d)(1)(C) permits testimony about a prior identification by the victim-witness.[87] Rule 801(d)(1)(C) makes admissible as non-hearsay the testimony of a declarant where the prior statement is "one of identification of a person made after perceiving him," language that clearly contemplates in-court testimony by the victim. Indeed, the pre-rules case law supporting the admission of prior identifications by victims, at least where lineups and photographic identifications are concerned, is overwhelming.[88] The post-rules case law is in accord, even where the victim is unable to make an in-court identification of the defendant.[89]

When a third-party witness to a prior identification is called as a witness at trial, there are several recurring situations which raise additional hearsay issues.[90]

1. The victim testifies at trial about his prior identification, after which a third party, usually a police officer, is called to corroborate the victim's testimony.[91]

2. The victim testifies at trial but is unable, through lack of memory, to testify about his prior identification. Thereafter a police officer is called to provide the essential facts of the victim's prior identification.

3. The victim is unavailable at trial, through death, disappearance, or other cause not attributable to wrongdoing or inaction by the prosecution.[92] Thereafter the third party is called to testify about the victim-wit-

87. Obviously the person making the prior identification can be both the victim and the witness to the crime. This article will refer only to the victim.

88. See note 49 *supra*. Although initially treated as inadmissible hearsay, the clear trend and modern rule favors admissibility, the only significant difference being whether the prior identification should be treated as substantive evidence, Interestingly, the *Wade-Manson* series of cases, although principally involving the due process clause, also involved out-of-court and in-court identifications by the victims. In none of the cases did the court question the evidentiary propriety of the testimony. See text & notes 6-42 *supra*.

89. *See* United States v. Lewis, 565 F.2d 1248, 1251-52 (2d Cir. 1977); People v. Townsend, 47 Ill. App. 3d 789, 791, 365 N.E.2d 110, 112 (1977).

90. These situations also raise sixth amendment confrontation clause issues, discussed at text & notes 130-83 *infra*.

91. Obviously the person corroborating the victim's testimony can be someone other than a police officer. This article will refer only to police officer.

92. Unavailability for hearsay purposes is governed by Rule 804(a). A witness is unavailable for confrontation purposes only when the prosecution in good faith and through reasonable efforts attempts to secure the presence of the victim-witness and fails in its efforts. See text & notes 130-83 *infra*.

ness's prior identification.

Victim Recalls Prior Identification

The first situation is the most common. The victim customarily testifies at trial that he attended a lineup, pointed to the defendant and said, "That's the man who robbed me." The prosecution then calls a police officer who was present at the lineup to testify that in fact the victim did point to the defendant and verbally identified him.[93] Under traditional hearsay analysis, the victim's testimony about his prior identification is an out-of-court statement. It is also clearly a prior consistent statement, hence hearsay when offered by the prosecution, unless a recognized exception applies. The recognized prior identification exception, characterized as non-hearsay by Rule 801(d), applies when the victim himself testifies at trial to his prior identification. Does it, or should it, apply with equal force where a police officer testifies as a corroborative witness?

Historically, the older cases have been ambivalent, some permitting corroboration depending on the precise circumstances involved, others excluding such evidence altogether.[94] This ambivalence has continued to the present day, although the trend favors admissibility. The cases can be easily segregated according to the theory behind the ruling. One line of cases permits the corroborative testimony of the police officer without distinguishing the factual setting in which such evidence arises.[95] A second line permits such testimony of a third party only where the victim's identification has been attacked through methods such as impeachment or recent fabrication.[96] A third holds such evidence inadmissible on hearsay grounds, but usually finds it harmless error.[97]

Illustrative of the first line of cases broadly admitting such corroborative evidence from third parties is *United States v. Miller*,[98] in which the Second Circuit approved both the victim testifying to his prior identification and the corroboration of that prior identification by other witnesses. In *United States v. Lewis*,[99] which arose after the effective date of the federal rules, the Second Circuit cited *Miller* with approval. In *Lewis*, the robbery victim identified the defendant from a photographic display. At trial she recounted her prior identification. The prosecution then called an FBI agent who described how the photographic display was prepared and confirmed that the victim had selected the defendant's photograph as being

93. Not at issue here is whether the police officer can testify as to how the lineup was conducted. Where the principal issue, for instance, is whether the lineup was fairly composed or conducted, it is clear that the officer can testify to the relevant facts. The hearsay issue arises only when the officer is asked to repeat the victim's identification, whether verbal ("She said 'that's the man who robbed me' ") or assertive conduct ("She pointed to the defendant").

94. *See generally* Poole v. United States, 97 F.2d 423 (9th Cir. 1938) (inadmissible); Di Carlo v. United States, 6 F.2d 364 (2d Cir. 1925) (third party corroboration admissible); Commonwealth v. Rollins, 242 Mass. 427, 136 N.E. 360 (1922) (admissible); People v. Kennedy, 164 N.Y. 449, 58 N.E. 652 (1900) (inadmissible).

95. See text & notes 95-99 *infra*.

96. See text & notes 105-108 *infra*.

97. See text & notes 100-04 *infra*.

98. 381 F.2d 529 (2d Cir. 1967).

99. 565 F.2d 1248 (2d Cir. 1977).

that of the robber. The court held all this evidence admissible under Rule 801(d)(1)(C).

The opposite position, that such corroboration from third party witnesses is inadmissible hearsay, is illustrated by *Washington v. State*,[100] an Oklahoma case. There a police officer testified at trial that when he arrived at the scene of a murder, he had a conversation with a child, after which the officer "directed his investigation" toward the defendant.[101] The inescapable deduction from this testimony was that the child had told the police officer that the defendant had committed the murders. The court held that the third party testimony was inadmissible hearsay, observing that, "although an eye witness can testify at trial to an extrajudicial identification, this can only be done by an eye witness, and cannot be done by an officer or any other third party who was present at the time the extrajudicial identification was made."[102] The danger of such testimony is that it gives the impression that the identifying witness's testimony is corroborated by the third party when in fact this is not true corroboration at all,[103] although these courts often find the error harmless.[104]

Representative of the intermediate position, that corroboration is admissible only after the victim's out-of-court identification has been attacked, is *Lyons v. State*.[105] In *Lyons*, the Texas Court of Criminal Appeals found reversible error in the admission of a police officer's corroboration of a victim's unimpeached prior identification.[106] Likewise, in *Willis v. State*[107] the Florida Supreme Court adopted the view that corroborating testimony is "admissible in rebuttal of testimony tending to impeach or discredit the testimony of the identifying witness, or to rebut a charge, imputation, or suggestion of falsity."[108]

This intermediate position is superior. Grounded in the concept of relevance, it accepts the proposition that bolstering the victim's prior identification can be unfairly misleading to a jury and is relevant only if the cross examination directly challenges the victim's testimony about the fact that a prior identification occurred. In such a situation the corroboration is being introduced to rebut the inference created by the cross examination, a clearly proper purpose and one entirely consistent with the limited admission of prior consistent statements under Rule 801(d)(1)(B).

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100. 568 P.2d 301 (Okla. 1977).

101. *Id.* at 304.

102. *Id.* at 311.

103. People v. Wright, 65 Ill. App. 2d 23, 28, 212 N.E.2d 126, 128 (1965). The Illinois courts are inconsistent on this issue. In People v. Warren, 32 Ill. App. 3d 218, 336 N.E.2d 557 (1975), for example, the same appellate court followed the federal approach. "An officer's testimony about a witness's out-of-court identifications of the defendant are admissible if the person who makes the out-of-court identification: (1) is present at trial; (2) testifies to the prior identification; and (3) is subject to cross-examination." *Id.* at 220, 336 N.E.2d at 559. Recently, Illinois changed its position to the federal court view. *See* People v. Rogers, 81 Ill. 2d 571, 579, 411 N.E.2d 223, 227 (1980).

104. See note 62 *supra*.

105. 388 S.W.2d 950 (Tex. Crim. 1965).

106. *Id.* at 951.

107. 217 So. 2d 106 (Fla. 1968).

108. *Id.* at 107; *accord*, Aaron v. State, 273 Ala. 337, 343, 139 So.2d 309 (1961); State v. Few, 530 S.W.2d 411, 413-14 (Mo. App. 1975); Jackson v. State, 507 S.W.2d 231, 232 (Tex. Crim. 1974).

Victim Is Unavailable

A related situation is when the police officer present at the prior identification is called to testify that the now unavailable victim in fact previously identified the defendant. In this situation, the courts have generally held the testimony of the police officer inadmissible hearsay. The federal courts appear to have adopted this position. In *United States v. Miller*,[109] the court strongly suggested in dictum that such evidence might be inadmissible, although on grounds other than hearsay.[110] Illinois courts also have consistently held such surrogate testimony improper. For example, in *People v. Owens*[111] police conducted a lineup in a hospital room for a seriously injured victim. The victim identified the defendant by pointing to him. Two months later the victim died. At trial the prosecution called a police officer who testified to the victim's hospital room identification, to the disapproval of the appellate court.[112] Likewise, in *People v. Cuadra*[113] the New York Appellate Division held it reversible error to permit a police officer to testify that a friend of the victim had identified a photograph of the defendant at the police station, where the friend did not testify at trial.

Cases from other state jurisdictions that have decided the issue are generally in agreement,[114] with the notable exception of *State v. Simmons*,[115] a New Jersey case in which a sixteen-year-old deaf-mute rape victim identified the defendant by pointing to him and to the affected area of her anatomy. At trial the victim, who was retarded, was held to be incompetent as a witness. The appellate court held, however, that a police officer's testimony about the victim's hospital identification of the defendant was properly admitted on the questionable basis that it "constituted a link in the chain of circumstantial evidence implicating defendant."[116] This case, a rare exception, is best explained by the court's understandable desire to find the evidence admissible given the facts of the case.

Victim Cannot Recall Prior Identification

The most troublesome context is when the victim is available at trial but is unable to testify fully because of an inability either to make an in-court identification or to recall the prior identification. The prosecution

109. 565 F.2d 1248 (2d Cir. 1977).

110. See text & notes 130-83 *infra*. Surprisingly, none of the decisions appear to analyze this situation from the perspective of Rule 804(b)(5), the residual hearsay exception, when the declarant is unavailable. It would appear that its requirements could be met, except for the "interests of justice" requirement of subsection (C), which refers to the confrontation clause.

111. 32 Ill. App. 3d 893, 337 N.E.2d 60 (1975).

112. The appeals court reversed, not on hearsay grounds, an issue it did not need to reach, but because the police officer also testified that the defendant did nothing after being identified. Since the defendant had previously been given his *Miranda* rights, this was an impermissibly implied admission by silence and reversible error in itself. *Id.* at 896, 337 N.E.2d at 62. *See also* People v. Riley, 63 Ill. App. 3d 176, 181, 379 N.E.2d 746, 750 (1978); People v. Ford, 89 Ill. App. 2d 69, 82, 233 N.E.2d 51, 58 (1967); State v. Ford, 336 So. 2d 817, 821 (La. 1976).

113. 47 App. Div. 2d 886, 367 N.Y.S.2d 21 (1975).

114. *See, e.g.*, People v. Mayfield, 23 Cal. App. 3d 236, 240, 100 Cal. Rptr. 104, 106 (1972); People v. Howard, 599 P.2d 899, 901 (Colo. 1979); Knight v. State, 373 So. 2d 52, 53 (Fla. App. 1979).

115. 98 N.J. Super. 430, 237 A.2d 630 (1968).

116. *Id.* at 437, 237 A.2d at 633.

then attempts to bolster the existing identification evidence by having a police officer testify to the victim's prior identification.[117] When the witness is unable to make an in-court identification, the federal courts permit police officer testimony to bolster the victim's prior identification. In *United States v. Lewis*,[118] the leading federal case, the victim was unable to identify the defendant in court but did testify to her prior photographic identification of the defendant. An FBI agent testified and corroborated the victim's prior identification. The Second Circuit held the agent's testimony was properly admitted under Rule 801(d)(1)(C). The court ruled that the admissibility of the agent's testimony rested only on the victim's ability to relate her prior identification at trial.

State jurisdictions generally are in accord.[119] Perhaps the leading case is *People v. Gould*,[120] a 1960 California Supreme Court decision. In *Gould*, the victim of a burglary made an identification of the defendant from a photographic array about one hour after the crime. At trial, however, she was unable to positively identify the defendant as the burglar and expressed some uncertainty about her prior identification from the photographs. A police officer then testified on cross-examination that she was sure of her earlier photographic identification when she made it. After noting that the earlier identification was independent evidence of identity and that it had greater probative value than the in-court identification, the court approved admission of the officer's testimony. The *Gould* holding marked the beginning of state court admission of police corroborating testimony over hearsay objections where witnesses are unable to make in-court identifications,[121] even in circumstances where the victim is uncertain of the accuracy of the prior identification.[122]

The more difficult, although less common, problem occurs when the victim makes an in-court identification but cannot remember either the occurrence or result of the prior identification. In these circumstances the prosecutor, knowing that a mere in-court identification has minimal probative impact on the jury, will attempt to call as a witness a police officer to prove what the victim has forgotten altogether—the prior identification. Here the substantial majority of state jurisdictions follow the Louisiana Supreme Court's analysis in *State v. Jacobs*,[123] where a police officer testi-

117. Where the victim testifies at trial and neither makes an in-court identification nor remembers the prior identification, the witness is essentially unavailable. Hence, the situation is identical to those where the witness does not testify at all and, as the preceding section has noted, the cases are reasonably uniform in excluding any third party evidence on the identification issue. *But see* State v. Jackson, 24 Ariz. App. 7, 9, 535 P.2d 35, 37 (1975), where a court admitted the police officer's testimony when the victim at trial could neither make an in-court identification nor identify the photograph he had previously selected from a photographic array.

118. 565 F.2d 1248 (2d Cir. 1977).

119. *See, e.g.*, People v. Miller, 27 Ill. App. 3d 667, 327 N.E.2d 8 (1975); Johnson v. State, 237 Md. 283, 206 A.2d 138 (1965); State v. Draughn, 121 N.J. Super. 64, 296 A.2d 79, *aff'd*, 61 N.J. 515, 296 A.2d 68 (1972); People v. Nival, 33 N.Y.2d 391, 308 N.E.2d 883 (1974).

120. 54 Cal. 2d 621, 354 P.2d 865 (1960).

121. *See, e.g.*, People v. Miller, 27 Ill. App. 3d 667, 671, 327 N.E.2d 8, 11 (1975); Commonwealth v. Vitello, 376 Mass. 426, 458, 381 N.E.2d 582, 600 (1978); State v. Draughn, 121 N.J. Super. 64, 66, 296 A.2d 79, 80, *aff'd*, 61 N.J. 515, 296 A.2d 68 (1972).

122. People v. Lagand, 36 N.Y.2d 71, 74, 365 N.Y.S.2d 147, 149, 324 N.E.2d 534, 535 (1975).

123. 344 So. 2d 659 (La. 1977).

fied to the victim's prior photographic identification. Although the victim had made an equivocal identification of the defendant at trial, no testimony was elicited from her about the earlier photographic identification. The court held that the state may not bolster its case with an inadmissible extrajudicial identification when the identifier has not testified that she made such a pre-trial identification.[124]

Although there appears to be no post-rules federal case directly on point,[125] by its terms Rule 801(d)(1)(C) would seem to bar such testimony. As the Second Circuit noted in *United States v. Lewis*,[126] "[S]ubsection (C) represents a legislative decision to admit statements of identification provided the declarant 'testifies at . . . trial . . . and is subject to cross examination concerning the statement.' "[127] It is unclear if the language of subsection (C) would permit a police officer's testimony about a victim's prior identification where the victim did not testify about that identification. Here the Second Circuit expressed reservations, since "[i]n that situation, testimony like [the police officer's] might well raise questions concerning the adequacy of cross-examination and the right to confront the original identifying witness."[128] It appears from this language that despite Rule 801(d)(1)(C), federal courts would reach the state majority result and bar such evidence, although probably on confrontation, not hearsay, grounds.

Conclusion

This section has demonstrated that case law on the admissibility of corroborating testimony, before and since institution of the federal rules, is inconsistent. While the cases are generally in agreement that a police officer cannot testify to a prior identification when the victim is unavailable at trial or when the victim at trial is unable to remember anything of his prior identification, there is substantial conflict otherwise concerning when a police officer should be permitted to corroborate a victim's testimony about his prior identification. The question is at once simple and complex. One easy answer, of course, is simply to characterize the police officer's testimony as corroboration and summarily admit it on that basis, since courts routinely admit corroboration evidence at trial subject only to considerations enumerated in Rule 403. Why should a contrary result occur in the identification area?

The shortcoming of this approach is that it fails to appreciate the par-

124. *Id.* at 662; *accord*, People v. Smith, 105 Ill. App. 2d 8, 245 N.E.2d 23 (1969), where the victim identified the defendant at trial related that when the police had shown her some photographs after the robbery. However, she was not asked if she had identified anyone at that time. A police officer then testified about the photographic procedure, including that the victim had selected the defendant's picture. The appellate court held this inadmissible hearsay. The court did not directly address the question of whether the officer's testimony was proper simply because the victim was unavailable for cross-examination on her prior identification. *Id.* at 12-13, 245 N.E.2d at 25.

125. *See* Advisory Committee's Note, FED. R. EVID. 801(d)(1)(C), discussing the split in authority among the states prior to the enactment of the federal rules.

126. 565 F.2d 1248 (2d Cir. 1977).

127. *Id.* at 1252.

128. *Id.*

ticular nature of corroboration in the identification area. The particularly insidious quality of such corroboration, warranting different evidentiary treatment, is that it is not genuinely corroboration. A contrast with true corroborative evidence makes the distinction clear. Consider, on the one hand, a crime involving three victims. Each victim independently identifies the defendant in court and relates his prior identification as well. In this situation each victim's prior identification corroborates the other victims' prior identifications. This is true corroboration in the sense that there are three independent sources of the prior identification, each reaching the same conclusion. There cannot be a hearsay bar to the evidence, and the fact finder would and should give appropriately greater weight to this collective testimony.

On the other hand, where a single victim's testimony about his prior identification is "corroborated" by a police officer, there may be no true corroboration at all. The admissibility of the police officer's testimony here should logically depend on the nature of the victim's cross-examination. If the cross-examiner has implied that the lineup was in any manner unfairly or suggestively conducted, the officer should be permitted to rebut that allegation. If the cross-examiner has suggested that the victim never made an identification at all, or was hesitant or equivocal about the identification, the officer again should be permitted to rebut that allegation. Where, as is more commonly the case, the cross-examiner challenges the victim's ability to make an accurate lineup identification, a different rule should obtain. This cross-examination focuses on the victim's mental ability to transfer accurately the mental images made during the commission of the crime to the place and time of the lineup. The cross-examiner here will concentrate on the facts of the crime—the time, weather, lighting, distances, and other factors enumerated in *United States v. Simmons*,[129] the victim's ability to remember and articulate the details of the crime, and the appearance of the offender.

In this last type of cross-examination, the testimony of the police officer logically has no bearing. He was not present at the crime and cannot support by first-hand testimony those factors the cross-examiner is attempting to expose during the victim's cross-examination testimony. Because the testimony of the police officer cannot logically support the victim's testimony, it is irrelevant and creates the additional danger, by appearing to corroborate the victim's testimony, of misleading the fact finder into giving inappropriate weight to the victim's testimony. In short, those cases which hold that the police officer's testimony is properly admissible only when the victim's testimony about his prior identification is directly attacked on cross-examination are better reasoned. While they generally hold that corroboration in all other circumstances is inadmissible on hearsay grounds, relevance objections—that such corroboration is minimally probative, cumulative, and misleading—should be an alternative evidentiary bar to corroborative admissibility at trial.

129. 390 U.S. 377, 385 (1968).

CONFRONTATION CLAUSE LIMITATIONS

Intertwined with the evidentiary aspects of prior identification testimony is the constitutional limitation of the sixth amendment's confrontation clause, which states, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[130] The scope of the confrontation clause and its relationship to the hearsay rule is unclear. Both guard against the same danger, the admission of unreliable or untrustworthy evidence which cannot be tested adequately through cross-examination. Even so, case law has made it clear that the two concepts are not synonymous.[131] In addition, although the confrontation clause has been the subject of substantial scholarly analysis,[132] only since 1965 has the Supreme Court grappled with the difficult issue of the relationship between the confrontation right and hearsay.[133] Beginning with *Pointer v. Texas*[134] in 1965 and ending recently with the 1980 decision in *Ohio v. Roberts*,[135] the Court, in varying factual contexts,[136] has begun to formulate a unitary theory explaining the relationship of the confrontation clause to hearsay.

Confrontation Clause Cases

It is not uncommon in criminal trials for a victim to be unavailable at trial. Where identification is not in issue or can be proved circumstantially, the victim's absence is not necessarily fatal to a successful prosecution. Where identification is the paramount issue, however, and the victim is either absent from the trial or unable to recall a prior identification, and the prosecution attempts to prove the identification of the defendant through a police officer testifying to the victim's prior identification, sev-

130. U.S. CONST. amend. VI.

131. Mattox v. United States, 156 U.S. 237, 243 (1895); United States v. Bienvenue, 632 F.2d 910, 914 (1st Cir. 1980).

132. *See generally* F. HELLER, THE SIXTH AMENDMENT 105 (1951); Baker, *The Right to Confrontation, the Hearsay Rules, and Due Process, A Proposal for Determining When Hearsay May Be Used in Criminal Trials*, 6 CONN. L. REV. 529 (1974); Davenport, *The Confrontation Clause and The Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378 (1972); Graham, *The Confrontation Clause, the Hearsay Rule, and the Forgetful Witness*, 56 TEX. L. REV. 151 (1978); Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99 (1972); Natali, *Green, Dutton and Chambers: Three Cases in Search of a Theory*, 7 RUT.-CAM. L.J. 43 (1975); Read, *The New Confrontation-Hearsay Dilemma*, 45 S. CAL. L. REV. 1 (1972); Seidelson, *Hearsay Exceptions and the Sixth Amendment*, 40 GEO. WASH. L. REV. 76 (1971); Westen, *The Future of Confrontation*, 77 MICH. L. REV. 1185 (1979); Younger, *Confrontation and Hearsay: A Look Backward A Peek Forward*, 1 HOFSTRA L. REV. 32 (1973); Note, *The Confrontation Test for Hearsay Exceptions: An Uncertain Standard*, 59 CAL. L. REV. 580 (1971); Note, *Confrontation and the Hearsay Rule*, 75 YALE L.J. 1434 (1966).

133. In Pointer v. Texas, 380 U.S. 400, 403 (1965), the Court expressly made the sixth amendment's confrontation clause applicable to the states.

134. 380 U.S. 400 (1965).

135. 448 U.S. 56 (1980).

136. Between the decisions in *Pointer* and *Roberts*, cases involving the relationship between hearsay and the right to confrontation decided by the Supreme Court include Douglas v. Alabama, 380 U.S. 415 (1965); Barber v. Page, 390 U.S. 719 (1968); United States v. Bruton, 391 U.S. 123 (1968); California v. Green, 399 U.S. 149 (1976); Dutton v. Evans, 400 U.S. 74 (1970); Mancusi v. Stubbs, 408 U.S. 204 (1972); Chambers v. Mississippi, 410 U.S. 284 (1973); and Davis v. Alaska, 415 U.S. 208 (1974).

eral hearsay and confrontation issues are raised. What constitutes unavailability of a witness? Under what circumstances may other evidence be permitted to substitute for the in-court testimony of an unavailable witness? What restrictions will obtain on the sources of substitute evidence? How do confrontation issues relate to prior identifications? The problems are compounded because the Supreme Court has never decided a confrontation clause case in the factual context of prior identifications. Hence, the *Pointer* line of decisions must be examined with a view toward understanding the nature of the confrontation right and applying a derived theory to prior identifications. For these purposes, *California v. Green*,[137] *Dutton v. Evans*,[138] and *Ohio v. Roberts*[139] are the seminal cases.

In *California v. Green*,[140] the defendant was convicted of selling marijuana to Porter, a minor. Both in his statement to Wade, a police officer, and at the preliminary hearing, Porter identified Green as his supplier. At Green's trial, where Porter was the chief prosecution witness, Porter suddenly became evasive and uncooperative and testified that since he was under the influence of drugs at the time of the drug sale he could not remember who the seller was. Relying on section 1235 of the California Evidence Code, which admits as substantive evidence prior inconsistent statements of a witness if that witness has an opportunity at trial to admit or deny making the prior statement, the prosecutor impeached Porter on direct examination by reading into evidence excerpts from Porter's preliminary hearing testimony. In addition, the trial court permitted officer Wade to testify to Porter's earlier statement. The California Court of Appeals reversed, holding that the use of the prior statements violated the defendant's confrontation right.[141] The California Supreme Court affirmed.[142]

In an opinion by Justice White, the United States Supreme Court reversed the decision, holding only that the use of Porter's preliminary hearing testimony did not violate the confrontation clause.[143] In reaching this

137. 399 U.S. 149 (1970).
138. 400 U.S. 74 (1970).
139. 448 U.S. 56 (1980).
140. 399 U.S. 149 (1980).
141. 71 Cal. Rptr. 100 (1968).
142. 70 Cal. 2d 654, 451 P.2d 422 (1969).
143. Significantly, the Court did not reach the issue of whether the use of Porter's prior statement to officer Wade violated the confrontation clause. At trial Porter neither admitted nor denied making the statement. He simply testified that he could not remember the episode. The Court remanded that issue to the California Supreme Court. Justice Harlan, concurring, would have decided this issue under the view that the confrontation clause only requires the prosecution to produce any available witnesses and make them available for cross-examination. The witness's lack of recall "does not have sixth amendment consequence." 399 U.S. at 188 (Harlan, J., concurring). Justice Brennan, dissenting, would have held Porter's prior statement inadmissible under the view that physical production of the witness at trial is insufficient to meet confrontation clause requirements where the witness neither has an actual nor feigned inability to remember the prior statement, "because the witness cannot be questioned at trial concerning the pertinent facts." *Id.* at 194 (Brennan, J., dissenting). On remand, the California Supreme Court held that the admission of officer Wade's testimony regarding Porter's prior statement did not violate Green's confrontation rights. 3 Cal. 3d 981, 991, 479 P.2d 998, 1003-04 (1971). For a thorough analysis of the questionable logic of this conclusion, *see generally* Graham, *The Confrontation Clause, the Hearsay Rule, and the Forgetful Witness*, 56 TEX. L. REV. 151 (1978).

conclusion, the Court noted that confrontation:

> (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth;' (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.[144]

Insofar as the preliminary hearing testimony was concerned, Porter was both under oath and subject to cross-examination at the hearing—"circumstances closely approximating those that surround the typical trial."[145] The Court thus concluded that the rule should not be different merely because the witness was available for trial since if the witness was unavailable, the prior testimony would clearly be admissible.[146] Under these circumstances, Porter's preliminary hearing testimony had been both obtained under circumstances demonstrating reliability or trustworthiness and tested by cross-examination. The Court remanded the issue of the admissibility of Porter's prior statement to officer Wade.[147]

In *Dutton v. Evans*,[148] the issue was the admissibility of an out-of-court statement of an available but uncalled witness. There, three defendants were charged with the murder of three policemen. Evans was tried separately. A prosecution witness named Shaw, who was a cellmate of Williams, a severed co-defendant, testified that following arraignment Williams stated, "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now."[149] Over objection, the trial court admitted this statement against Evans based on a Georgia statute admitting co-conspirator's statements against any conspirator once a conspiracy had been proved.

The Supreme Court, in a plurality decision,[150] upheld the admission of the evidence against a confrontation clause challenge. Justice Stewart noted for the plurality that confrontation and hearsay were not identical in reach.[151] Observing that the "mission of the confrontation clause is to ad-

144. 399 U.S. at 158.

145. *Id.* at 165. Whether either the scope or extent of cross-examination at a preliminary hearing "closely approximates" that at trial is certainly questionable. Many defense attorneys often elect to use the preliminary hearing as a discovery vehicle. In such circumstances the tenor of the cross-examination would be entirely different than one conducted at trial.

146. *Id.* at 166-67. For decisions which consider the admissibility of a prior statement in these circumstances, *see* United States v. Payne, 482 F.2d 449 (4th Cir.), *cert. denied*, 419 U.S. 876 (1974); People v. Green, 3 Cal. 3d 1971, 479 P.2d 998 (1971); Johnson v. State, 338 A.2d 124 (Del. 1975).

147. 399 U.S. at 170.

148. 400 U.S. 74 (1970).

149. *Id.* at 77.

150. The four Justices in the plurality were Justice Stewart, who wrote the opinion, joined by Chief Justice Burger and Justices White and Blackmun. Justice Blackmun, joined by the Chief Justice, filed a concurring opinion. Justice Harlan concurred in the result. Justice Marshall, joined by Justices Black, Douglas, and Brennan, dissented. This division suggests both the complexity of the issues and the deep division of views on the relationship between confrontation and hearsay.

151. 400 U.S. at 81.

vance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement,' "[152] Justice Stewart noted that the central issue was whether Shaw actually heard the statement he attributed to Williams. On this issue Shaw could be effectively cross-examined. Thus the possibility that Williams could show that the statement imputed to him was unreliable was dismissed as "wholly unreal."[153] Moreover, Williams' statement related by Shaw had sufficient "indicia of reliability" to be placed before the jury despite the lack of confrontation of the declarant.[154]

Justice Harlan, renouncing his previous position in *Green*, found unsatisfactory his former rule of preference which required the prosecution to produce any available witnesses before resorting to hearsay. His difficulty with the preference rule was that it would apparently bar admittedly reliable hearsay which traditionally has been admitted at trials, such as business records, official reports, and treatises.[155] Justice Harlan nevertheless concurred, finding that there had been adequate cross-examination of Shaw and that the admission of the evidence met due process standards.

Justice Marshall, joined by Justices Black, Douglas, and Brennan, dissented. Under Justice Marshall's view, the defendant's inability to cross-examine Williams denied him his right to confront adverse witnesses.[156] He vigorously attacked both Justice Stewart's position that cross-examination of Williams could not possibly affect the jury's view of Shaw's testimony and his position that this testimony was at most peripheral.[157] Justice Marshall also disagreed that the "indicia of reliability" test was an adequate substitute for confrontation rights. In short, in Justice Marshall's view the confrontation right meant that the defendant must be allowed to cross-examine all witnesses against him.[158]

Ohio v. Roberts[159] is the Supreme Court's latest decision dealing with the nature of confrontation. The defendant in *Roberts* was charged with forgery. At the preliminary hearing the defense called the victim's daughter as a witness. At trial the prosecution repeatedly but unsuccessfully attempted to secure the daughter's testimony. In rebuttal, the prosecution introduced the daughter's preliminary hearing transcript in evidence, over the defendant's confrontation objection, to contradict the defendant's testimony. Justice Blackmun, writing for a six member majority, upheld the admission of the transcript, ruling that the confrontation clause was not violated.[160] Candidly observing that their previous decisions in this area had not stated an integrated theory of the relationship of confrontation to

152. *Id.* at 89, *citing* California v. Green, 399 U.S. 149, 161 (1980).
153. 400 U.S. at 89.
154. *Id.*
155. *Id.* at 96 (Harlan, J., concurring).
156. *Id.* at 111.
157. *Id.* at 103.
158. *Id.* at 111.
159. 448 U.S. 56 (1980).
160. *Id.* at 77.

hearsay,[161] Justice Blackmun set forth the general analytical principles to be applied to any confrontation issue:

> The Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay. First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual cases (including cases where prior cross-examination has occurred) the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.
>
> The second aspect operates once a witness is shown to be unavailable. Reflecting its underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that "there is no material departure from the reason for the general rule"
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> . . . .
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> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.[162]

On the *Roberts* facts, the rejection of the confrontation clause claim was relatively simple. Finding that defense counsel's examination of the daughter at the preliminary hearing, although a direct examination, was

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161. "The Court has not sought to map out a theory of the Confrontation Clause that would determine the validity of all . . . hearsay 'exceptions.' California v. Green . . . But a general approach to the problem is discernible." *Id.* at 64, 65.

162. *Id.* at 65-66. On the matter of necessity, Justice Blackmun repeated the Court's previous standards:

> The basic litmus of Sixth Amendment unavailability is established: "[A] witness is not 'unavailable' for purposes of . . . the exception to the confrontation requirement unless the prosecutorial authorities have made a *good faith effort* to obtain his presence at trial." Barber v. Page, 390 U.S. at 724-725 (emphasis added) . . . Thus, if no possibility of procuring the witness exists (as, for example, the witness' intervening death), "good faith" demands nothing of the prosecution. But if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith *may* demand their effectuation. . . . The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness. As with other evidentiary proponents, the prosecution bears the burden of establishing this predicate.

Id. at 74-75 (emphasis in original). Under this analysis, the Court held that the daughter was unavailable, a conclusion that was hardly surprising since the prosecution had repeatedly attempted to locate and subpoena her and even her parents did not know of her whereabouts. *Id.* at 75-77.

Justice Brennan dissented. Joined by Justices Marshall and Stevens, he argued that the prosecution had even failed to make a "good faith effort" to find the missing witness. *Id.* at 80 (Brennan, J., dissenting). Note that under the majority's test, unavailability requires a good faith prosecution effort to locate and produce witnesses, clearly a more stringent requirement than that of unavailability under Rule 804(a). In addition, *Roberts'* two basic concepts—necessity and reliability—parallel the "other exceptions" to hearsay in Rules 803(24) and 804(b)(5), the residual exceptions.

the "equivalent of significant cross examination"[163] since it was "replete with leading questions, the principal tool and hallmark of cross-examination,"[164] and having sufficient "indicia of reliability," the prior statement was properly admissible.

Confrontation and Identifications

The Supreme Court has never decided a confrontation clause issue in a prior identification setting. Moreover, the case law in both lower federal and state courts is essentially non-existent.[165] It is particularly important in the absence of controlling precedent to apply the analytical approach of *Roberts* and its predecessors to those situations in which prior identification testimony is presented at trial.[166] *Roberts* is critical for several reasons. First, it represents the first serious attempt by the Court, admittedly in response to past criticism, to define a unitary conceptual framework in which any confrontation issue, regardless of its factual setting, can be analyzed and decided. Second, the decision itself is well reasoned, balancing the constitutional protections of the confrontation clause with the practical realities of criminal trials. Third, *Roberts* was decided by a majority whose philosophical approach in criminal cases will likely continue for years to come. Finally, it is unlikely that a confrontation clause issue in a prior identification setting will reach the Court. *Roberts* thus will be the most directly applicable holding to such cases.

The most common situation, where the victim testifies at trial to his own prior identification, poses no confrontation problems. The witness is actually present at trial, under oath, and is subject to cross-examination on both the in-court and out-of-court identifications. This is the model situation where the underlying purpose of the confrontation clause is not threatened. The second situation, where the victim testifies at trial to his prior identification and then is corroborated by a police officer present at the identification procedure, appears also to pose no confrontation problems[167] since both the victim and the police officer are actually present at trial, under oath, and are subject to cross-examination. The third situation, where the victim is actually unavailable through death, illness, disap-

163. *Id.* at 70.

164. *Id.* at 70-71.

165. This is probably caused by two historical facts. First, the confrontation clause has been held applicable to the states only since 1965, and it is the state courts that decide most of the street crime cases in which prior identification testimony is so prevalent. Second, the Supreme Court's *Wade-Manson* cases, stressing fairness in pretrial identification procedures, have resulted in the defense's use of pretrial motions to suppress as the principal method of attacking prior identifications, arguably at the expense of raising hearsay and confrontation objections at trial. *See* text & notes 6-42 *supra*. Practically all the reported lower court decisions involving confrontation concern co-conspirator declarations and Rule 801(d)(2)(E). *See, e.g.*, United States v. Fielding, 630 F.2d 1357 (9th Cir. 1980).

166. The analytical approach articulated in *Roberts* appears to be one that the Supreme Court will adhere to. First, the majority opinion gathered the support of six Justices. Second, the dissent was based on a factual issue—whether the prosecution had met its burden of demonstrating unavailability. Hence, it is not clear that the dissenting Justices disagreed with the majority's analytical approach.

167. As has been argued in the previous section, such "corroboration" is improper, under certain circumstances, on either hearsay or Rule 403 grounds.

pearance, or other good cause, and a police officer is called to provide the details of the victim's prior identification, presents serious confrontation problems. Even if the victim is unavailable in terms of confrontation standards, the "indicia of reliability" standards will normally bar such evidence.

The substantial majority of prior identifications occur during lineups and photographic procedures at the poliee investigation stage of the criminal process. None of the indicia of reliability are present. It is not a judicial proceeding, the victim is not under oath, nor is he subject to cross-examination. In most situations the defendant's counsel does not even have a right to be present at the identification procedure.[168] Under these circumstances the indicia of reliability requirements cannot be satisfied. The other extreme, where the prior identification occurs at a preliminary hearing or a former trial where substantial cross-examination on the identification issue is conducted, appears to meet confrontation requirements in light of *Green*. Where the prior identification occurs in a setting with anything less than the procedural rights and judicial formalism of a preliminary hearing, it is unlikely that confrontation right standards can be met.[169] However, the intermediate situation, where the victim testifying at trial has a substantial or total loss of memory about the prior identification, and where the prosecution then calls a police officer who was present at the prior identification to provide the absent details, raises serious confrontation problems. First, is the victim unavailable in the confrontation sense so that hearsay evidence of the prior identification can be introduced?[170] Second, does that substantial evidence have sufficient indicia of reliability to comply with minimum confrontation requirements?

In *Roberts*, the Court appeared to take the position that a witness is available when the prosecution has obtained that witness's "presence at trial."[171] Yet that decision did not directly address the situation where the witness is physically present in court but cannot testify in any meaningful fashion about the prior identification.[172] One may certainly argue that implicit in the meaning of "presence at trial" is the assumption that the witness remembers and can meaningfully testify to those facts of which he has

168. *See* Moore v. Illinois, 434 U.S. 220, 226-27 (1977); United States v. Ash, 413 U.S. 300, 321 (1973); Kirby v. Illinois, 406 U.S. 682, 690 (1972).

169. For example, courts have been extremely cautious in admitting former testimony of unavailable witnesses in criminal cases. *Compare* United States v. West, 574 F.2d 1131 (4th Cir. 1978) (admitting grand jury testimony of drug purchaser slain prior to trial over confrontation clause objections since it had sufficient indicia of reliability) *with* United States v. Thevis, 84 F.R.D. 57 (N.D. Ga. 1979) (admitting grand jury testimony of statements to FBI made by government witness in a racketeering prosecution, but only because the defendants had conspired to kill the witness, thereby waiving their confrontation rights).

170. Note that the impeachment rationale of Rule 801(d)(1)(A) for admissibility is inapplicable. Where a witness states that he cannot remember the earlier event, a prior statement containing details about the earlier event is not inconsistent with the witness's trial testimony in the sense contemplated by the rule. *See* Advisory Committee's Note, FED. R. EVID. 801.

171. 448 U.S. at 74.

172. This is by no means an uncommon situation. While the incidence of total failure to remember a prior identification may be small, witnesses frequently fail to remember if they identified anyone, who that person was, whether the person identified was the accused, and other related facts involving the identification process.

first-hand knowledge. This would simply equate, for confrontation purposes, forms of unavailability: A witness physically present in court but who remembers essentially nothing is the same as a physically absent witness.[173]

Assuming that the forgetful witness is "unavailable," what substitute evidence may be admitted? This was the exact issue reserved by the United States Supreme Court in *Green*. While the Court held that Porter's preliminary hearing transcript was admissible—it was extremely reliable since it was given under oath in a judicial proceeding in which he had been subjected to meaningful cross-examination—the Court remanded to the California Supreme Court the remaining issue of admissibility of Porter's prior statement to the police officer. On remand, the California Supreme Court was squarely faced with the issue of "whether Porter's 'apparent lapse of memory' so affected defendant's opportunity to cross-examine him at trial that the admission of the witness's prior statement to officer Wade violated defendant's right of confrontation under the Sixth Amendment."[174] The court held it did not. Using the *Green* analysis of confrontation purposes served by the rule, "(1) to insure reliability by means of the oath, (2) to expose the witness to the probe of cross-examination, and (3) to permit the trier of fact to weigh his demeanor,"[175] the California court concluded that in the circumstances of the case the confrontation requirements had been met.[176]

The correctness of the California court's holding in *Green* is questionable,[177] yet there are few other cases on point.[178] Where a police officer is called to testify to the victim's forgotten prior identification, such testimony ought to run afoul of the confrontation clause. Under *Roberts*, the substitute evidence must bear sufficient indicia of reliability so as to be trustworthy and "afford the trier of fact a satisfactory basis for evaluating

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173. In this regard, the differing views of Justices Harlan and Brennan in *Green* are noteworthy. Justice Harlan noted that confrontation only required the prosecution to make witnesses physically available at trial regardless of their recall. 399 U.S. at 188-89 (Harlan, J., concurring). Justice Brennan disagreed on the basis that in situations of presence without recall, the right of cross-examination is meaningless. *Id.* at 203 (Brennan, J., dissenting). It appears likely that the present Court would agree with Justice Harlan's reasoning.

174. 3 Cal. 3d 981, 989, 479 P.2d 998, 1003 (1971).

175. *Id.*

176. *Id.* at 991, 479 P.2d at 1004. The facts of the *Green* case are not particularly applicable to the usual prior identification situations. In *Green*, a prosecution witness essentially became hostile and, on direct examination, gave testimony extremely favorable to the defense, a fact which did not escape the Court's notice. 399 U.S. at 159. Thus, the defense could not claim to be unable to conduct a meaningful cross-examination of the witness.

177. *See* Graham, *supra* note 143, at 178-79.

178. *See* U.S. v. Payne, 492 F.2d 449 (4th Cir.), *cert. denied*, 419 U.S. 876 (1974), where a witness, a brother of three defendants who had pleaded guilty to the same charge, testified on the stand that he could not remember participating in the offense with his brothers. The government then impeached him with a prior statement he had given to a Secret Service agent. The trial court admitted the statement as substantive evidence under the recorded recollection exception. This ruling was upheld on appeal. 492 F.2d at 450. A similar decision was reached in Johnson v. State, 338 A.2d 124 (Del. 1975), in which one elderly witness having a limited memory was corroborated by several prior statements she made. The prior statements were admitted substantively under Delaware law permitting substantive use of prior statements of a witness present at trial and subject to cross-examination. *Id.* at 126; *see* Graham, *supra* note 143, at 179-83 for a critical analysis of these cases.

the truth of the prior statement."[179] Under this analysis, the police officer's testimony is inadmissible. As distinguished from a prior judicial transcript, the officer's statement was not given under oath or subject to cross-examination. Effective cross-examination in this situation necessarily includes probing the victim's mental processes which resulted in the identification, something impossible to pursue effectively during the cross-examination of the police officer. Moreover, the source of the information, the police officer, is not a neutral, disinterested witness. Often no other admissible evidence will be available to corroborate, contradict, or test the accuracy of the officer's testimony. In short, all the dangers the confrontation clause has been interpreted to protect against are present and the sixth amendment should bar the officer's testimony.

As previously noted, case law concerning application of the confrontation clause to prior identifications is essentially non-existent.[180] *United States ex rel. Abdus-Sabun v. Cuyler*[181] is a rare instance where a confrontation issue arose in a lineup setting. The defendant was charged with robbery and murder. Following his arrest, he was placed in a lineup, where several witnesses to the robbery identified him. At the first trial, which ended in a hung jury, the prosecution called six eyewitnesses. On retrial, the prosecution called only two of the eyewitnesses. When a police officer later testified that a total of six eyewitnesses had identified the defendant at the lineup, defense counsel did not object. The Third Circuit in affirming noted that, since the defendant's failure to object was a deliberate tactical decision aimed at obtaining a broader cross-examination calculated to show that some of the identifications were tentative, the confrontation issue was waived. The language of the opinion does suggest, however, that had counsel timely objected to the officer's testimony, the defendant's confrontation rights would have been violated.[182]

In those situations where the witness is either physically or functionally unavailable, the indicia of reliability requirements of *Roberts* and its predecessors should bar surrogate testimony whenever the victim's prior identification occurs in an environment not involving "a firmly rooted hearsay exception," and the proponent cannot show "particularized guarantees of trustworthiness."[183] This strongly suggests that whenever a prior identification occurs at a place other than a preliminary hearing, previous

179. 448 U.S. at 65-66.

180. See text & note 165 *supra*; United States v. Fielding, 630 F.2d 1357 (9th Cir. 1980), *opinion withdrawn and case redecided on evidentiary grounds*, 645 F.2d 719 (9th Cir. 1981), where the court conducted an impressive analysis of the *Roberts* unavailability and reliability tests in concluding that out-of-court statements of a witness who did not appear at trial were improperly admitted. There, the government was permitted to introduce, through a police officer, out-of-court statements of one Flores, who claimed to have heard inculpatory statements made by the defendant's co-conspirators. On appeal, the Ninth Circuit held that these statements violated the defendant's confrontation rights. The subsequent opinion that withdrew the original opinion again reversed the conviction, because the admission of Flores' statements violated hearsay rules. Hence, the second opinion did not need to reach the confrontation clause issue.

181. 653 F.2d 828 (3d Cir. 1981).

182. *Id.* at 833. The court also noted that admitting the police officer's testimony of identification made by persons who did not appear at trial violated the Pennsylvania hearsay rule. *Id.* at 832-33.

183. 448 U.S. at 66.

trial, or analogous adversarial judicial proceeding, the evidence of the prior identification, if produced through the police officer, will not meet minimum confrontation right standards. Accordingly, in such circumstances the sixth amendment confrontation clause should bar from introduction in evidence those prior identifications that occur during the investigative stage of the criminal justice process.

CONCLUSION

The identification of the defendant as the offender is a required element of proof in every criminal case and is commonly the principal issue at trial. Hence, the question of what kinds of evidence are properly admissible on that issue is often the principal evidentiary dispute. For that reason, it is surprising that the hearsay and confrontation aspects of prior identifications has received so little attention in the case law.

This article has suggested that the varying types and sources of prior identification evidence should be analyzed in terms of the purposes of the hearsay rule, the parameters of the prior identification exception to that rule, and the requirements of the confrontation clause. Just as a rigid application of traditional hearsay concepts should not be permitted to bar relevant, reliable prior identification evidence, the convenient label of "prior identification" should not be a substitute for rational analysis or be construed to admit unquestioningly all such evidence regardless of its nature or source. Accordingly, litigants and courts should scrutinize each item of evidence offered as a prior identification and determine its admissibility in a manner consistent with both the conceptional rationale for the prior identification exception and the mandate of the confrontation clause. Given their importance, it is hoped that these issues will receive increased attention in the future.