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## FOURTH AMENDMENT IMPLICATIONS OF COMPELLING AN INDIVIDUAL TO APPEAR IN A LINEUP WITHOUT PROBABLE CAUSE TO ARREST

### I. INTRODUCTION

The problem discussed herein may be illustrated by the following case in point:<sup>1</sup> two men entered a restaurant, shot three people, and then were observed fleeing in an automobile registered in the name of Alphonso C. Consequently, Alphonso C. became a suspect in the shooting. Since the police lacked probable cause to arrest him,<sup>2</sup> the prosecutor applied for and was granted an order directing Mr. C. to appear in a lineup. In so doing, the court authorized the detention of Mr. C. for the period necessary to conduct a lineup.<sup>3</sup> However, by issuing a warrant for the seizure of Mr. C. without probable cause to arrest, the court may have violated the fourth amendment to the United States Constitution, which states that "no Warrants shall issue, but upon probable cause . . . ."<sup>4</sup>

If probable cause to arrest is necessary to compel a suspect to appear in a lineup, a dilemma is created for law enforcement officials when the evidence which would constitute such probable cause is a witness' identification.<sup>5</sup> A properly conducted lineup is the most effective way of securing an accurate identification.<sup>6</sup> In addition, when a suspect is detained in violation of his

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1. *Alphonso C. v. Morgenthau*, 50 App. Div. 2d 97, 376 N.Y.S.2d 126 (1st Dep't 1975), appeal dismissed, 38 N.Y.2d 923, 346 N.E.2d 819, 382 N.Y.S.2d 980 (1976) (per curiam).

2. The authorities have probable cause to arrest when they know of facts or circumstances "sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91 (1964); see, e.g., *Henry v. United States*, 361 U.S. 98, 102 (1959); *Brinegar v. United States*, 338 U.S. 160, 176 (1949).

3. This order was overturned by the Appellate Division, First Department, on the grounds that the issuing judge lacked jurisdiction to so order. 50 App. Div. 2d 97, 376 N.Y.S.2d 126 (1st Dep't 1975). The prosecutor appealed to the Court of Appeals of the State of New York, which dismissed the appeal and remitted the case to the appellate division to dismiss the appeal taken to that court. 38 N.Y.2d 923, 346 N.E.2d 819, 382 N.Y.S.2d 980 (1976) (per curiam). See notes 87-89 *infra* and accompanying text.

4. U.S. Const. amend. IV.

5. Cf. *Carrington, Speaking for the Police*, 61 J. Crim. L.C. & P.S. 244, 255-58 (1970).

6. See *N. Sobel, Eye-Witness Identification* § 3, at 7-8 (1972). Although corporeal identification is preferable, photographs are a perfectly valid investigatory tool. See *Simmons v. United States*, 390 U.S. 377, 384 (1968); *Sobel, supra*, at 7-8 (1972). A photo lineup should consist of more than six photographs. 390 U.S. at 386 n.6. However, where there is no photograph available in police records, obtaining a photograph of the suspect could pose a problem. Photographing the suspect violates none of his constitutional rights. See *Katz v. United States*, 389 U.S. 347, 351 (1967). However, as in the case of lineups, the actual photographing of the suspect must be distinguished from the infringement of his liberty necessary to accomplish it. See notes 11-13 *infra* and accompanying text. Practically, allowing oneself to be photographed should require a lesser intrusion than appearing in a lineup and could be accomplished without any infringement at all. However, where any infringement is necessary, fourth amendment issues will arise. See *In re Investigation of a Multi-Vehicle Accident*, 135 N.J. Super. 190, 342 A.2d 903 (L. Div. 1975).

fourth amendment rights, a question arises whether the witness' identification of the suspect at the lineup or at any subsequent time is admissible into evidence against him. Pursuant to the exclusionary rule, evidence obtained in violation of the fourth amendment is not admissible at trial.<sup>7</sup> Courts have held, however, that when a defendant in a criminal case is compelled to participate in a lineup in violation of his rights under the fourth amendment, the witness' subsequent in-court identification of the defendant is admissible if it is of "independent origin," *i.e.*, not influenced by the witness' prior identification at the lineup.<sup>8</sup> Thus, the remedy available to a defendant whose constitutional rights have been violated is limited once he is identified at the lineup.

This Note will first examine the issue of whether compelling an individual to appear in a lineup violates his fourth amendment rights. The discussion will attempt to resolve the dilemma encountered by law enforcement authorities who may be unable to secure sufficient evidence against a suspect to have probable cause to arrest.<sup>9</sup> This Note will then examine some of the difficulties that a suspect compelled to appear in a lineup will encounter in securing relief.<sup>10</sup>

## II. CONSTITUTIONAL RIGHTS OF THE INDIVIDUAL VS. RIGHTS OF SOCIETY

Compelling the suspect to appear in a lineup does not violate his right against self-incrimination as set forth in the fifth amendment, since it is generally agreed that the fifth amendment applies only when an individual is compelled to give evidence of "a testimonial or communicative nature" against himself.<sup>11</sup> On the other hand, the constitutionality of requiring an individual to appear in a lineup, absent probable cause to arrest under the fourth amendment, has never been squarely decided.

In examining the fourth amendment ramifications of such an order, the viewing of the suspect by witnesses must be distinguished from the detention necessary to permit the viewing.<sup>12</sup> The viewing itself should not violate a suspect's fourth amendment rights because the right to privacy guaranteed by the fourth amendment extends only to the individual's "expectation of privacy."<sup>13</sup> Since the viewing of one's outward appearance may hardly be said to

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7. See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961).

8. See notes 63-67 *infra* and accompanying text.

9. See Part II *infra*.

10. See Part III *infra*.

11. See, e.g., *United States v. Wade*, 388 U.S. 218, 221 (1967) (compelling defendant to appear in lineup does not violate fifth amendment); *Gilbert v. California*, 388 U.S. 263, 265-67 (1967) (taking of handwriting exemplars does not violate defendant's fifth amendment rights); *Schmerber v. California*, 384 U.S. 757 (1966) (taking of blood samples does not violate defendant's constitutional rights); *Holt v. United States*, 218 U.S. 245, 252-53 (1910) (compelling defendant to put on perpetrator's blouse does not violate fifth amendment).

12. See *United States v. Dionisio*, 410 U.S. 1, 8 (1973); *United States v. Doe*, 457 F.2d 895, 898-99 (2d Cir. 1972), cert. denied, 410 U.S. 941 (1973).

13. See *Katz v. United States*, 389 U.S. 347, 351 (1967) (tapping a public telephone violates

infringe on one's expectation of privacy, no fourth amendment problem should arise.<sup>14</sup>

Consistent with this analysis, courts have generally found no fourth amendment violation where a suspect incarcerated on another charge is ordered into a lineup for a crime for which there is no probable cause to arrest him, because the procedure requires no detention without probable cause.<sup>15</sup> However, the incarcerated suspect still retains some rights under the fourth amendment.<sup>16</sup> Thus, some courts have intimated that even when the suspect is incarcerated, he may not be compelled to appear in a lineup absent reasonable suspicion<sup>17</sup> that he committed the crime under investigation.<sup>18</sup>

one's expectation of privacy and thus one's fourth amendment rights); *In re Multi-Vehicle Accident*, 135 N.J. Super. 190, 193, 342 A.2d 903, 905 (L. Div. 1975) (no expectation of privacy as to facial features).

14. Cf. *United States v. Mara*, 410 U.S. 19, 21 (1973) (no expectation of privacy as to handwriting exemplars); *United States v. Dionisio*, 410 U.S. 1, 14 (1973) (no expectation of privacy as to voice exemplars); *United States v. Doe*, 457 F.2d 895, 898-99 (2d Cir. 1972), cert. denied, 410 U.S. 941 (1973) (no expectation of privacy as to handwriting exemplars).

15. See, e.g., *Johnson v. Louisiana*, 406 U.S. 356, 365 (1972) (person arrested and arraigned placed in lineup); *United States v. Perry*, 504 F.2d 180 (D.C. Cir. 1974) (person arrested and arraigned on unrelated charge properly placed in lineup); *United States v. Allen*, 408 F.2d 1287 (D.C. Cir. 1969) (per curiam) (defendant held on unrelated crime placed in lineup for crimes of similar modus operandi); *United States v. Evans*, 359 F.2d 776 (3d Cir. 1966) (incarcerated defendant compelled to appear in lineup on unrelated charge); *Rigney v. Hendrick*, 355 F.2d 710 (3d Cir. 1965), cert. denied, 384 U.S. 975 (1966) (prisoners awaiting trial properly placed in lineup for other offenses); *United States v. Anderson*, 352 F. Supp. 33 (D.D.C. 1972), aff'd, 490 F.2d 785 (D.C. Cir. 1974) (defendant lawfully in custody may be placed in lineup for similar but unrelated offense); *Morris v. Crumlish*, 239 F. Supp. 498 (E.D. Pa. 1965) (incarcerated defendant compelled to appear in lineup on unrelated charge); *State v. Fierro*, 107 Ariz. 479, 489 P.2d 713 (1971) (defendant may be placed in lineup while in jail for an unrelated crime); *People v. Hodge*, 526 P.2d 309, 310 (Colo. 1974) (en banc) (defendant properly detained on one charge properly placed in lineup on another charge); *People v. Nelson*, 40 Ill. 2d 146, 238 N.E.2d 378 (1968) (defendant incarcerated on another charge may be placed in lineup); *People v. Hall*, 24 Mich. App. 509, 180 N.W.2d 363 (1970), leave to appeal granted, 391 Mich. 786 (1974) (incarcerated suspect may be placed in lineup for unrelated crime without a warrant). But see *Mackell v. Palermo*, 59 Misc. 2d 760, 300 N.Y.S.2d 459 (Sup. Ct. 1969) (held fact that defendant was incarcerated did not empower court to order him into a lineup in another county).

16. See, e.g., *People v. Vega*, 51 App. Div. 2d 33, 379 N.Y.S.2d 419 (2d Dep't 1976) (prisoner cannot be ordered to change his appearance absent probable cause to arrest).

17. "Reasonable suspicion" has been defined as "the quantum of knowledge sufficient to induce an ordinarily prudent and cautious man under the circumstances to believe criminal activity is at hand." *People v. Cantor*, 36 N.Y.2d 106, 112-13, 324 N.E.2d 872, 877, 365 N.Y.S.2d 509, 516 (1975); see *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

18. See, e.g., *United States v. Allen*, 408 F.2d 1287 (D.C. Cir. 1969) (per curiam); *Rigney v. Hendrick*, 355 F.2d 710 (3d Cir. 1965), cert. denied, 384 U.S. 975 (1966) (defendant ordered to appear in lineup only for crimes of similar modus operandi); *Morris v. Crumlish*, 239 F. Supp. 498, 499 (E.D. Pa. 1965) (inmate ordered to appear in lineup only where police have "reason to believe that an inmate may have been involved in the commission of a major crime under investigation"); *State v. Fierro*, 107 Ariz. 479, 489 P.2d 713 (1971) (defendant ordered to appear in lineup only for similar crimes).

When the suspect is at liberty, the controversial issue raised is whether the suspect may be detained for purposes of a lineup absent probable cause to arrest. If the individual is under indictment, and has been released on bail or parole, he is generally subject to the control of the court which is empowered to order his appearance.<sup>19</sup> Some courts have held that this power may be exercised to order defendant's appearance in a lineup for an unrelated crime without violating the fourth amendment.<sup>20</sup> As in the case of incarcerated suspects, courts have intimated that such power may be exercised only where there is reason to suspect that the defendant committed the unrelated crime under investigation.<sup>21</sup>

Where the suspect is at liberty and not subject to the control of the court, a serious constitutional question arises as to whether the suspect may be detained for purposes of a lineup, with or without a court order. So-called "investigatory detentions" conducted without probable cause to arrest have been held valid, even where conducted without authorization by a court. For instance, in *Terry v. Ohio*,<sup>22</sup> the Supreme Court upheld a police officer's right to stop an individual whom he reasonably suspected of criminal activity and to frisk that individual for weapons.<sup>23</sup> Other cases have upheld more extensive warrantless intrusions based on reasonable suspicion.<sup>24</sup>

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Significantly, the fact that no reasonable grounds for suspicion were presented to the court has been cited as the controlling factor in *Mackell v. Palermo*, 59 Misc. 2d 760, 300 N.Y.S.2d 459 (Sup. Ct. 1969), where a New York trial court refused to order an incarcerated individual to shave and appear in a lineup. See *In re Homicide of Aucelli*, 174 N.Y.L.J. at 15, cols. 4-5 (Sup. Ct. July 2, 1975) and *Merola v. Fico*, 81 Misc. 2d 206, 365 N.Y.S.2d 743 (Sup. Ct. 1975), which held that lineup orders were valid where reasonable grounds for suspicion were alleged.

19. See, e.g., N.Y. C.P.L. § 530.60 (McKinney 1971) (court may order defendant's appearance to review his bail).

20. See, e.g., *United States v. Anderson*, 352 F. Supp. 33, 36 n.7 (D.D.C. 1972), *aff'd* 490 F.2d 785 (D.C. Cir. 1974) (once defendant has been arrested he may be ordered to appear in lineup for unrelated crime even if on bail); *Morris v. Crumlish*, 239 F. Supp. 498, 501 (E.D. Pa. 1965) (persons free on bail for unrelated crimes may be required to submit to possible identification by victim in crime for which he is not formally charged); *People v. Mineo*, 85 Misc. 2d 919, 381 N.Y.S.2d 179 (Sup. Ct. 1976) (defendant arrested may be fingerprinted to see if sought for other offenses); cf. *Johnson v. Louisiana*, 406 U.S. 356, 365 (1972); *United States v. Scarpellino*, 431 F.2d 475, 479 (8th Cir. 1970); *Adams v. United States*, 399 F.2d 574, 577 (D.C. Cir. 1968), cert. denied, 393 U.S. 1067 (1969). See also *Williams v. United States*, 419 F.2d 740, 743 (D.C. Cir. 1969).

21. See, e.g., *Morris v. Crumlish*, 239 F. Supp. 498, 499-500 (E.D. Pa. 1965) (defendant ordered to appear in lineup for crimes of similar modus operandi); cf. cases cited in note 18 *supra*.

22. 392 U.S. 1 (1968).

23. *Id.* at 21-22, 24.

24. See, e.g., *United States v. Mayes*, 524 F.2d 803, 806 (9th Cir. 1975) (warrantless detention during police investigation); *United States v. Richards*, 500 F.2d 1025, 1029 (9th Cir. 1974), cert. denied, 420 U.S. 924 (1975) (detention for questioning); *United States v. Scheiblaue*, 472 F.2d 297, 300 (9th Cir. 1973) (brief detention for questioning); *Early v. People*, 178 Colo. 167, 173, 496 P.2d 1021, 1025 (1972) (en banc) (warrantless detention for palming reasonable); *People v. Morales*, ——— App. Div. 2d ———, ———, 383 N.Y.S.2d 608, 611 (1st Dep't 1976) (Birns, J., concurring) (limited detention for purposes of questioning not unreasonable); *In re Carlos B.*, 86 Misc. 2d 160, 163-64, 382 N.Y.S.2d 655, 658-59 (Fam. Ct. 1976) (detention for

However, in *Davis v. Mississippi*,<sup>25</sup> where police detained and fingerprinted defendant without probable cause to arrest, the Supreme Court held that defendant's fourth amendment rights were violated.<sup>26</sup> In so doing, the Court suggested that the police should have obtained a warrant from a judicial officer.<sup>27</sup>

Following the mandate of *Davis v. Mississippi*, a suspect should be detained pursuant to the authorization of a judicial officer.<sup>28</sup> However, the Court in *Davis* did not reach the question of whether a court may issue such a warrant without probable cause to order the suspect's arrest.<sup>29</sup> Moreover, the problem presented in *Davis* is distinguishable from that examined here. *Davis* involved a detention for the purpose of securing defendant's fingerprints, while the issue here involves a detention for the purpose of securing an eyewitness identification. Some authorities have noted that since eyewitness identifications are a less reliable form of evidence than fingerprints, the fourth amendment requirements of detentions for the purposes of lineups should be far more stringent. In other words, the court should require more evidence against the suspect to order him into a lineup than it would to order him to be fingerprinted.<sup>30</sup> Other authorities have suggested a more logical alternative: to ensure the absence of suggestiveness at a lineup held without probable cause

purpose of showup reasonable); *People v. Pitts*, 174 N.Y.L.J. at 10, cols. 2-4 (Sup. Ct. Dec. 22, 1975) (detention to determine ownership of machines in defendants' possession reasonable); *People v. Beatrice*, 174 N.Y.L.J. at 11, cols. 5-6 (Sup. Ct. Oct. 10, 1975) (detention to ascertain ownership of watches in defendant's possession reasonable); *State v. Byers*, 85 Wash. 2d 783, 539 P.2d 833 (1975) (en banc) (transporting suspect to scene of crime was a permissible detention). But see *People v. Harris*, 15 Cal. 3d 384, 540 P.2d 632, 124 Cal. Rptr. 536 (1975) (transporting suspect to scene of crime was an impermissible detention).

25. 394 U.S. 721 (1969).

26. *Id.* at 728.

27. *Id.*, where the Court noted "the general requirement [in cases of searches and seizures] that the authorization of a judicial officer be obtained in advance of detention would seem not to admit of any exception in the fingerprinting context." *Terry v. Ohio*, 392 U.S. 1 (1968), which condoned a "stop and frisk" without a warrant, is distinguishable from *Davis v. Mississippi* in that *Terry* deals with the police officer's right to ensure his safety in street situations. *Terry* permitted "a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual . . ." 392 U.S. at 27.

28. See *United States v. Harris*, 453 F.2d 1317, 1323 (8th Cir. 1972), cert. denied, 412 U.S. 927 (1973) (handwriting exemplars wrongfully obtained without a warrant may be suppressed); *United States v. Greene*, 429 F.2d 193, 196 n.5 (D.C. Cir. 1970) (suggesting warrant procedure for ordering individuals to appear in lineups absent probable cause to arrest).

29. 394 U.S. at 728.

30. See *In re Investigation of a Multi-Vehicle Accident*, 135 N.J. Super. 190, 195-96, 342 A.2d 903, 906 (L. Div. 1975) (denying state's request for an order compelling defendant to allow himself to be photographed for purposes of photographic lineup because eyewitness identification is a less reliable mode of investigation than fingerprinting); Greenberg, *The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See*, 61 Calif. L. Rev. 1011, 1041 (1973); Note, *Detention to Obtain Physical Evidence Without Probable Cause: Proposed Rule 41.1 of the Federal Rules of Criminal Procedure*, 72 Colum. L. Rev. 712, 741-44 (1972).

to arrest, the suspect should have counsel present.<sup>31</sup> Though the United States Supreme Court has held that the right to counsel attaches only when defendant is indicted or otherwise formally charged,<sup>32</sup> these authorities indicate that the presence of counsel at a lineup held without probable cause to arrest is a factor lending to the reasonableness of the detention under the fourth amendment.<sup>33</sup>

In any event, court-ordered detentions of suspects for the purpose of obtaining physical evidence have been upheld where there was only reasonable suspicion that the suspect committed the crime.<sup>34</sup> Moreover, the suggested procedure outlined in *Davis* has been applied to detentions for the purpose of lineups.<sup>35</sup> Such detentions have been authorized on reasonable suspicion rather than upon probable cause to believe the individual committed the crime.<sup>36</sup> In accord with this line of cases,<sup>37</sup> the ALI Model Code of Pre-Arrestment Procedure delineates a procedure whereby a court may order the detention of an individual for "identification purposes"<sup>38</sup> where there is

31. See *United States v. Thomas*, 536 F.2d 1253 (8th Cir. 1976); *United States v. Greene*, 429 F.2d 193, 196 (D.C. Cir. 1970); *United States v. Allen*, 408 F.2d 1287, 1289 (D.C. Cir. 1969) (per curiam); *United States v. Eley*, 286 A.2d 239, 240-41 (D.C. Ct. App. 1972); *Wise v. Murphy*, 275 A.2d 205, 207 (D.C. Ct. App. 1971); Idaho Code § 19-625(2)(H) (Supp. 1975); N.C. Gen. Stat. § 15A-278(5) (1973); cf. *United States v. McNeese*, 361 F. Supp. 1100 (E.D. Okla. 1973) (obtaining handwriting exemplars prior to defendant's arrest complies with fourth amendment since defendant waived right to counsel).

32. See *Kirby v. Illinois*, 406 U.S. 682 (1972), where the Court held that a showup conducted before defendant was indicted or otherwise formally charged was not a "criminal prosecution" at which defendant had a constitutional right to be represented by counsel.

33. See generally authorities cited in note 31 supra.

34. See *In re Fingerprinting of M.B.*, 125 N.J. Super. 115, 123-24, 309 A.2d 3, 7 (App. Div. 1973) (order that suspect be fingerprinted); *District Atty. v. Angelo G.*, 48 App. Div. 2d 576, 580, 371 N.Y.S.2d 127, 131 (2d Dep't 1975); Note, Proposed Federal Rule of Criminal Procedure 41.1, 56 Minn. L. Rev. 667 (1972); cases cited in note 35 infra.

35. See *United States v. Greene*, 429 F.2d 193, 196 n.5 (D.C. Cir. 1970); *Wise v. Murphy*, 275 A.2d 205 (D.C. Ct. App. 1971); *Merola v. Fico*, 81 Misc. 2d 206, 365 N.Y.S.2d 743 (Sup. Ct. 1975); *In re Homicide of Aucelli*, 174 N.Y.L.J. at 15, col. 4 (Sup. Ct. July 2, 1975).

36. See *Wise v. Murphy*, 275 A.2d 205 (D.C. Ct. App. 1971), noted in 18 Wayne L. Rev. 827 (1972); *Merola v. Fico*, 81 Misc. 2d 206, 365 N.Y.S.2d 743 (Sup. Ct. 1975); *In re Homicide of Aucelli*, 174 N.Y.L.J. at 15, col. 4 (Sup. Ct. July 2, 1975); Comment, Detention for Taking Physical Evidence Without Probable Cause, 14 Ariz. L. Rev. 132, 139-40 (1972); cf. *Biehunik v. Felicetta*, 441 F.2d 228 (2d Cir.), cert. denied, 403 U.S. 932 (1971) (detention for purposes of lineup valid without probable cause if "reasonableness" test satisfied).

37. See ALI Model Code of Pre-Arrestment Procedure 462-75 (1975) (commentary) [hereinafter cited as Code], noted in Vorenberg, ALI Approves Model Code of Pre-Arrestment Procedure, 61 A.B.A.J. 1212 (1975).

38. Code, supra note 37, §§ 170.1-8. Identification procedures covered by the Code include body surface examinations such as fingerprinting, id. § 170.1(2)(a), and "procedures to obtain witness identification through lineups, photographs, voice samples or handwriting exemplars." Id. § 170.1(2)(d). The Code further provides for "procedures to obtain specimens or samples of blood, urine, saliva, hair or fingernails, or other bodily substances that can be obtained by comparable methods . . . procedures to obtain identification material that may be on the surface of the body or under fingernails or that can be obtained by comparable methods . . ." Id. § 170.1(2)(b)-(c).

probable cause to believe a crime was committed and reasonable suspicion that the individual committed the crime.<sup>39</sup> An order will be issued only where the results of the procedure will be of "material aid in determining whether the person named in the affidavit committed the offense,"<sup>40</sup> and where such evidence is not readily obtainable from another public agency.<sup>41</sup>

Several states have passed similar legislation.<sup>42</sup> Such statutes fall into two categories. Some jurisdictions require that there be probable cause to believe a crime was committed and reason to suspect that the individual named in the order committed the offense before an order may issue.<sup>43</sup> Others merely require probable cause to believe a crime has been committed and that procurement of such evidence "from an identified or particularly described individual may contribute to the identification of the individual who committed such offense."<sup>44</sup> Arizona's statute requires *less* than reasonable suspicion that the subject of the order committed the crime under investigation, yet that state has found no constitutional infirmity.<sup>45</sup> In *State v. Grijalva*,<sup>46</sup> the Supreme Court of Arizona noted that the Arizona statute permitted a limited detention, not to exceed three hours,<sup>47</sup> only on a clear showing of necessity by the state. In making such a showing the state must establish that the evidence sought is relevant to the investigation and not otherwise obtainable,<sup>48</sup> and that the offense in question constitutes a felony.<sup>49</sup> Balancing the rights of the defendant with the interests of society, the court held that the "reasonableness" requirement of the fourth amendment was satisfied.<sup>50</sup>

39. *Id.* § 170.2(6)(a)-(b).

40. *Id.* § 170.2(6)(c).

41. *Id.* § 170.2(6)(d). The purpose of this section is to limit the number of nontestimonial identification orders. If a suspect can show that the evidence is otherwise available to the law enforcement agency, he can move to vacate the order. *Id.* at 105 (commentary).

42. See *Ariz. Rev. Stat. Ann.* § 13-1424 (Supp. 1973); *Colo. Rev. Stat. Ann. Rules of Criminal Procedure* 41.1 (1973); *Idaho Code* § 19-625 (Supp. 1975); *Neb. Rev. Stat.* § 29-3301-07 (Supp. 1974); *N.C. Gen. Stat.* § 15A-271-82 (1973); *Utah Code Ann.* § 77-13-37 (Supp. 1975).

43. *Colo. Rev. Stat. Ann. Rules of Criminal Procedure* 41.1(c) (1973); *Idaho Code* § 19-625(1)(A)-(B) (Supp. 1975); *N.C. Gen. Stat.* § 15A-273(1)-(2) (1973); *Utah Code Ann.* § 77-13-37(1) (Supp. 1975). Also of this genre is Proposed *Fed. R. Crim. P.* 41.1, 52 *F.R.D.* 462 (1971). For an examination of the North Carolina statute, see Billings, *Pretrial Criminal Procedure Act: Scope and Objectives*, 10 *Wake Forest L. Rev.* 353 (1974).

44. *Ariz. Rev. Stat. Ann.* § 13-1424(A)(2) (Supp. 1973); *Neb. Rev. Stat.* § 29-3303(2) (Supp. 1974). A bill providing for a similar procedure on the federal level was introduced in the Senate in 1969 but apparently died in committee. S. 2997, 91st Cong., 1st Sess. (1969).

45. See *State v. Grijalva*, 111 *Ariz.* 476, 533 P.2d 533 (1975) (en banc) (detention to obtain photographs, fingerprints, and hair samples of defendant); *Long v. Garrett*, 22 *Ariz. App.* 397, 527 P.2d 1240 (2d Div. 1974) (detention to obtain handwriting exemplar).

46. 111 *Ariz.* 476, 533 P.2d 533 (1975) (en banc).

47. *Ariz. Rev. Stat. Ann.* § 13-1424(B)(7) (Supp. 1973).

48. *Id.* § 13-1424(A)(2)-(3).

49. *Id.* § 13-1424(A)(1) (offense punishable by at least one year).

50. 111 *Ariz.* 476, 479, 533 P.2d 533, 536 (1975) (en banc) where the Court noted: "[t]he concept of reasonableness requires a balancing between the public necessity and the extent to which an individual's interest in privacy is invaded."



Though the fourth amendment prohibits only unreasonable searches and seizures, it also specifies that warrants shall not issue except upon probable cause. However, Supreme Court decisions have indicated that the existence of probable cause depends on whether the search and seizure is reasonable.<sup>51</sup> In *Camara v. Municipal Court*,<sup>52</sup> the Supreme Court defined probable cause as "the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness."<sup>53</sup> To apply the standard, the Court stated, one must balance the government's interest with the extent of the intrusion upon the individual's rights. The lesser the intrusion, the less evidence is required to establish probable cause.<sup>54</sup> Since an investigatory detention should involve significantly less of an intrusion than a full-blown arrest,<sup>55</sup> the evidence required to connect the suspect with the crime should be less than that necessary to establish probable cause to arrest.<sup>56</sup>

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51. See *Terry v. Ohio*, 392 U.S. 1 (1968); *Camara v. Municipal Court*, 387 U.S. 523 (1967); See *v. City of Seattle*, 387 U.S. 541 (1967).

52. 387 U.S. 523 (1967).

53. *Id.* at 534.

54. *Id.* at 538-39.

55. See cases cited in note 56 *infra*. But see *United States v. Jennings*, 468 F.2d 111, 115 (9th Cir. 1972) (investigatory detention for purpose of fingerprinting must meet probable cause standards substantially similar to those for an arrest); Greenberg, *The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See*, 61 Calif. L. Rev. 1011, 1041-42 (1973).

56. *United States v. Martinez-Fuerte*, 96 S. Ct. 3074, 3081 (1976) (border search); *United States v. Harris*, 453 F.2d 1317, 1323 (8th Cir. 1972), cert. denied, 412 U.S. 927 (1973) (handwriting exemplar); *Biehunik v. Felicetta*, 441 F.2d 228 (2d Cir.), cert. denied, 403 U.S. 932 (1971) (lineup); *United States v. Greene*, 429 F.2d 193, 197 (D.C. Cir. 1970) (lineup); *Early v. People*, 178 Colo. 167, 172, 496 P.2d 1021, 1024 (1972) (en banc) (fingerprinting); *Wise v. Murphy*, 275 A.2d 205, 212-17 (D.C. Ct. App. 1971) (en banc) (lineup), noted in 18 Wayne L. Rev. 827 (1972); *In re Investigation of a Multi-Vehicle Accident*, 135 N.J. Super. 190, 196-97, 342 A.2d 903, 906-07 (L. Div. 1975) (photographing suspect); *In re Fingerprinting of M.B.*, 125 N.J. Super. 115, 123-24, 309 A.2d 3, 7 (App. Div. 1973); *People v. DeBour*, No. 212 at 4 (N.Y. Ct. App. June 15, 1976) (frisk); *People v. Morales*, 22 N.Y.2d 55, 238 N.E.2d 307, 290 N.Y.S.2d 898 (1968), vacated and remanded, 396 U.S. 102 (1969) (per curiam) (detention for questioning); *District Atty. v. Angelo G.*, 48 App. Div. 2d 576, 579, 371 N.Y.S.2d 127, 131-32 (2d Dep't 1975) (handwriting exemplar); *Merola v. Fico*, 81 Misc. 2d 206, 208, 365 N.Y.S.2d 743, 746 (Sup. Ct. 1975) (lineup); Note, *Detention To Obtain Physical Evidence Without Probable Cause: Proposed Rule 41.1 of the Federal Rules of Criminal Procedure*, 72 Colum. L. Rev. 712, 741-44 (1972); Note, *Proposed Federal Rule of Criminal Procedure 41.1*, 56 Minn. L. Rev. 667, 676 (1972), cf. *Burke v. Sullivan*, 52 App. Div. 2d 536, 382 N.Y.S.2d 286 (1st Dep't 1976) (court did not exceed authority by ordering defendant to appear in lineup since probable cause for order existed); *People v. Vega*, 51 App. Div. 2d 33, 379 N.Y.S.2d 419 (2d Dep't 1976) (defendant may only be required to change his appearance for purposes of a lineup after his arrest). Significantly, in *People v. Morales*, 22 N.Y.2d 55, 62, 238 N.E.2d 307, 312, 290 N.Y.S.2d 898, 905 (1968), the New York Court of Appeals held that the legality of a detention for purposes of questioning must be determined by "weighing the seriousness of the known crime . . . and the degree of suspicion possessed by the police against the magnitude of the personal rights encroached upon." They concluded the detention was valid since police had reason to suspect the defendant had information about the crime when they detained him for questioning. The Supreme Court of the

These principles have been specifically applied in upholding lineups conducted without probable cause to arrest.<sup>57</sup> Statutes providing for orders compelling a suspect to appear in a lineup on evidence establishing reasonable suspicion that he committed the offense in question<sup>58</sup> or evidence establishing that so compelling the individual will aid in the investigation<sup>59</sup> follow this line of reasoning.<sup>60</sup> Thus, while the trend is toward variable standards of probable cause, the law is still unclear as to whether an investigatory detention on less than probable cause to arrest satisfies such standards.<sup>61</sup>

### III. DEFENDANT'S REMEDIES

If a suspect is unconstitutionally detained and is subsequently identified in a lineup, testimony that such an identification was made should not be admitted at trial.<sup>62</sup> However, the same witness who may not testify that he identified defendant at the lineup may still be permitted to identify defendant in open court at trial. Except in cases where defendant's fourth amendment rights were willfully and egregiously violated,<sup>63</sup> the witness' in-court identification is

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United States, rather than grapple with the issue of the constitutionality of an investigatory detention, remanded the case for an evidentiary hearing to determine whether the police had probable cause to arrest when they detained defendant. *Morales v. New York*, 396 U.S. 102, 105-06 (1969) (per curiam). On remand, the appellate division affirmed the hearing judge's finding that the police did have probable cause to arrest. *People v. Morales*, — App. Div. 2d —, 383 N.Y.S.2d 608 (1st Dep't 1976). Judge Lupiano concurred, concluding that although the police lacked probable cause to arrest, their conduct was reasonable. *Id.* at —, 383 N.Y.S.2d at 609-10. Judge Birns concurred, in effect reiterating the principles set forth in the earlier Court of Appeals decision. *Id.* at —, 383 N.Y.S.2d at 610-11. Judge Murphy dissented, concluding that detentions on less than probable cause to arrest were illegal under *Brown v. Illinois*, 422 U.S. 590 (1975). *Id.* at —, 383 N.Y.S.2d at 614. See note 61 *infra*.

57. See, e.g., *Biehunik v. Felicetta*, 441 F.2d 228, 230-31 (2d Cir.), cert. denied, 403 U.S. 932 (1971); *Wise v. Murphy*, 275 A.2d 205, 212-17 (D.C. Ct. App. 1971); *Merola v. Fico*, 81 Misc. 2d 206, 365 N.Y.S.2d 743 (Sup. Ct. 1975).

58. See note 43 *supra* and accompanying text.

59. See note 44 *supra* and accompanying text.

60. See Code, *supra* note 37, at 459-69.

61. *Brown v. Illinois*, 422 U.S. 590 (1975) reaffirmed the principles of *Wong Sun v. United States*, 371 U.S. 471 (1963), which held that an admission obtained from defendant after his illegal arrest without probable cause could not be used against him. Evidence which came to light from defendant's statements was also inadmissible unless such evidence came to light "by means sufficiently distinguishable to be purged of the primary taint." 371 U.S. at 488, citing *J. Maguire, Evidence of Guilt* 221 (1959). In *Brown v. Illinois*, 422 U.S. 590 (1975), the Court held that the fact that police gave defendant his *Miranda* warnings after illegally arresting him without probable cause did not purge his confession of the taint of the illegal arrest. This decision may be interpreted as holding that evidence derived from detentions upon less than probable cause to arrest must be suppressed. *People v. Morales*, — App. Div. 2d at —, 383 N.Y.S.2d at 614 (1st Dep't 1976) (Murphy, J., dissenting).

62. See *United States v. Greene*, 429 F.2d 193, 196 (D.C. Cir. 1970). But see *United States v. Young*, 512 F.2d 321, 323 (4th Cir. 1975), cert. denied, 96 S. Ct. 1432 (1976) (illegality of arrest would not render pretrial identification inadmissible).

63. See *United States v. Edmons*, 432 F.2d 577, 583 (2d Cir. 1970), noted in 12 *Wm. & Mary L. Rev.* 921 (1971), where defendants were arrested on mere pretext and placed in a lineup. The

admissible if it is of "independent origin."<sup>64</sup> This remedy is derived from *United States v. Wade*,<sup>65</sup> where defendant was identified at a lineup held in violation of his constitutional rights.<sup>66</sup> The Court noted that the witness could still make an identification at trial where the government established "by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the lineup identification,"<sup>67</sup> *i.e.*, that the in-court identification was based upon an "independent source."

The remedy suggested in *Wade* is not complete. If a suspect is illegally compelled to participate in a lineup, he is still subject to criminal prosecution and the witness' damning in-court identification. Therefore, defendant's best course would be to prevent execution of the lineup order, foreclosing the possibility of being identified as the perpetrator. There are some difficulties in obtaining such relief.<sup>68</sup>

#### A. Relief Pursuant to 42 U.S.C. § 1983

A possible course available to an individual compelled to appear in a lineup by state authorities is commencement of an action in federal court pursuant to 42 U.S.C. § 1983,<sup>69</sup> charging violation of his fourth amendment rights under

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court excluded in-court identification from the trial testimony despite its independent source. Compare *id.* with *People v. Martinez*, 37 N.Y.2d 662, 339 N.E.2d 162, 376 N.Y.S.2d 469 (1975) (police arrested defendant in good faith but in violation of fourth amendment, and defendant later confessed to unrelated crime; confession was admissible).

64. See *Johnson v. Louisiana*, 406 U.S. 356, 365 (1972); *United States v. Hoffman*, 385 F.2d 501 (7th Cir. 1967), cert. denied, 390 U.S. 1031 (1968); *Wright v. State*, 528 S.W.2d 905, 909 (Ark. 1975); *State v. Smith*, 322 So. 2d 197, 203 (La. 1975); *State v. Lynch*, 528 S.W.2d 454, 459-60 (Mo. Ct. App. 1975); *Commonwealth v. Richards*, 327 A.2d 63, 68-69 (Pa. 1974). But see *United States v. Young*, 512 F.2d 321, 323 (4th Cir. 1975), cert. denied, 96 S. Ct. 1432 (1976) (admissibility of identification testimony depends on suggestiveness of initial confrontation).

65. 388 U.S. 218 (1967).

66. *Id.* at 233-37. In this case the constitutional right violated was defendant's sixth amendment right to counsel.

67. *Id.* at 240.

68. For the difficulties in obtaining review of such orders issued by a federal court, see Note, *Detention to Obtain Physical Evidence Without Probable Cause: Proposed Rule 41.1 of the Federal Rules of Criminal Procedure*, 72 Colum. L. Rev. 712, 734-41 (1972), which concludes that successfully obtaining interlocutory review is improbable since the final decision rule applies to criminal cases. See *DiBella v. United States*, 369 U.S. 121, 126 (1962). However, the District of Columbia Court of Appeals has determined that such orders are final, consistent with the view of finality taken in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-47 (1949). See *United States v. Eley*, 286 A.2d 239, 240 (D.C. Ct. App. 1972); *Wise v. Murphy*, 275 A.2d 205, 211 (D.C. Ct. App. 1971) (en banc). Relief by extraordinary writ may be foreclosed since defendant has alternative, albeit inadequate, remedies of pretrial motions to suppress and post-conviction appeal. See *United States v. Allen*, 408 F.2d 1287, 1288 (D.C. Cir. 1969) (per curiam).

69. 42 U.S.C. § 1983 (1970) provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for

color of state law. The individual would seek an injunction barring state officials from requiring him to appear in a lineup. This route, however, is fraught with problems.

If the suspect is compelled to appear without judicial authorization, injunctive relief is impractical,<sup>70</sup> since such warrantless detentions may occur without notice. If judicial authorization is obtained, there may be legal obstacles to injunctive relief. Though a state judge<sup>71</sup> is immune from a judgment for damages,<sup>72</sup> his judicial immunity does not extend to injunctive relief.<sup>73</sup>

However, the Supreme Court has looked upon injunctions against state criminal proceedings with disfavor. In *Younger v. Harris*,<sup>74</sup> the Court stated that federal courts would not enjoin pending state criminal prosecutions unless the prosecution was conducted in bad faith and confronted petitioner with irreparable harm, both great and immediate.<sup>75</sup> In a companion case, *Dyson v. Stein*,<sup>76</sup> the Supreme Court held that the principles of *Younger* were applicable to prospective criminal prosecutions.<sup>77</sup> More recently, however, in

redress." Such relief may be sought without exhausting state remedies. *Monroe v. Pape*, 365 U.S. 167, 183 (1961).

70. Injunctive relief may be legally feasible, however. See, e.g., *Biehunik v. Felicetta*, 441 F.2d 228 (2d Cir.), cert. denied, 403 U.S. 932 (1971); *Rigney v. Hendrick*, 355 F.2d 710 (3d Cir. 1965), cert. denied, 384 U.S. 975 (1966); *Morris v. Crumlish*, 239 F. Supp. 498 (E.D. Pa. 1965) (injunctions against officials holding lineups denied on merits); cf. *Gerstein v. Pugh*, 420 U.S. 103 (1975); Note, Federal Equitable Relief in Matters Collateral to State Criminal Proceedings, 44 *Fordham L. Rev.* 597 (1975).

71. A state court is not a person under 42 U.S.C. § 1983 (1970), and therefore cannot be made a party defendant. E.g., *Monroe v. Pape*, 365 U.S. 167 (1961); *Zuckerman v. Appellate Div., Second Dep't*, 421 F.2d 625 (2d Cir. 1970); *Harris v. Louisiana Supreme Court*, 334 F. Supp. 1289, 1300 (E.D. La. 1971). However, the members of the court may be sued individually. E.g., *Erdmann v. Stevens*, 458 F.2d 1205 (2d Cir.), cert. denied, 409 U.S. 889 (1972).

72. See, e.g., *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871) (judge not civilly liable except where he clearly lacks jurisdiction and knows it).

73. See, e.g., *Littleton v. Berbling*, 468 F.2d 389, 408-09 (7th Cir. 1972), rev'd on other grounds sub nom. *O'Shea v. Littleton*, 414 U.S. 488 (1974); *Jacobson v. Schaefer*, 441 F.2d 127, 130 (7th Cir. 1971); *Clark v. Zimmerman*, 394 F. Supp. 1166 (M.D. Pa. 1975); *Louisiana ex. rel. Purkey v. Ciolino*, 393 F. Supp. 102, 110 (E.D. La. 1975); *Wallace v. McDonald*, 369 F. Supp. 180, 188 (E.D.N.Y. 1973); *Bramlett v. Peterson*, 307 F. Supp. 1311, 1321-22 (M.D. Fla. 1969); *United States v. Clark*, 249 F. Supp. 720, 728 (S.D. Ala. 1965). But see *Hill v. McClellan*, 490 F.2d 859, 868 (5th Cir. 1974); *Atchley v. Greenhill*, 373 F. Supp. 512, 514-15 (S.D. Tex. 1974), aff'd, 517 F.2d 692 (5th Cir. 1975), cert. denied, 96 S. Ct. 1115 (1976). Enjoining a state proceeding does not violate the anti-injunction statute, 28 U.S.C. § 2283 (1970). *Mitchum v. Foster*, 407 U.S. 225 (1972).

74. 401 U.S. 37 (1971).

75. *Id.* at 45-46, 53.

76. 401 U.S. 200 (1971) (per curiam).

77. Plaintiff sought an injunction against future arrests and seizure of allegedly obscene material without an adversary hearing. The district court denied this relief, but granted declaratory and injunctive relief against enforcement of the state statute based on its unconstitutionality. *Stein v. Batchelor*, 300 F. Supp. 602 (N.D. Tex. 1969). The Supreme Court emphasized

*Gerstein v. Pugh*,<sup>78</sup> the Court enjoined state procedures whereby persons already arrested were detained without a hearing to determine whether there was probable cause to arrest. The Court indicated that the restrictions of *Younger* did not apply because "[t]he injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution."<sup>79</sup> However, the absence of judicial intervention in the state procedures challenged in *Gerstein* distinguishes that case from the situation where a court orders an individual to appear in a lineup.

If no injunctive relief is available, the individual whose rights have been violated will be subject to criminal prosecution and in-court identification. If he seeks to ease the discomfort of his predicament with monetary damages, judicial immunity will foreclose his recovery from judges or prosecutors.<sup>80</sup> However, as the Court recently noted in *Imbler v. Pachtman*,<sup>81</sup> a prosecutor engaged in investigatory activities might not be entitled to the absolute immunity that he shares with judges when he acts in his quasi-judicial capacity. When he acts as an investigator he may be entitled only to a good faith defense similar to the policeman's.<sup>82</sup> Generally, where a prosecutor engages in searches or seizures, he is acting in his investigatory capacity,<sup>83</sup> and thus only the defense of good faith, *i.e.*, that he believed the seizure was constitutional, would be available.<sup>84</sup> However, if these officials were merely executing the warrant of a judicial officer according to his instructions, they would not be liable for damages.<sup>85</sup> Consequently, recovery of damages under section 1983 may be limited to cases of warrantless detentions conducted in bad faith.<sup>86</sup>

that the sole ground for enjoining pending state court criminal proceedings was a finding of irreparable injury. 401 U.S. at 203.

In addition, federal courts cannot suppress illegally seized evidence while the state criminal proceeding is still pending if the conditions set forth in *Younger* are not met. *Perez v. Ledesma*, 401 U.S. 82, 85 (1971).

78. 420 U.S. 103 (1975).

79. *Id.* at 108 n.9.

80. See, e.g., *Imbler v. Pachtman*, 96 S. Ct. 984 (1976) (prosecutor immune); *Guedry v. Ford*, 431 F.2d 660 (5th Cir. 1970) (judge and prosecutor immune); *Fanale v. Sheehy*, 385 F.2d 866 (2d Cir. 1967) (justice of the peace and prosecutor immune).

81. 96 S. Ct. 984 (1976).

82. *Id.* at 995.

83. See, e.g., *Guerro v. Mulhearn*, 498 F.2d 1249 (1st Cir. 1974) (obtaining wiretap order); *Hampton v. City of Chicago*, 484 F.2d 602 (7th Cir. 1973), cert. denied, 415 U.S. 917 (1974) (warrantless search and seizure); *Robichaud v. Ronan*, 351 F.2d 533 (9th Cir. 1965) (detention to obtain confession).

84. See *Imbler v. Pachtman*, 96 S. Ct. 984, 995 (1976); *Pierson v. Ray*, 386 U.S. 547, 557 (1967) (police may rely only on good faith defense).

85. See, e.g., *Pennsylvania ex rel. Feiling v. Sincavage*, 439 F.2d 1133 (3d Cir. 1971) (*per curiam*).

86. E.g., *Beightol v. Kunowski*, 486 F.2d 293 (3d Cir. 1973) (plaintiff stated a valid claim for damages against police who arrested him for purposes of fingerprinting and photographing him).

## B. Remedies in New York

The New York Court of Appeals held in *Alphonso C. v. Morgenthau*<sup>87</sup> that a judge's order compelling an individual to appear in a lineup was not subject to interlocutory appeal. Applying the rule set forth in *Santangelo v. People*<sup>88</sup> that all appeals in criminal proceedings must be specifically authorized by statute, the court held that orders compelling suspects to appear in lineups were in the nature of criminal proceedings.<sup>89</sup>

Where there is no remedy by appeal, New York provides for equitable relief in the nature of mandamus or prohibition pursuant to Article 78 of the New York Civil Practice Law and Rules.<sup>90</sup> Such relief is only available in limited circumstances, and is granted sparingly in criminal matters.<sup>91</sup> Petitioner must show that the issuing judge exceeded his jurisdiction and that petitioner has a clear legal right to the relief<sup>92</sup> sought before his petition may be adjudicated on the merits.<sup>93</sup> In essence, petitioner may successfully challenge the order directing his detention only if he shows that the court lacked jurisdiction to so order. The Appellate Division, First Department held in *Alphonso C. v. Morgenthau*<sup>94</sup> that a supreme court judge lacked jurisdiction to order Alphonso C. to appear in a lineup absent probable cause to arrest. But its determination was contrary to the second department's decision in *District Attorney v. Angelo G.*,<sup>95</sup> which held that a supreme court judge had authority to order the detention of a suspect for investigatory purposes where there was sufficient evidence linking the suspect to the crime so as to render the detention reasonable.<sup>96</sup> In other words, *Angelo G.* applied the variable

87. 38 N.Y.2d 923, 346 N.E.2d 819, 382 N.Y.S.2d 980 (1976) (per curiam).

88. 38 N.Y.2d 536, 344 N.E.2d 404, 381 N.Y.S.2d 472 (1976).

89. 38 N.Y.2d at 924-25, 346 N.E.2d at 819, 382 N.Y.S.2d at 981. In *Santangelo v. People*, 38 N.Y.2d 536, 344 N.E.2d 404, 381 N.Y.S.2d 472 (1976), the Court of Appeals noted that decisions on motions to quash subpoenas for lack of jurisdiction are appealable even though such appeals are not authorized by statute. This route could have been utilized in *Alphonso C.*, since the order compelling the suspect to appear in a lineup was very similar to a subpoena.

90. N.Y. C.P.L.R. §§ 7801-06 (McKinney 1963), as amended, (Supp. 1975).

91. See, e.g., *State v. King*, 36 N.Y.2d 59, 324 N.E.2d 351, 364 N.Y.S.2d 879 (1975); *Butts v. Justices of the Court of Spec. Sess.*, 37 App. Div. 2d 607, 323 N.Y.S.2d 619, 620 (2d Dep't 1971) (courts are reluctant "to award such relief, unless a clear case of arbitrary and illegal action, without reasonable explanation or excuse, is presented").

92. See, e.g., *State v. King*, 36 N.Y.2d 59, 62, 324 N.E.2d 351, 353-54, 364 N.Y.S.2d 879, 882 (1975); *Proskin v. County Court*, 30 N.Y.2d 15, 280 N.E.2d 875, 330 N.Y.S.2d 44 (1972); *Lee v. County Court*, 27 N.Y.2d 432, 436-37, 267 N.E.2d 452, 454, 318 N.Y.S.2d 705, 708-09, cert. denied, 404 U.S. 823 (1971); *Smith v. Conway*, 44 App. Div. 2d 622, 353 N.Y.S.2d 75 (3d Dep't 1974); *Butts v. Justices of the Court of Spec. Sess.*, 37 App. Div. 2d 607, 323 N.Y.S.2d 619 (2d Dep't 1971).

93. If there is no such showing, respondent may move to dismiss the petition for objections in point of law pursuant to N.Y. C.P.L.R. § 7804(f) (McKinney 1963).

94. 50 App. Div. 2d 97, 376 N.Y.S.2d 126 (1st Dep't 1975), appeal dismissed, 38 N.Y.2d 923, 346 N.E.2d 819, 382 N.Y.S.2d 980 (1976) (per curiam).

95. 48 App. Div. 2d 576, 371 N.Y.S.2d 127 (2d Dep't 1975), appeal dismissed, 38 N.Y.2d 923, 346 N.E.2d 819, 382 N.Y.S.2d 980 (1976) (per curiam).

96. *Id.* at 579, 371 N.Y.S.2d at 130.

standard of probable cause, suggested in *Camara v. Municipal Court*,<sup>97</sup> in determining that a supreme court judge, without probable cause to arrest, could order a suspect to give handwriting exemplars. The first department, however, has since clarified its position as set forth in *Alphonso C.* In an Article 78 proceeding challenging an order based on less than probable cause to arrest which directed a suspect to appear in a lineup, the first department dismissed the petition, noting that "[p]robable cause for the order to appear in a lineup has been demonstrated, thus distinguishing this case from *Matter of Alphonso C.* . . ."<sup>98</sup> Consequently, the first department apparently also recognizes variable standards of probable cause, and will entertain an Article 78 proceeding only where petitioner is ordered detained on evidence insufficient to meet these standards, *i.e.*, evidence so insufficient as to render the detention unreasonable.

The current consensus of New York courts is apparently that a suspect may be ordered detained for investigatory purposes absent probable cause to arrest. However, the People must establish probable cause for the detention, *i.e.*, sufficient evidence linking the suspect with the crime to render the detention reasonable. Once the issuing judge determines that there is probable cause to order the detention, Article 78 relief will be foreclosed since it is not available to reverse errors of law or fact.<sup>99</sup>

### C. Possible Alternatives

In *Wise v. Murphy*,<sup>100</sup> the District of Columbia Court of Appeals held that orders compelling an individual to appear in a lineup were directly appealable in that jurisdiction.<sup>101</sup> Following this example, the ALI Model Code of Pre-Arrest Procedure<sup>102</sup> suggests legislative enactment of a procedure which includes a provision whereby the individual named in the order may move to vacate said order "if [the court] finds that there were insufficient grounds for issuance or that the order was otherwise improperly issued."<sup>103</sup> As noted in the commentary thereto, those states adopting nontestimonial identification procedures have not adopted the Code provisions providing for direct appeal.<sup>104</sup> However, the availability of such review may have practical disadvantages, *e.g.*, delay. This could only increase the possibility of misidentification, and be an added burden on the courts.<sup>105</sup>

97. 387 U.S. 523 (1967).

98. *Burke v. Sullivan*, 52 App. Div. 2d 536, 382 N.Y.S.2d 286 (1st Dep't 1976).

99. See *State v. King*, 36 N.Y.2d 59, 62, 324 N.E.2d 351, 353, 364 N.Y.S.2d 879, 882 (1975).

100. 275 A.2d 205 (D.C. Ct. App. 1971) (en banc).

101. *Id.* at 211; accord, *In re Investigation of a Multi-Vehicle Accident*, 135 N.J. Super. 190, 342 A.2d 903 (L. Div. 1975); *In re Fingerprinting of M.B.*, 125 N.J. Super. 115, 309 A.2d 3 (App. Div. 1973).

102. See Code, note 37 *supra*.

103. *Id.* § 170.6.

104. *Id.* at 487-88.

105. *Id.*; see Note, *Detention to Obtain Physical Evidence Without Probable Cause: Proposed Rule 41.1 of the Federal Rules of Criminal Procedure*, 72 Colum. L. Rev. 712, 735 (1972).

## IV. CONCLUSION

Though there has been no clear determination as to the constitutionality of compelling a suspect to appear in a lineup absent probable cause to arrest, the apparent consensus of the courts is that such detentions are permissible where there is sufficient evidence linking the suspect to the crime so as to render the seizure reasonable, *i. e.*, probable cause for the detention. Where a suspect is nonetheless ordered to appear in a lineup without probable cause, his most effective remedy may be pursued only after he is identified, by a motion to suppress the identification. However, the witness' in-court identification of the suspect will not be suppressed where it is based upon an "independent source." In view of the difficulties encountered by the subject of a lineup order in securing relief, the legislative enactment of safeguards ensuring the individual the right to have an attorney present during the lineup,<sup>106</sup> limiting the length of the detention,<sup>107</sup> and prohibiting certain police conduct such as questioning the suspect during that period<sup>108</sup> are in order.

*Barbara D. Gonzo*

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106. See Idaho Code § 19-625(2)(H) (Supp. 1975); N.C. Gen. Stat. § 15A-278(5) (1975); Code, note 37 *supra*, § 170.3(2)(m); note 31 *supra* and accompanying text.

107. See Ariz. Rev. Stat. Ann. § 13-1424(B)(7) (Supp. 1973); Colo. Rev. Stat. Ann. Rules of Criminal Procedure 41.1(f)(1) (1973); Idaho Code § 19-625(2)(G) (Supp. 1975); Neb. Rev. Stat. § 29-3305(9) (Supp. 1974); N.C. Gen. Stat. § 15A-279(c) (1975); Code, note 37 *supra*, § 170.3(2)(l).

108. See Idaho Code § 19-625(2)(I) (Supp. 1975); Neb. Rev. Stat. § 29-3305(6) (Supp. 1974); N.C. Gen. Stat. § 15A-278(6) (1975); Code, note 37 *supra*, § 170.3(2)(j).