

The ‘IVIP’ Project: An Argument for the Inclusion of Voice Parades within Code D of PACE

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Abstract: *This paper reviews the law and practice in relation to earwitness voice identification procedures in England and Wales. It also draws on results from two surveys, one aimed at police and the other aimed at lawyers, which reveal a marked lack of awareness of earwitness voice identification procedures, given they are rarely used. The central thesis of the paper is that practice in this area could be significantly improved by placing voice identification parades within the scope of Code D of the Police and Criminal Evidence Act 1984. The article further draws on experimental work conducted as part of the IVIP project funded by the UK Economic and Social Research Council, which contributes empirical findings towards improving voice parade procedures to make their deployment more efficient and less costly.*

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I. Introduction

Criminal practitioners are familiar with the use of eyewitness evidence in trials, and the procedures that provide an objective mechanism for testing its quality. Code D of the Police and Criminal Evidence Act 1984 (PACE) sets out a detailed code which enables investigators to know the circumstances in which parades can be conducted and the best practice to be followed. Some cases, however, depend not on a visual recognition but on an auditory recognition by a witness, for example, the perpetrator may have been masked, heard over the telephone or obscured from view in some way.¹ In such cases, the earwitness evidence is potentially just as determinative and requires similar, if not more, caution. As Sherrin has put it, “Earwitness evidence is less common than eyewitness evidence, and it is often heard in combination with eyewitness evidence, but it can be important and even critical in criminal prosecutions”.² Although earwitness identification evidence is much rarer than eyewitness evidence it can be crucial in certain cases when it does arise, particularly for cases where there has been a very long exposure to the perpetrator’s voice as may occur in kidnapping, sexual assault and terrorism cases involving hostage-taking. It is essential that there is a fair, systematic, scientifically-tested process for collecting earwitness evidence which can be consistently applied for cases where it is needed.³

Research conducted via a Freedom of Information request in 2015 established that only 10% of police forces in England and Wales had information to suggest they had conducted a voice

¹ Francis Nolan, “A recent voice parade” (2003) *International Journal of Speech, Language and the Law* 10(2): 277-91.

² Christopher Sherrin, “Earwitness Evidence: The Reliability of Voice Identifications” (2015) 52(3) *Osgoode Hall Law Journal* 819, 821.

³ Kirsty McDougall, “Ear-catching versus eye-catching? Some developments and current challenges in earwitness identification evidence”, in C. Bernardasci, et al. (eds.), *Proceedings of XVII AISV (Associazione Italiana Scienze della Voce) Conference: ‘Speaker Individuality in Phonetics and Speech Sciences: Speech Technology and Forensic Applications’, 4-5 February 2021, University of Zürich* (Zürich: University of Zürich, 2021), pp. 33-56.

identification parade in the period 2005-2015.⁴ The underlying causes of this can be attributed to several factors: for example, a lack of knowledge by legal professionals about the existence of such procedures, and concerns regarding the reliability of earwitness evidence.⁵ However, both these factors are compounded by the fact that the current Home Office guidelines for the construction of voice parades (the McFarlane guidelines) are complex and scientifically outdated.⁶ The existence of voice parades is alluded to in Code D of PACE which states, “While this Code concentrates on visual identification procedures, it does not prevent the police making use of aural identification procedures such as a ‘voice identification parade’, where they judge that appropriate”.⁷ No details are given beyond a link to the Home Office circular of the McFarlane guidelines. Yet, the Court of Appeal has refused to accept the argument that Code D creates any form of investigative obligation.⁸ As a result there has been little to promote the use or improvement of voice parade procedures.

In order to improve practice in this area, the ‘Improving Voice Identification Procedures’ project (IVIP), funded by the UK Economic and Social Research Council, has sought to use experimental data to identify ways in which procedures can be improved. In choosing the options for the parade parameters based on experimental results, the aim has been to preserve identification accuracy to protect the suspects whilst also making the procedure quicker to prepare and less expensive. In this paper the findings are summarised, the most significant of which is providing empirical evidence to support the parameters of the procedure, along with

⁴ Jeremy Robson, “A Fair Hearing? The Use of Voice Identification Parades in Criminal Investigations in England and Wales” (2017) 1 Crim LR 36, 45.

⁵ Christopher Sherrin, “Earwitness Evidence: The Reliability of Voice Identifications” (2015) 52(3) Osgoode Hall Law Journal 819, 819-823.

⁶ Home Office Circular 057/2003, “Advice on the Use of Voice Identification Parades” *UK Home Office Circular 057/2003 from the Crime Reduction and Community Safety Group, Police Leadership and Powers Unit*, 12 May 2003

<<http://webarchive.nationalarchives.gov.uk/20130125153221/http://www.homeoffice.gov.uk/about-us/corporate-publications-strategy/home-office-circulars/circulars-2003/057-2003/>>

⁷ Police and Criminal Evidence Act 1984, Code D at [1.2].

⁸ *Crow* [2021] EWCA Crim 617 at [25].

the fact that it is possible to construct parades safely and accurately using much shorter samples of speech than has previously been thought possible. However, the ability to implement procedures on an ad hoc basis is of limited value if there is not a consistent approach to their application. While it is not argued that voice parades should be used with the frequency of eyewitness procedures, the approach used by the police in determining whether a voice parade should be used ought to be consistent. Consequently, reform is recommended so that (1) the parameters of voice parades are adapted in line with the recommendations of this paper, and (2) voice identification parades are explicitly brought within Code D of PACE.

The structure of this paper is as follows. Section II examines the current legal treatment of voice identification procedures, noting in particular Court of Appeal judgments which hold that these procedures do not fall within Code D. Section III turns to consider the treatment of these procedures in practice by police forces, particularly focussing on the general lack of awareness of voice identification procedures and their inconsistent application. Having recommended for voice identification procedures to be brought within Code D, Sections IV and V address some of the challenges in doing this. Section IV addresses the challenge that the existing McFarlane guidelines for voice identification parades have not previously been tested experimentally, and so provides empirical data to test for optimal parameters. Section V addresses how the inclusion of voice parades within Code D of PACE will help develop a centralised framework of police best practice, something that will further allow the defence to launch robust challenges to breaches of those guidelines, enhancing the protections suspects have. Section VI concludes.

II. The Background to and Legal Treatment of Voice Procedures

In his review of identification procedures in 1976, Lord Devlin noted that in Sweden, voice parades were being used by the police.⁹ These procedures consisted of the suspect and foils all reading from a standardised piece of text.¹⁰ In England and Wales, initial versions of Code D of PACE made no reference to discrete voice procedures. In the days of line-ups conducted using volunteers, it was possible for a witness to ask any participants on the parade to speak. Although the identification officer was required to give a warning about the inherent risk, this approach was permitted (and remains permitted in Scotland).

This approach is problematic as it made it difficult to ascertain whether identifications had been based on face or voice information. More importantly, it was highly likely to produce identifications which could be easily challenged by the defence. as the foils were chosen on the basis of appearance only, with no attempt to choose similar-sounding, comparable voices for the voice parade. Further, it was of no use in cases where there was no physical description. As a result, a number of police forces took to constructing their own voice parades. In *Hersey*, the police constructed a voice parade to enable the shopkeeper victim of a masked robbery to demonstrate whether he could identify the defendant (whom he knew) from his voice alone.¹¹ The police constructed a parade with 11 foils reading an extract from the defendant's interview, interspersed with the extract of the defendant speaking those words naturally. Read and natural speech are relatively easily distinguished¹² and the witness knew the defendant's voice and so it was argued that the parade should have been excluded. Rejecting this argument, the Court of Appeal noted that:¹³

⁹ Lord Devlin, "Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases" (1976) Ordered by The House of Commons, at [4.4].

¹⁰ Lord Devlin, "Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases" (1976) Ordered by The House of Commons, at Annex L at [36].

¹¹ *Hersey* [1997] EWCA Crim 3106, [1998] Crim LR 281.

¹² Adrian P. Simpson, "Spontaneous speech" in *The Bloomsbury Companion to Phonetics* (London: Bloomsbury Academic, 2013), pp. 155-169.

¹³ *Hersey* [1997] EWCA Crim 3106, [1998] Crim LR 281.

“In our judgment it is, in truth, difficult to see any valid reason why in the circumstances of this case the judge should not have admitted this evidence. It is said that Mr Whiting knew the appellant’s voice and that the Crown’s case would not in those circumstances be strengthened by any subsequent further identification. That may or may not be true. However, one of the purposes of an identification parade is to give the witness an opportunity to test whether his original identification was or was not correct and, even more important, as has been recognised in cases concerning a visual recognition, in appropriate circumstances out of fairness to the accused so that he can be excluded if the original identification was erroneous. It is often overlooked that identification parades may be as valuable to an accused as they are to the prosecution.”

The recognition that identity parades could serve a purpose in exculpating a defendant resulted in the argument being advanced that this created a duty to conduct parades where a defendant disputed identification. However, this approach was rejected in *Gummerson* in which the Court of Appeal stated that Code D applied only to eyewitness identification and had not been intended to capture other forms of identification.¹⁴

Post-*Gummerson* there were a number of developments which suggested that voice parades were receiving greater recognition. In 2003, Professor Francis Nolan and DS McFarlane developed a code of practice for the police for the construction of voice parades which became known as the McFarlane guidelines. The purpose of these guidelines was to provide a clear source of advice for police, which codified a best-practice method for conducting voice parades that could be consistently applied across cases. The guidelines were developed based on a review of the existing literature and also crucially, the voice identification system was designed to track as closely as possible the existing procedure for visual identification parades. This

¹⁴ *Gummerson* [1999] Crim LR 680.

made a number of recommendations for the minimum standards to be met, including the requirements that each of the voice recordings used in the parade (suspect and foils) be 60 seconds long, that none of the samples contained contextual information which might attract the attention of the witness, and that there was a robust process of quality control by a forensic phonetician to ensure that the parade did not draw attention to the suspect.¹⁵ These recommendations were approved by the Home Office and circulated as best practice guidance.¹⁶ They remain separate from the Code of Practice outlined in Code D. Departure from these guidelines might provide a legitimate basis for criticism, but would not of itself amount to a ground for exclusion of the evidence.¹⁷

Code D of PACE developed significantly in the early part of the 21st century. The House of Lords' decision in *Forbes* recognised the importance of consistent and fair use of identification procedures where identification was disputed.¹⁸ The increased use of video parades meant that the option of asking a volunteer to speak was redundant. Code D began to become directed at providing guidance for the police while at the same time creating an ethos of best practice with an emphasis on following the spirit of the Code. In other words, whilst Code D contained rules, it was not strict in the sense that a breach of any rule was not automatically detrimental to the case being constructed; this is explored further in Section V below.

¹⁵ Home Office Circular 057/2003, "Advice on the Use of Voice Identification Parades" *UK Home Office Circular 057/2003 from the Crime Reduction and Community Safety Group, Police Leadership and Powers Unit*, 12 May 2003

<<http://webarchive.nationalarchives.gov.uk/20130125153221/http://www.homeoffice.gov.uk/about-us/corporate-publications-strategy/home-office-circulars/circulars-2003/057-2003/>>

¹⁶ Home Office Circular 057/2003, "Advice on the Use of Voice Identification Parades" *UK Home Office Circular 057/2003 from the Crime Reduction and Community Safety Group, Police Leadership and Powers Unit*, 12 May 2003

<<http://webarchive.nationalarchives.gov.uk/20130125153221/http://www.homeoffice.gov.uk/about-us/corporate-publications-strategy/home-office-circulars/circulars-2003/057-2003/>>

¹⁷ *Davies* [2004] EWCA Crim 2521 at [32]-[35].

¹⁸ *Forbes* [2001] 1 AC 473.

While the primary focus of the guidance on identification is visual identification, the Code now reads:¹⁹

“Whilst this Code concentrates on visual identification procedures, it does not preclude the police making use of aural identification procedures such as a ‘voice identification parade’, where they judge that appropriate.”

This change to the landscape of voice parades led to Robson arguing that it was in keeping with the stated objectives of Code D for officers to be treated as having an obligation to consider their use where appropriate and make an informed decision as to whether or not it was feasible; a blanket policy decision to refuse to conduct voice parades was argued to be inconsistent with the spirit of the Code.²⁰ This point was considered but rejected by the Court of Appeal in *Crow*, with Carr LJ observing that:²¹

“There is no PACE code on voice identification. It is mentioned only briefly in Code D and no direct provision is made for cases in which the attempted identification is to be made on the basis of voice alone.”

The position in England and Wales stands in contrast to Ireland where the failure to conduct a proper voice parade has resulted in a successful argument that evidence should be excluded in which a confrontation type procedure was deemed to be unacceptable.²² The Irish Court of Criminal Appeal (having reviewed the case law from England and Wales) allowed an appeal where the Garda had not conducted a voice parade concluding that the absence of a procedural

¹⁹ Police and Criminal Evidence Act 1984, Code D at [1.2].

²⁰ Jeremy Robson, “A Fair Hearing? The Use of Voice Identification Parades in Criminal Investigations in England and Wales” (2017) 1 Crim LR 36, 48.

²¹ *Crow* [2021] EWCA Crim 617 at [25].

²² *DPP v Crowe* [2015] IECCA 9.

safeguards for testing the evidence meant that minimum standards of fairness were not met and the conviction could not be upheld. They noted that:²³

“Undoubtedly, the adoption in a particular case of a voice identification procedure which attempts to address potential biases and infirmities by means of safeguards, is likely to improve the cogency of such evidence. Therefore such measures are strongly to be encouraged on that account alone. Perhaps even more importantly they are also to be strongly encouraged in the interests of procedural fairness.”

To summarise, the Court of Appeal in England and Wales has consistently held that voice parades do not fall within Code D of PACE. While the McFarlane guidelines constitute best practice guidance, there is no obligation to conduct voice parades, no guidance on when they should be conducted, and no remedy for the defence if they are not conducted or are conducted in breach of the best practice. As such, there is no formal centralised procedure for conducting voice parades.

III. Conducting Voice Parades in Practice

Given that voice parades do not fall within Code D, the question then arises as to the mode and frequency of their use by police forces. The McFarlane guidelines were approved by the Home Office and one aim was to produce a safe and objective set of criteria for the design of parades which eliminate any risk of the witness’ attention being drawn to the suspect. While a laudable goal, this has made the process of conducting voice parades time-consuming and expensive for police forces, and has contributed in part to their rare use.

²³ *DPP v Crowe* [2015] IECCA 9 at 72.

Data collected via a Freedom of Information request examining the period 2005–2015, revealed that out of the 43 police forces in England and Wales, only 4 could confirm that they had used such procedures and 4 indicated they had considered using such a procedure. A further 26 did not have any data either way. There were 7 forces who indicated that as a matter of policy they would not construct a parade.²⁴

As a result of the lack of deployment of voice parades, coupled with the policy decisions not to conduct the parades, the IVIP project has used an interdisciplinary team of phoneticians, linguists, psychologists, criminologists and lawyers to explore this topic in more detail.²⁵ There were two main goals of the project that are relevant to this article. First was a desire to develop, for the first time, an empirical research base for the structure of voice identification parades, given that some of the parameters established in the McFarlane guidelines closely follow those of visual identification parades without having been tested previously in the aural domain (IVIP project Strand 1). It was recognised that the costs involved in conducting voice identification parades in line with the McFarlane guidelines are significant, and so the experiments also considered whether any parameters could be altered without undermining accuracy.

The second goal relevant to this article was addressed in Strand 4 of the IVIP project. This strand examined legal interactions with voice identification and voice parades, aiming to investigate the extent to which lawyers had encountered parades in practice and to survey police officers about their knowledge and understanding of parades.

Lawyers were surveyed via an anonymous questionnaire using the software Qualtrics.²⁶ This was available between March 2021 and September 2023 and was circulated initially via social media and then via QR code at a series of events held for lawyers. 72 participants took the

²⁴ Further see: Jeremy Robson, “A Fair Hearing? The Use of Voice Identification Parades in Criminal Investigations in England and Wales” (2017) 1 Crim LR 36, 45-46. Note: two police forces did not reply.

²⁵ Project reference: ES/S015965/1.

²⁶ The data set from the survey of lawyers is available via contacting the first author.

survey of whom 19 indicated that they “were not a lawyer” (the survey link had also been distributed to forensic phonetic consultants and researchers at an interdisciplinary event). On the remaining 53, 16 indicated that they had been involved in a case involving a voice parade and the remaining 37 could not recall whether they had been in a case involving voice identification evidence. Of the 16 who had encountered voice parades in practice, 4 had encountered it on more than one occasion and the remaining 12 only once. Of the 4 who had dealt with multiple parades, 1 added a note to indicate they had dealt with 3. Participants who had encountered earwitness voice identification evidence in a case were asked what category of offence the case fell under. Of these, 11 were offences of violence, 3 were sexual offences, 3 were offences of dishonesty and 1 was a “cannot remember”. From this, 9 participants reported that the voice parades had been used in trials where the defendant was convicted.

This is a comparatively small and self-selecting data set but within this it did confirm the scarcity of voice parades with only 30% of participants reporting having used them (and it is conceivable given the anonymity of the survey that multiple participants may have been involved in the same case). Even those that had been involved in cases using them had only encountered them between 1 and 3 times in their career. Video identification procedures are, on the other hand, encountered by most practitioners on a weekly, if not daily basis.

The trend of the lawyer survey was also reflected in the responses of a parallel survey answered by individual police officers.²⁷ Particular goals of this survey were to assess police officers’ awareness of the existence of voice parades and the Home Office guidelines, and to gather information on their personal experiences of conducting voice parades. The survey was distributed through police contacts of the authors via the National Voice Recognition Board (a group convened by the NPCC (National Police Chiefs’ Council) which includes representatives

²⁷ The data set from the survey of police officers is available via contacting the first author.

from all of the police forces of England and Wales and law enforcement professionals working in areas relevant to voice analysis) and especially the Metropolitan Police Audio Laboratory (which yielded the great majority of responses) during 2023. 58 responses were collected in total, and the average total duration of service of the officers responding was 16.0 years (with a standard deviation of 8.7 years).²⁸

The percentage of respondents who had been involved in a case in which a parade was either conducted or considered was very low, at 3% and 7% respectively; 90% of respondents had not been involved in a case where a parade was considered. For the few respondents who had encountered cases where a parade was considered or conducted, the types of cases varied, but were of a serious nature such as assault, murder and hostage-taking.

In terms of the officers' own police forces' engagement with voice parades, 10% were aware that their force had conducted a parade, 23% were not aware of their force having conducted a parade, and 67% were not sure.

Regarding use of the 2003 McFarlane guidelines, only 5% of respondents were aware of the recommended guidelines' existence. Among respondents who had conducted a parade or knew that their force had, 5% said that they had always followed the guidelines, 2.5% said they never followed them and 92.5% were not sure.

Consequently, when the data received from surveys is taken together, two points are apparent. First, police and lawyers rarely come into contact with voice parades; it is very much the exception, rather than the norm. Second, the police survey in particular revealed that the McFarlane guidelines have not centralised practice in this area as hoped, especially given only 5% of police respondents were aware of their existence. Given the lack of awareness and lack

²⁸ Although 16 years of service may appear to be a relatively high average here, it should be noted that 19 of the respondents had more than 20 years of service, including five participants each with more than 30 years service.

of centralisation of current practice regarding voice parades, the central recommendation of this article is for voice parades to be explicitly brought within Code D of PACE. This should be done by expressly including voice parades within a designated part of Code D, rather merely alluding to them in passing and referring onwards to the Home Office Circular, as is currently done. Bringing voice parades within Code D in this way would solve both the problem regarding awareness and regarding lack of centralisation, as it ensures the police would be mindful of the guidelines by default.

IV. Reviewing and Confirming the Parameters of Voice Parades

While the recommendation is for voice parades to be explicitly brought within the scope of Code D, two challenges need first to be overcome. In the police survey discussed in Section III, the police officers were also asked about the factors that were taken into account when deciding whether or not to conduct a voice parade. Two particularly influential factors were identified as being “the strength of other available evidence” and “the severity of the crime”, which were scored an average of 4.23 and 4.10 respectively on a 1-5 scale (5 constituting a very important factor). Given both these factors centre around the necessity of conducting a voice parade, they conceal a deeper concern about the financial and time costs of conducting a voice parade compliant with the McFarlane guidelines. Indeed, this costs concern was explicitly noted by one respondent when justifying why their force decided not to conduct a voice parade in a particular case.²⁹ Therefore, one objective of Strand 1 of the IVIP project was to review the existing McFarlane guidelines for conducting voice parades and to conduct experimental research to determine whether any of the parameters of the existing parade

²⁹ While the actual cost of a voice parade depends on the nature of the specific case and the recorded speech material available, the cost will be of the order of several thousand pounds, whereas a video parade for a visual identification will be a matter of a few hundred pounds.

methodology could be altered to make the procedure more efficient without compromising recognition accuracy.

Furthermore, as mentioned above, the parameters of McFarlane guidelines were based primarily on conclusions drawn from literature reviews available in 2003 and a desire to create an analogous version of the existing visual identification guidelines as far as possible. However, the recommendations have never been tested experimentally in the context of voice identification and there has been subsequent research in psychology and neuroscience highlighting differences in how humans process visual and aural information for identifying individuals.³⁰ Thus, the IVIP project aimed to establish an empirical research base to support best practice by testing the current parameters against alternatives.

To this end, the IVIP team has conducted a number of experiments.³¹ As a result of the IVIP empirical research, the team is now collaborating with the police towards establishing a revised set of voice parade guidelines for England and Wales. The recommended revisions resulting from IVIP research are as follows.

Reduce voice parade speech samples from 60 seconds to 15 seconds.

³⁰ Andrew Young, Sascha Frühholz, and Stefan Schweinberger, “Face and voice perception: Understanding commonalities and differences” (2020) 25(4) Trends in Cognitive Sciences 398.

³¹ Reports of experimental results are given in: Kirsty McDougall, “Ear-catching versus eye-catching? Some developments and current challenges in earwitness identification evidence” in *Proceedings of XVII AISV (Associazione Italiana Scienze della Voce) Conference: ‘Speaker Individuality in Phonetics and Speech Sciences: Speech Technology and Forensic Applications’, 4-5 February 2021* (Zurich: University of Zurich, 2021) pp.33-56; Harriet M.J. Smith, Jens Roeser, Nikolas Pautz, Josh Davis, Jeremy Robson, David Wright, Natalie Braber, and Paula Stacey, “Evaluating earwitness identification procedures: adapting pre-parade instructions and parade procedure” (2023) 31 Memory 147; Nikolas Pautz, Kirsty McDougall, Katrin Mueller-Johnson, Francis Nolan, Alice Paver, and Harriet M.J. Smith, “Identifying unfamiliar voices: the influence of sample duration and parade size” (2023) 76(12) Quarterly Journal of Experimental Psychology 2804; Nikolas Pautz, Kirsty McDougall, Katrin Mueller-Johnson, Francis Nolan, Alice Paver, and Harriet M.J. Smith, “Time to reflect on voice parades: The influence of reflection and retention interval duration on earwitness performance” (2024) 38 Applied Cognitive Psychology e4162; Nikolas Pautz, Peter Goodwin, Kirsty McDougall, Alice Paver, Francis Nolan, and Harriet M.J. Smith, “Mitigating the risk of false alarms in voice identification procedures: Parade type and witness instructions” (in prep.).

The McFarlane guidelines recommend that the speech samples of the suspect's voice and eight foil voices are prepared as edited compilations of innocuous short phrases of speech taken from police interviews – the suspect's interview and police interviews with suspects with similar-sounding voices from other unrelated cases. The recommended duration for these compilations in the McFarlane guidelines is 60 seconds, however this duration was a somewhat arbitrary choice. IVIP research comparing earwitness identification performance across 15-, 30- and 60-second voice samples shows that there is no reduction in recognition performance for 15- compared to 60-second samples.³² Thus IVIP recommends that sample duration can be safely reduced to 15 seconds. This will present a significant reduction in the time needed to prepare a parade and also its cost, as it can be onerous and time-consuming to locate enough interview recordings of suitable foil speakers whose interviews contain sufficient speech material to compile a sample. Further, the actual editing process to compile 15-second samples rather than 60-second samples is quicker, contributing to further reductions in required time and cost.

Use 8 foils to form a parade of 9 voices including the suspect's voice.

The IVIP project conducted an experiment to test earwitness performance using 6-person versus 9-person voice parades.³³ Recognition performance was not statistically different between the two parade sizes, so on this basis either parade size would be satisfactory. However, if the parade features an innocent (rather than guilty) suspect, one must bear in mind the chances of them being selected from the parade. IVIP research suggests that in such circumstances performance is at chance level. That is, earwitnesses guess and are likely to

³² Nikolas Pautz, Kirsty McDougall, Katrin Mueller-Johnson, Francis Nolan, Alice Paver, and Harriet Smith, "Identifying unfamiliar voices: the influence of sample duration and parade size" (2023) 76(12) Quarterly Journal of Experimental Psychology 2804.

³³ Nikolas Pautz, Kirsty McDougall, Katrin Mueller-Johnson, Francis Nolan, Alice Paver, and Harriet Smith, "Identifying unfamiliar voices: the influence of sample duration and parade size" (2023) 76(12) Quarterly Journal of Experimental Psychology 2804.

make an erroneous positive identification. So for a 6-person parade containing an innocent suspect, the chance of the suspect being selected would be 14.2%, while for a 9-person parade it would be 10%. Thus IVIP recommends that the 9-person parade size is maintained, due to the greater statistical protection offered to an innocent suspect.

When conducting of a voice parade, use specified wording to warn the witness about the difficulty of making an identification by voice and the consequences of making a selection if the perpetrator is not in the parade.

The McFarlane guidelines recommend that the witness undertaking a parade is told that the perpetrator may or may not be present, but they are not prescriptive about the exact wording. In a further study, IVIP tested the effect of variations in wording, cumulatively increasing the strength of the ‘warning’ relating to the difficulty of the parade and the consequences of an incorrect decision. The ‘standard’ warning stated that the ‘perpetrator may or may not be present’. The ‘strong’ warning added that ‘selecting someone from the lineup when the perpetrator is not present could lead to a wrongful conviction’. The ‘very strong’ warning added that ‘voice recognition can be very difficult. Only make a positive identification if you are very sure’. The results of the accuracy analyses showed that strengthening the warning improves performance in parades where the perpetrator is not present (i.e. the frequency of the witness correctly stating that the perpetrator is absent), but this is at the expense of correct identifications when the perpetrator’s voice *is* present in the parade. In other words, there is a trade-off between reducing false alarm rates and improving hit rates. Stronger warnings appear to make people less likely to make a selection, which would only constitute improved performance if the suspect was innocent. In order to determine the appropriate recommendation, we also conducted signal detection analyses. Such analyses combine

performance from perpetrator-present parades (hits) and perpetrator-absent parades (false positives) to estimate whether people can reliably tell if the perpetrator appears in the parade. Importantly, these analyses revealed that following both a ‘strong’ or ‘very strong’ warning, witnesses are unable to distinguish the perpetrator from the foil samples at a rate above chance-level. That is, responses are no more diagnostic than a guess and so do not have probative value. So while recognising the need to reduce false positives and maximise accurate identifications, it is only by following the ‘standard’ warning that performance is above chance-level. This study shows that the wording of the instructions given to witnesses can affect identification performance and highlights the importance of using consistent wording when conducting parades. In order not to compromise identification accuracy on parades where the perpetrator is present, and, more importantly, to avoid chance performance, IVIP recommends that witnesses are simply told that ‘the perpetrator may or may not be present’. This is consistent with the guidance in Code D on warnings in eyewitness cases.

Use a serial voice parade format.

The IVIP project conducted a further set of experiments to test whether identification outcomes may be influenced by the parade format used in the voice parade procedure. The McFarlane guidelines recommend a serial format where the witness listens to all voice samples before making a decision. This was compared with a ‘sequential’ format in which the witness makes a yes/no decision after hearing each voice sample. Immediately after the parade they then have the opportunity to resolve their decision if they have answered ‘yes’ to multiple voices. Analysis of data for this study showed no difference in identification accuracy between serial and sequential parade formats. We therefore recommend that the serial format should be maintained.

Therefore, overall findings of the experimental data do allow some changes to be made which will reduce the difficulty of producing parades. While challenges inevitably remain, it is hoped that altering the parameters of voice parades in this way would allow the police greater scope to implement voice parades in appropriate cases.

V. Breaches of Code D and s.78 PACE

If the parameters of voice identification parades are amended as suggested, the question then arises as to where the formalised and improved parameters are stored. Code D of PACE is subtitled the ‘Revised Code of Practice for the Identification of Persons by Police Officers’, and given the focus on identification, Code D seems the appropriate home for voice identification procedures. Indeed, this is supported by the fact that eye witness identification is also contained within Code D.³⁴ Placing the parameters and guidelines for earwitness identification parades within Code D would allow the location of all identification parameters to become centralised, thus further allowing for a consistent approach to be taken.

Bringing voice parades within Code D would allow for a more streamlined process, whereby suspects are better able to know their rights, ensuring they can rely on the Code D guidelines to ensure a fair investigation. It is true that the defence can make challenges to the construction of voice parades even without a centralised framework, as cases like *Davies*³⁵ and *Hersey*,³⁶ discussed in Section II, demonstrate. However, it is undeniable that all parties are better served

³⁴ Police and Criminal Evidence Act 1984, Code D, Section 3, Part (A).

³⁵ *Davies* [2004] EWCA Crim 2521.

³⁶ *Hersey* [1997] EWCA Crim 3106, [1998] Crim LR 281.

by a uniform and centralised set of guidelines that allow suspects and witnesses to easily make challenges for infringements.

Moreover, bringing voice parades within the scope of Code D would not lead to a proliferation of challenges to the construction of voice parades, as there is a well developed body of case law concerning when evidence ought to be struck out on the basis of a PACE infringement.³⁷ Under s.78 PACE, the courts have a discretion to exclude evidence if, and only if, “the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it”.³⁸ While PACE and its Codes can be admitted as evidence to determine the s.78 question, exclusion is not the automatic result of a breach.³⁹ Generally, two particular factors are relevant: (1) the severity of the breach; and (2) any investigative bad faith.

First, considering the severity of the breach, the Court of Appeal has held that a “significant and substantial” breach of PACE needs to be established before s.78 is engaged.⁴⁰ It should be noted that this threshold is not itself determinative and the Court of Appeal in *Walsh* has affirmed that the courts maintain an overall discretion: it “does not mean, of course, that in every case of a significant or substantial breach of [...] the Code of Practice the evidence concerned will automatically be excluded”.⁴¹ The general rule of thumb is that the evidence need not be excluded if the jury is able to evaluate the breach when determining the weight given to the evidence. For example, in *Nunes*, a roadside identification without the formal protections of a parade was held to be a breach of Code D,⁴² yet the breach could be adequately

³⁷ cf Mike Maguire, “Effects of the P.A.C.E. Provisions on Detention and Questioning - Some Preliminary Findings” (1988) 28 Brit J Criminology 19, 21; cf 42.

³⁸ Police and Criminal Evidence Act 1984, s.78(1).

³⁹ Police and Criminal Evidence Act 1984, s.67(11); *Forbes* [2001] 1 AC 473 at [23].

⁴⁰ *Archbold: Criminal Pleading, Evidence and Practice 2024* (London: Sweet & Maxwell), para.15B-95.

⁴¹ *Walsh* (1990) 91 Cr App R 161 at 163.

⁴² *Nunes* [2001] EWCA Crim 2283, at [21].

dealt with in the jury direction.⁴³ Similar sentiments have been expressed in *Yaryare*,⁴⁴ *Bogie*,⁴⁵ and *Grier*.⁴⁶ Generally, therefore, the s.78 power is only used in the most extreme situations. An identical approach can be taken with earwitness evidence, as if the new guidelines are stored within Code D, then this too can provide the basis for the jury properly to scrutinise the evidence and the significance of any breaches that may have occurred.

The second factor is any investigative bad faith. As noted in the introduction to s.78 in *Archbold*, “the propriety or otherwise of the way in which the evidence was obtained is something to which the court is specifically enjoined to take into account”.⁴⁷ Thus, while bad faith will “usually lead to exclusion of the evidence”, it is only a “relevant factor”, and not “conclusive”.⁴⁸ Ormerod and Birch have drawn a contrast between the police being merely “negligent or sloppy” and where the police have “deliberately flouted” the Code.⁴⁹ The tenor of this distinction is echoed in the Court of Appeal’s decision in *Mason*, where the absence of genuine bad faith meant the evidence was not excluded.⁵⁰

Ultimately, therefore, Code D acts as a framework tool, allowing the defence to argue objectively that best practice has not been followed. The focus should not be on technical breaches, but on ensuring that the “spirit of PACE” has been followed.⁵¹ However, this is not to say that the detailed rules of PACE are not important, and should not be considered

⁴³ *Nunes* [2001] EWCA Crim 2283, at [25]. Further see the trial judge’s comments at [13].

⁴⁴ *Yaryare and Others* [2020] EWCA Crim 1314, at [88].

⁴⁵ *Bogie* [2023] EWCA Crim 1280, at [21], [44], [59].

⁴⁶ *Grier v DPP* [2024] EWHC 1493 (Admin) at [27], [62].

⁴⁷ *Archbold: Criminal Pleading, Evidence and Practice 2024* (London: Sweet & Maxwell), para 15B-90.

⁴⁸ *Archbold: Criminal Pleading, Evidence and Practice 2024* (London: Sweet & Maxwell), paras 15B-96–15B-97.

⁴⁹ David Ormerod and Diane Birch, “The evolution of the discretionary exclusion of evidence” (2004) CLR 767, 781.

⁵⁰ *Mason* (2002) EWCA Crim 385 at [49]. See further David Ormerod and Diane Birch, “The evolution of the discretionary exclusion of evidence” (2004) CLR 767, 781-782; and *Perry* (2000) Court of Appeal (Criminal Division); [2000] 4 WLUK 14; 3 Apr 2000, where several breaches of PACE Code D occurred during a video identification parade, yet the Court of Appeal exercise their s.78 discretion to exclude the evidence, at [37].

⁵¹ *Mason* (2002) EWCA Crim 385 at [60].

carefully.⁵² As Murphy has noted, PACE was introduced after the infamous convictions of the Birmingham Six and the Guildford Four on the basis of corrupt confessions.⁵³ The need for a uniform and formalised approach to evidence gathering, breaches of which would be punished, spurred the introduction of PACE. This is especially true given that the old Judges' Rules (the pre-cursor to PACE) had been "treated as of little account", by police and judges alike.⁵⁴ As such, PACE was designed to introduce a "collective ethos of aiming at 'doing it by the book'".⁵⁵ Nonetheless, the focus is a holistic one, with PACE acting as soft law guidelines for the police to follow where the spirit of PACE is just as important as the letter.⁵⁶

Therefore, bringing voice parades within Code D of PACE will ensure that they are standardised and centralised guidelines rules that are taken seriously by the police and courts alike, whilst ensuring that the defence have a framework through which they can launch challenges evidence obtained in breach of the spirit of the rules.

VI. Conclusion

The current legal treatment of voice parades means they are in a no-man's land of requiring care in their production but with there being no clear guidance which enables the police to understand what is required of them or the defence to challenge fairly the way in which evidence is collected. This seems to be at odds with the claim that Code D is designed to be a purposive document aimed at providing both practical guidance to the police and a standard against which their investigative conduct can be measured. Consequently, the principal

⁵² Michael Zander, "If the PACE Codes Are Not Law, Why Do They Have to Be Followed?" (2012) 176 JPN 713, 714.

⁵³ N. Murphy, "The Role of the Solicitor at the Police Station" (Queen's University Belfast, 2017) <https://krw-law.ie/wp-content/uploads/2017/05/The-Role-of-a-Solicitor-in-the-Police-Station-PACE-IPLS-8.3.17.pdf>.

⁵⁴ Michael Zander, "How is PACE working?" (2022) 9 CLR 718, 719.

⁵⁵ Michael Zander, "How is PACE working?" (2022) 9 CLR 718, 719.

⁵⁶ Mike Maguire, "Effects of the P.A.C.E. Provisions on Detention and Questioning - Some Preliminary Findings" (1988) 28 Brit J Criminology 19, 42.

recommendation of the present article is that in order to end this no-man's land, voice parades should be brought explicitly within the scope of Code D of PACE.

However, in order to formalise voice parades within Code D there ought to be experimental data supporting the parameters of the guidelines, something that was lacking when the McFarlane guidelines were constructed. Furthermore, it has been noted that conducting the voice parades is oftentimes financially onerous and time-consuming. To this end, the IVIP project aimed to address both concerns and in combination with the empirical data it provides in support of most existing voice parade parameters in the current guidelines, the key recommendation is that foil samples can be safely shortened from 60 to 15 seconds without affecting accuracy.

In addition, when conducting and reviewing voice parades in line with Code D, it ought to be remembered that Code D, along with all of PACE, is designed to be a purposive document providing guidance on best practice. PACE should not be viewed as a technical set of rules, minor infringement of which will result in the exclusion of the evidence, but rather it is the spirit of PACE that is of prime importance. Placing voice parades within Code D will allow police and defence alike to have a centralised and formal set of guidelines to regulate their work, thus helping cultivate PACE as a spirit of best practice.