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Constitutional Law - Criminal Law - Preindictment Identification Confrontation Held Not to Be Critical Stage of the Prosecution Where the Accused's Right to Counsel Attaches

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CONSTITUTIONAL LAW—CRIMINAL LAW—Preindictment Identification Confrontation Held Not To Be Critical Stage Of The Prosecution Where The Accused's Right To Counsel Attaches.

On February 22, 1968, Thomas Kirby and a companion named Ralph Bean were stopped by police on Madison Street in Chicago because Kirby resembled a man wanted by the police for an unrelated criminal offense. Both men produced personal papers bearing the same name, Willie Shard, and when they gave conflicting explanations concerning these papers they were arrested. Upon arrival at the station, the police discovered that two days earlier one Willie Shard had reported that two men had robbed him of his wallet containing personal identification and travelers checks.

Shard was contacted and brought to the station. Immediately upon seeing Kirby and Bean he positively identified them as the pair that had perpetrated the robbery.[1] When Shard first saw Kirby and Bean at the station the pair was sitting at a table in an interrogation room with a number of police officers. Six weeks later Kirby and Bean were indicted for the robbery of Shard. At the arraignment proceedings counsel was first appointed to represent them.[2]

At the trial Kirby made timely motions to suppress Shard's testimony on the theory that he had been denied his sixth and fourteenth amendment right to counsel and the *Wade-Gilbert* exclusionary rule should therefore be invoked. These motions were denied and Shard was permitted to testify with respect to his pretrial identification of Kirby at the police station. Shard also identified the defendants in the courtroom as being the same two men who had robbed him on February 20.[3] The defense thoroughly cross-examined Shard with respect to circumstances surrounding his identification at the police station. Nevertheless, the jury found both men guilty of robbery.

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1. Kirby and Bean were sitting at a table with a number of police officers. Although Shard was brought to the station for the purpose of identifying two persons suspected of robbing him, there was no formal lineup.

2. ILL. REV. STAT. ch. 38, §113-3 (1971) requires that counsel be provided for indigent defendants prior to arraignment.

3. Bean's conviction was reversed, *People v. Bean.* 121 Ill. App. 2d 232, 257 N.E. 2d 562 (1970) holding that Shard's identification was the product of an unlawful arrest, search and detention. Thus Shard's identification testimony was inadmissible as to Bean.

In his appeal, Kirby argued that it was reversible error for the trial court to allow the introduction of the identification testimony into evidence, since he had been without benefit of counsel at the pretrial confrontation. Kirby urged that the *Wade-Gilbert* exclusionary rule, formulated by the United States Supreme Court in 1967, was clearly applicable.[4] The Illinois Appellate Court rejected Kirby's contention and affirmed the conviction.[5] The court relied on an earlier Illinois decision, *People v. Palmer*,[6] which held that the *Wade-Gilbert* per se exclusionary rule was *not* applicable to preindictment identification confrontations. The *Palmer* case limited the per se exclusionary rule to *post*-indictment situations.[7] The United States Supreme Court granted a writ of certiorari[8] to consider whether a pretrial confrontation between a suspect not yet indicted and an identifying witness is a critical stage in the prosecution at which time the right to counsel attaches.[9] The prior Supreme Court decisions of *United States v. Wade*[10] and *Gilbert v. California*[11] held that a *post* indictment pretrial "lineup" at which an accused is exhibited to identifying witnesses is a "critical stage of a criminal prosecution."[12] The Court stated that it was an infringement of the accused's sixth and fourteenth amendment rights to conduct such a lineup without the presence of counsel, absent a knowing, intelligent waiver.[13]

In *Kirby v. Illinois*,[14] the Supreme Court refused to extend the *Wade-Gilbert* doctrine to the situation where a suspect had not yet been indicted. Therefore, a pretrial preindictment identification will not be excluded solely on the grounds that there was no counsel present.

This holding removes the preindictment identification procedures from the status of the "critical stage." Suspects no longer must be provided with the assistance of counsel prior to participating in identification confrontations. Nevertheless, an unfair confrontation which may lead to a false identification may still be excluded, but the onus is

4. United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967).
5. People v. Kirby, 121 Ill. App. 2d 323, 257 N.E.2d 589 (1970).
6. 41 Ill. 2d 571, 244 N.E.2d 173 (1969).
7. *Id.* at 573, 244 N.E.2d at 174.
8. 402 U.S. 995 (1971).
9. Powell v. Alabama, 287 U.S. 45 (1932).
10. 388 U.S. 218 (1967).
11. 388 U.S. 263 (1967).
12. *See* United States v. Wade, 388 U.S. 218, 236-37 (1967).
13. *Cf.* Gideon v. Wainwright, 372 U.S. 335 (1963).
14. 406 U.S. 682 (1972).

now on the defendant to prove that the confrontation was, in fact, unfair.

THE *Wade-Gilbert* EXCLUSIONARY RULE

In order to fully analyze the opinion[15] of the Court, there must first be a discussion of *United States v. Wade*,[16] *Gilbert v. California*,[17] and the resulting per se exclusionary rule.

The fact situation presented in *Wade* involved a lineup confrontation after the defendant had been indicted for robbing a federally insured bank. The FBI, without first notifying the defendant's appointed counsel, conducted a lineup composed of the defendant together with several other prisoners. Two witnesses identified Wade as the robber. Thereafter, he was convicted, but in his appeal he challenged the admission of the identification testimony offered by a witness in attendance at the lineup. The basis of his contention was that since he was not represented by counsel at the pretrial identification, his sixth amendment rights were violated.

The Court, per Mr. Justice Brennan, held that a post indictment lineup

> [w]as a critical stage of the prosecution at which he [the accused] was as much entitled to such aid [of Counsel] . . . as at the trial itself.[18]

The Court arrived at this conclusion after reviewing the possible abuses that could occur in lineups as well as other identification procedures.[19] The Court observed that once a witness makes an identification at a lineup he will generally not reverse himself at trial, thus solidifying in his mind what could be the product of an unfairly suggestive lineup procedure.[20]

The *Wade* Court further emphasized that: "The influence of improper suggestion probably accounts for more miscarriages of justice than any other factor."[21] In order to prevent any unfairness during

15. *Kirby* was a plurality decision, Mr. Justice Stewart, Mr. Justice Blackmun, Mr. Justice Rehnquist with the Chief Justice concurring separately in the Opinion of the Court with Mr. Justice Powell concurring only in the result. Mr. Justice Brennan, joined by Mr. Justice Douglas and Mr. Justice Marshall wrote a dissenting opinion. Mr. Justice White wrote a separate dissent.

16. 388 U.S. 218 (1967).

17. 388 U.S. 263 (1967).

18. 388 U.S. at 236-37, quoting *Powell v. Alabama*, 287 U.S. 45, 57 (1932).

19. *Id.* at 232-34. Intentionally or unintentionally, the police could place other persons in the lineup with the suspect who are not of similar appearance, skin tone, size, color, hair, race, dress, height, weight, clothes sizes, similar identifying characteristics, etc.

20. *Id.* at 229.

21. *Id. See also* BROWN, LEGAL PSYCHOLOGY, p. 71 (1926); 2 U.C.L.A. L. REV. 552, 554 (1955).

the pretrial period, the Court held that an accused should have the benefit of counsel at identification confrontations. The Court stated:

> Since it appears that there is grave potential for prejudice in pretrial lineups, and since the presence of counsel itself can often avert such prejudice and assure a meaningful confrontation at trial . . . the presence of counsel at pretrial lineups must be assured when possible.[22]

The pretrial lineup is often that point in the prosecution when an identification becomes settled in the mind of a prospective witness, thereby reducing the in court identification to a "mere formality."[23] Thus the Court decided that since there was such a grave potential for unfair suggestion and prejudice at certain identification confrontations, counsel should be present as the first line of defense. With the information gained by counsel when observing the particular pretrial confrontation, he could effectively cross-examine key identifying witnesses, and hopefully reveal any prejudice or unfairness that may have transpired.[24] Identification evidence resulting from confrontations not in compliance with this procedure would be excluded.

In *Wade*, the Court noted that where an illegal pretrial lineup[25] had been conducted, an in court identification would be admissible only if the government could show by clear and convincing evidence that it was independent and separate from the tainted lineup.[26]

Of course, proving that the in court identification was independent and separate from the tainted lineup would often prove to be an impossible task for the state. It is difficult to see how the government could show, by clear and convincing evidence, that an illegal lineup,

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22. 388 U.S. at 236-37. *See also* Murray, *The Criminal Lineup at Home and Abroad*, 1966 UTAH L. REV. 610, 627-28.

23. 388 U.S. at 226. The Court further stated:

> The trial which might determine the accused's fate may well be not in the courtroom, but at the pretrial confrontation—the State aligned against the accused, the witness the sole jury, the accused unprotected against intentional or unintentional unfairness with little or no appeal from the judgment rendered by the witness—"That's the Man!"

Id. at 235, 236. *See also* BORCHARD, CONVICTING THE INNOCENT (1932). This work illustrates twenty-nine cases of erroneous identifications leading to incarceration of the innocent. In only two of those cases did the guilty party even physically resemble the accused. WALL, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES, pg. 26 (1965). This work presents a thorough discussion of the unreliability of eyewitness identifications.

24. It is important to note here that the fact situation in which *Wade* was decided was a post indictment pretrial confrontation.

25. The Court referred to an illegal lineup as a pretrial but post indictment lineup held without accused's counsel, absent an intelligent waiver and absent any emergency situation.

26. 388 U.S. at 240. *Wade* was remanded to the district court for a hearing determinative on the independence of the in-court identification consistent with the opinion. *See also* BROWN, *supra* note 21, at 71 (1926); 2 U.C.L.A. L. REV. 552, 554 (1955).

once viewed, could play no part whatsoever in a subsequent in court identification.

A companion case, *Gilbert v. California*,[27] in which Mr. Justice Brennan again wrote the opinion of the Court, held that it was error to admit into evidence an in court identification without first determining that it was of independent origin and untainted by a prior illegal lineup. In a prosecution for armed robbery and murder, the accused was identified at a post indictment lineup without counsel present. The officers told the witnesses present at the lineup, "if they had any doubts, now was the time to resolve them, not at trial." The accused was promptly identified by the group of witnesses, who at no time had their communications with each other restricted.

The Court held in light of *Wade*, that these identifications were inadmissible and stated further:

> Only a per se exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup.[28]

As the result of these two decisions, the so-called *Wade-Gilbert* rule has emerged. In effect, this rule excludes *any* identification testimony from a witness who was present at an illegal lineup, i.e., a lineup in which defendant was not given an opportunity for effective assistance of counsel.

Stovall v. Denno[29] can cause the loss of the entire testimony by the witness if he had attended an illegal pretrial lineup or confrontation. If the police had had all of the identification witnesses attending that tainted lineup, the court would then be obligated to scrutinize that pretrial confrontation and exclude any testimony which was so tainted. Thus, all of the state's identification testimony could be lost to the case. Many prosecutors felt that *Stovall's* long-range effect could be even more far-reaching and lasting than *Wade's*.

THE PRE-*Kirby* APPLICATION OF THE *Per Se* RULE

The prevailing view when applying the *Wade-Gilbert*[30] rule was

27. 388 U.S. 263 (1967). Actually three cases were handed down the same day, the third being *Stovall v. Denno*, 388 U.S. 293 (1967) holding *Wade* and *Gilbert* applicable prospectively only. *Stovall* also affirmed the rule that the Court must scrutinize every pretrial confrontation to assure its fundamental fairness.

28. 388 U.S. at 273.

29. 388 U.S. 293 (1967).

30. *See* 406 U.S. at 704 n.14 (Brennan, J., dissenting). The states were split in application, thirteen states adopting the federal application of *Wade*, while five states including Illinois (*People v. Palmer*) opted for the narrow and strict construction application holding *Wade-Gilbert* to apply only in post indictment factual situations.

that it applied to preindictment confrontations, as well as post indictment situations.[31] Every federal jurisdiction had applied the rule in this manner. In *Wilson v. Gaffney*,[32] the court stated:

> But surely the assistance of counsel, now established as an absolute post-indictment right does not arise or attach because of the return of an indictment. . . . Every reason set forth by the Supreme Court in *Wade* . . . for the assistance of counsel post-indictment has equal or more impact when projected against a pre-indictment atmosphere.[33]

In *Rivers v. United States*,[34] the Fifth Circuit Court of Appeals observed that *Wade* and *Gilbert* indicated that a confrontation between suspects and witnesses was a critical stage and unless waived, counsel must be present. The court went on to state:

> [I]t is indisputable that most, perhaps all, confrontations occurring after arrest fall within the rules announced in *Wade* and *Gilbert*. Any suggestion that the rules announced apply only to formal lineups is seriously weakened by *Stovall*.[35]

While *Rivers* was a liberal construction of *Wade* and *Gilbert, United States v. Greene*[36] stands as the high-water mark of the rule's application. In *Greene*, the accused had been identified at a *pre-arrest* confrontation arranged by the police. The court held that it was reversible error to admit the testimony concerning that confrontation into evidence, stating:

> We find its [*Wade-Gilbert*] requirements of counsel equally applicable to the informal, *pre-arrest* confrontation of appellant in the squad room.[37]

The court observed that the question of fairness is just as crucial in a preindictment situation as in a post indictment confrontation.

The majority of the state courts which had considered the question of *Wade's* applicability to preindictment situations agreed with the federal interpretation.[38] A representative case is *People v. Gowler*.[39]

31. Wilson v. Gaffney, 454 F.2d 142 (10th Cir. 1972); Gov't of Virgin Islands v. Callwood, 440 F.2d 1206 (3rd Cir. 1971); United States v. Greene, 429 F.2d 193 (D.C. Cir. 1970); Cooper v. Picard, 428 F.2d 524 (1st Cir. 1970); United States v. Ayers, 426 F.2d 524 (2nd Cir. 1970); United States v. Phillips, 427 F.2d 1035 (9th Cir. 1970); United States v. Broadhead, 413 F.2d 1351 (7th Cir. 1969).

32. 454 F.2d 142 (10th Cir. 1972).

33. *Id.* at 144.

34. 400 F.2d 935 (5th Cir. 1968).

35. 400 F.2d at 939, 940; Stovall v. Denno, 388 U.S. 293 (1967); Miranda v. Arizona, 384 U.S. 436 (1966).

36. 429 F.2d 193 (D.C. Cir. 1970).

37. *Id.* at 195.

38. The thirteen states which adopted the federal application were California, Louisiana, Massachusetts, Michigan, Nevada, North Carolina, Ohio, Pennsylvania, Rhode Island, Texas, Washington and Wisconsin.

39. 1 Cal. 3d 335, 82 Cal. Rptr. 363, 461 P.2d 643 (1969).

The case involved a preindictment lineup conducted in the absence of defendant's counsel. The California Supreme Court held:

> We have concluded that the *Wade-Gilbert* Rules are not limited in their application to lineups occurring after indictment. Our reasons are several. First, and perhaps most importantly, we find nothing in the reasoning of those opinions . . . requiring that the rules should be so limited [to post indictment situations] . . . . A lineup which occurs prior to the point in question [indictment] may be fraught with the same risks of suggestion as one occurring after that point, and may result in the same far-reaching consequences for the defendant.[40]

Taking a distinct minority position, the Illinois Supreme Court in *People v. Palmer*[41] refused to apply the *Wade-Gilbert* rule to preindictment situations. Palmer was convicted of robbing a cab driver. During the robbery the victim had ample opportunity to study and observe his assailant. When the victim was provided with photos of formerly convicted robbers he identified Palmer's picture. The police and the victim went to Palmer's residence to effect an arrest. Thereupon, the victim immediately identified Palmer as his robber. The victim's identification testimony which consisted of an in court identification and testimony concerning the pretrial identification confrontation, was allowed at trial. In his appeal, Palmer complained that the admission of the identification testimony was in clear contravention of the *Wade-Gilbert* rule. However the Illinois Supreme Court rejected Palmer's contention stating:

> The confrontation here was immediately following the defendant's arrest and prior to his indictment and the appointment of counsel, and the decisions of *Wade* and *Gilbert* are not binding. . . .[42]

Thus, in Illinois, the right to counsel at an identification confrontation attached only after an indictment had been returned.

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40. *Id.* at 342, 82 Cal. Rptr. at 368, 461 P.2d at 648. In *Palmer v. State*, 5 Md. App. 691, 249 A.2d 482 (1967) the Maryland Court of Appeals reached a similar result basing their reasoning upon the necessity of having a fair and meaningful cross-examination at trial. The Maryland court excluded all identification evidence (testimony) which was tainted by exhibiting the accused to identifying witnesses in absence of accused's counsel which was not subject to objective review at the trial. At p. 486 the *Palmer* court said: "We think it necessarily follows that the rules of *Wade* and *Gilbert* apply also to a lineup conducted before indictment and to other pretrial confrontations within the meaning of *Tyler*." *Tyler v. State*, 5 Md. App. 265, 246 A.2d 634 (1968), held that *Wade* applies the exclusionary rule only to those confrontations which are not subject to objective review at trial by cross-examination.

41. 41 Ill. 2d 571, 244 N.E.2d 173 (1969). In all, five states constituted the minority view: Arizona, Florida, Missouri, and Virginia along with Illinois. State v. Field, 104 Ariz. 486, 455 P.2d 964 (1969); Perkins v. State, 228 So. 2d 382 (Fla. 1969); State v. Walters, 457 S.W.2d 817 (Mo. 1970); Buchanan v. Commonwealth, 210 Va. 664, 173 S.E.2d 792 (1970).

42. 41 Ill. 2d 571, 573, 248 N.E.2d 173, 175 (1969). *See also* People v. Elam, 50 Ill. 2d 214, 218, 278 N.E.2d 76, 77 (1972).

In *State v. Fields*,[43] an Arizona court reached the same result as in *People v. Palmer*. However the court qualified its refusal to expand *Wade-Gilbert* to preindictment situations by noting its duty to scrutinize every pre-trial confrontation and guarantee the fairness of the identification process.[44] In *Perkins v. State*,[45] the Florida Supreme Court, in a preindictment context, enunciated a narrow construction of the *Wade-Gilbert* rule stating:

> We are not unmindful that the identification process involved in the present case may well bespeak the characteristics common to the infirmities found objectionable in the *Wade* and *Gilbert* decisions.[46]

However, the *Perkins* court felt that to apply the logical extension of the *Wade* rule to a preindictment case would be an extension better left to the United States Supreme Court.

The pre-*Kirby* period was marked by a clear division. The majority of courts (and all federal courts) would extend the *Wade-Gilbert per se* exclusionary rule to the preindictment situation and thus exclude *all* identification testimony originating in a confrontation which occurred absent the accused's counsel, regardless of whether it occurred preindictment or post indictment. The minority of courts, including Illinois, would not so exclude preindictment confrontation evidence.

Preindictment Confrontations Are Not Critical Stages in The Criminal Prosecution

In *Kirby v. Illinois*[47] the Supreme Court adopted the minority position and held that the *Wade-Gilbert* exclusionary rule applies after the commencement of formal judicial proceedings. Judicial proceedings may be commenced by way of formal charge, preliminary hearing, indictment, information, or arraignment. At this point the state is aligned against the accused and the adverse positions of the government and the defendant have generally solidified.[48] The Court reasoned that the accused does not formally face the state until these ini-

43. 104 Ariz. 486, 455 P.2d 964 (1969).
44. 388 U.S. 293 (1967). *Stovall* held that the Due Process Clause of the fifth and fourteenth amendments forbids a lineup which is unnecessarily suggestive and conducive to irreparable mistaken identification charging the courts with a duty to scrutinize any pretrial confrontation for unfairness.
45. 228 So. 2d 382 (Fla. 1969).
46. *Id.* at 390.
47. Kirby v. Illinois, 406 U.S. 682 (1972).
48. While *Kirby* charges the State with the duty to provide counsel only when the adversary criminal process has begun, it remains for the states to determine when that point is actually reached. The Missouri Supreme Court has held that the criminal process (adversary judicial proceedings) begins with the filing of a complaint and the

tial steps toward criminal prosecution have been taken, and therefore the right to counsel need not attach.[49]

Mr. Justice Stewart, writing the opinion of the Court, rejected the applicability of *Miranda v. Arizona*[50] to the instant case; viewing *Miranda* as primarily related to the fifth amendment privilege against self-incrimination and not determinative of a sixth amendment controversy. The majority indicated there was no question of a fifth amendment violation in *Kirby*,[51] but rather, a sixth amendment infringement was at issue. Similarly, a prior decision in *Escobedo v. Illinois*[52] was decided in a fact situation which went to the fifth amendment right against compulsory self-incrimination. In *Escobedo*, however, the Court determined that the critical stage where the accused was constitutionally entitled to a lawyer was *before* indictment at the interrogation. In *Escobedo*, the Court announced the "focus theory," observing that it would exalt form over substance to make the right to counsel depend on whether at the time of the interrogation the authorities had secured a formal indictment. Rather, the test for when the right to counsel attaches should be when the police investigation turned from a general inquiry into an unsolved crime to an investigation centering on a specific suspect.

As in *Gilbert* and *Wade*, the *Escobedo* Court stated that only a *per se* exclusionary rule as to such tainted testimony could be an effective sanction to insure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical stage.

The *Kirby* decision limits the *Wade-Gilbert* rule's application to the post indictment period. The Court departed from not only the *Escobedo* rationale[53] but from the long line of Supreme Court decisions[54]

issuing of a warrant. Thus in Missouri, the right to counsel would attach at that time. On the other hand, Massachusetts, a state which had applied the majority liberal interpretation of *Wade* has expressly disavowed its earlier decision and now applies the right to counsel only after indictment.

49. 73 YALE L.J. 1000, 1030-34 (1964).
50. 384 U.S. 436 (1966).
51. Schmerber v. California, 384 U.S. 757, 761 (1966).
52. 378 U.S. 478 (1963).
53. *See* Johnson v. New Jersey, 384 U.S. 719 (1966).
54. In Gideon v. Wainwright, 372 U.S. 335 (1963) the sixth amendment right to counsel was made applicable to the states through the fourteenth amendment. In Spano v. New York, 360 U.S. 315 (1959), the right to counsel was extended past the trial, to any proceeding, including interrogation by the police after formal charge. Mr. Justice Stewart, concurring in *Spano*, went so far as to compare any police interrogation after formal charge against the standard of a public trial, observing that in our system, an indictment is supposed to be followed by an arraignment and trial with all constitutional guarantees. Mr. Justice Stewart believes that any stage after trial should have at least those safeguards and guarantees. In Massiah v. United States, 377 U.S. 201 (1964), incriminating evidence which the police elicited from defendant

which had been *expanding*[55] the right to counsel rather than limiting it. However, the Court expressly retained the safeguards of *Stovall v. Denno*:[56]

> What has been said is not to suggest that there may not be occasions during the course of a criminal investigation when the police do abuse identification procedures. Such abuses are not beyond the reach of the Constitution. As the Court pointed out in *Wade* itself, it is always necessary to "scrutinize any pretrial confrontation. . . ."[57]

The plurality of the *Kirby* Court considered the identification confrontation here to be merely a *routine* police procedure and were loathe to burden the police with the duty to provide an accused with counsel. Conversely, the *Wade* Court found no countervailing policy considerations against requiring the presence of counsel at lineups, emphasizing that an attorney is an essential part of the criminal process[58] and that the possibility of occasional delays to police procedure not worth the risk of the potential prejudice which could result from an unfair lineup.

There are two apparent explanations for the opposite treatment of this problem. First, as the *Wade* Court stated:

> Legislative or other regulations, such as those of local police departments, which eliminate the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial may also remove the basis for regarding the stage as critical.[59]

There is some evidence that police have modified their regulations to conform to the *Wade* guidelines.[60] Second, the personnel changes in the Court subsequent to *Wade* indicate a change in attitude towards the rights of the accused.[61]

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after he was indicted but while he was free on bail through the use of a police informer who was a co-defendant electronically wired to relay defendant's conversation with him to the police was held to be inadmissible against him at trial. The fatal defect in the evidence procurement was that the defendant had been denied his constitutional right to counsel while the police recorded his conversation. Both *Miranda* and *Escobedo* also extended the right to counsel to "every critical stage of the prosecution." Escobedo v. Illinois, 378 U.S. 478, 486 (1963).

55. Powell v. Alabama, 287 U.S. 45, 53 (1932); Coleman v. Alabama, 399 U.S. 1 (1970).

56. Stovall v. Denno, 388 U.S. 293 (1967).

57. 406 U.S. at 690-91.

58. Miranda v. Arizona, 384 U.S. 436 (1966).

59. 388 U.S. at 239.

60. *See* Murray, *supra* note 22, 627-28. Prof. Murray comments on the regulations of the Washington D.C. Police Dep't concerning lineups after *Wade*.

61. Of the Justices who heard *Wade*, only Mr. Justice Stewart joined the plurality in *Kirby*. The other four Justices of the plurality (Mr. Chief Justice Burger, Mr. Justice Blackmun and Mr. Justice Rehnquist, with Mr. Justice Powell concurring) are all recent appointees. The dissent, on the other hand, was composed of four Justices, all of whom were on the Court when *Wade* was decided.

Mr. Justice Brennan, who wrote the opinion of the Court in both *Wade* and *Gilbert*, strenuously dissented in *Kirby*,[62] taking the plurality Justices to task for their narrow interpretation of *Wade* and *Gilbert*. Mr. Justice Brennan disputed the plurality's conclusion that *Miranda* did not apply to the *Kirby* situation. He observed that *Miranda* required that as soon as Kirby was taken into custody, he should have been informed of his right to counsel. Mr. Justice Brennan observed that the controlling sixth amendment decisions[63] reflect the constitutional principle that in addition to having the right to presence of counsel at trial, the accused is also guaranteed that he need not stand alone against the state at *any* stage of the prosecution, formal or informal, in court or out, wherever counsel's absence might derogate from his right to a fair trial.[64]

Similarly, Justice Brennan disagreed with the plurality's expedious disposition of the *Escobedo* case,[65] questioning how *Escobedo* could be applicable in *Wade* (which was a post indictment situation) and not in *Kirby* (which, like *Escobedo*, was a preindictment confrontation).[66] Moreover, Justice Brennan was distressed by the plurality's reliance on the pre-*Wade* decision of *Johnson v. New Jersey*[67] which restricted *Escobedo* to its facts. Even if *Johnson* did so limit *Escobedo*, *Escobedo* was specifically relied upon by the *Wade* and *Gilbert* Courts to reach their results.

The spirit of the *Wade* decision is embodied in Mr. Justice Brennan's dissent. He notes that a confrontation for identification purposes is a very sensitive process, peculiarly riddled with innumerable dangers and variables which might adversely affect a trial.[68] The sixth amendment guarantees that the accused shall have the benefit of counsel to provide him with a meaningful defense.[69] If any impropriety occurs

62. 406 U.S. 691 (1972).
63. Powell v. Alabama, 287 U.S. 45 (1932); Hamilton v. Alabama, 368 U.S. 52 (1961); Massiah v. United States, 377 U.S. 478 (1964); Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964).
64. 388 U.S. at 218-27.
65. Of course, in its grant of certiorari, 402 U.S. 995 (1971), the Court limited its review only to deciding the application of *Wade-Gilbert*. But Justice Brennan felt that *Wade-Gilbert* depended so heavily on *Miranda* that one cannot apply *Wade* and discard *Miranda*.
66. 406 U.S. at 693, n.3 (Brennan, J., dissenting).
67. 384 U.S. 719, 733-34 (1966).
68. 388 U.S. at 226.
69. *See* Read, *Lawyers at Lineups; Constitutional Necessity or Avoidable Extravagance?*, 17 U.C.L.A. L. REV. 339 (1969).

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense.

U.S. CONST. amend. VI.

which might be conducive to making the witness identify the suspect mistakenly, an effective tool to show irregularity would be cross-examination. However an accused can seldom reconstruct the pretrial identification at the trial. An accused is untrained to detect suggestive influences and at the highly emotional confrontation he might be unaware of unfairness.[70] Furthermore, at the trial the jury would probably be more apt to believe the policeman than a defendant's unsupported version of the confrontation. For all these reasons, by virtue of his training, an attorney at the confrontation can most effectively protect the rights of an accused.

Nonetheless, the attorney may be a poor choice to be cast in the role ot an *observer.*[71] The attorney, by virtue of his training and his obligation to his client, is an advocate. The attorney's first duty is owed to his client, and not to guarantee the complete objectivity of the confrontation. Furthermore, the attorney would have no real control over the proceedings, and may have an interest in preserving error for use on appeal.

An additional practical argument against providing attorneys at preindictment lineups is the great potential for delay. The police would be forced to schedule lineups for the convenience of both witnesses and attorneys, a feat which would often prove difficult.[72] Moreover, the presence of counsel could possibly inject a "courtroom" procedure into a routine police function which could possibly harass the witness and make the job of finding co-operative witnesses an added burden.[73]

CONCLUSION

The original broad application of the *Wade-Gilbert* exclusionary rule was fraught with exceptions.[74] The right to counsel at pretrial confrontations was not required when: the suspect was not in custody;[75] the pretrial confrontation was accidental;[76] the confrontation occurred with the police in "hot pursuit" of the suspect;[77] the suspect's

70. *See* BROWN, *supra* note 21. Another very interesting, and very short dissent in *Kirby* is Mr. Justice White's. This dissent is simply that *Wade* and *Gilbert* control, and the Illinois decision should be reversed. It is interesting that Justice White was one of the original dissenters to *Wade* and *Gilbert.* Thus even an original dissenter to *Wade* sees that *Wade's* logic was meant to apply to a preindictment situation also.
71. *See* Note, 63 NW. U.L. REV. 251, 260 (1968).
72. Read, *supra* note 69.
73. *Id.* at 341.
74. 388 U.S. at 272-73.
75. United States v. Cox, 428 F.2d 683 (7th Cir.) *cert. den.* 400 U.S. 831 (1970).
76. United States v. Pollack, 427 F.2d 1168 (5th Cir.) *cert. den.* 400 U.S. 831 (1970).
77. Russell v. United States, 408 F.2d 1280 (D.C. Cir.) *cert. den.* 395 U.S. 928 (1969).

photograph was exhibited to identifying witnesses;[78] or to scientific procedures identifying the suspect.[79] However, the exceptions were necessary because of the obvious countervailing considerations which weighed heavily in favor of not applying the exclusionary rule in those particular circumstances.

If the suspect were not in custody, there would be no way for the state to provide the benefit of counsel for every possible confrontation which may occur. Likewise, accidental confrontations are not controlled by the police. Furthermore there is no realistic way that counsel can be provided prior to a confrontation which no one knew was going to take place. Policemen arriving at the scene of a recently perpetrated crime would fail in their duty to society if they did not immediately apprehend the suspect and present him to the on-the-scene witnesses so as to satisfy themselves that they did in fact apprehend the right man. Exhibiting photographs of suspects to witnesses is often the only available technique by which efficient police work can lead to discovery of a prospective suspect's name or description. Furthermore, the fairness of photograph identification and other reliable scientific procedures used to identify criminals (fingerprints, voice prints, ballistics tests, etc.) can be tested on cross-examination since the defense is in possession of the same data and material surrounding the identification as the state. When cross-examination can be used as an effective tool to bare unfairness and impropriety of a particular procedure, there is little reason to exclude the evidence.

The *Kirby* decision, unlike the aforementioned exceptions, is not based upon the consideration that an identification is reliable or necessary. Thus the *Kirby* decision, which eliminates the right to counsel before the return of an indictment, is not properly categorized as an "exception" to the *Wade-Gilbert* rule. Rather, the *Kirby* decision has weakened the *per se* rule. One speculates that virtually all pretrial confrontations will take place prior to indictment if feasible.

The *Kirby* Court does acknowledge the duty of the trial court to scrutinize *any* pretrial confrontation to determine if any unfairness has transpired to the detriment of the accused. The *Wade* Court however, gave the task of guaranteeing a fair pretrial confrontation to a suspect's counsel, and chose to exclude *any* evidence which might flow

78. United States v. Bennet, 409 F.2d 888 (2nd Cir.) *cert. den.* 396 U.S. 852 (1969).

79. Schmerber v. California, 384 U.S. 757 (1966). (Scientific data, such as fingerprints, blood tests, ballistics, voice prints, etc. which are subject to objective review and cross-examination are admissible notwithstanding self-incrimination and right to counsel theories.)

from a confrontation which counsel did not have the opportunity to observe. The *Kirby* Court, on the other hand, places the burden of insuring fairness at the confrontation upon the discretion of the court.

The Court in *Kirby* misapplied the spirit, if not the letter of the decision in *Wade*.[80] The abuses which *Wade* sought to avoid were in no way connected with the return of an indictment. To be consistent with its own reasoning, the *Kirby* Court should have either broadly applied *Wade* and thus recognized the right to counsel at preindictment confrontations or overruled *Wade* and its exclusionary rule. Whereas the *Wade* Court squarely faced the problem and offered a solution, (although some commentators would contend, the wrong solution[81]) *Kirby* avoids the issue, and leaves no guidance for the future. True, *Kirby* has discarded the *per se* exclusionary rule as to preindictment confrontations, however, it has replaced it with nothing more than judicial discretion.

The *Kirby* Court could have replaced the per se exclusionary rule with guidelines to be applied at lineups, and other pretrial confrontations. Specifically, the Court might have suggested the installation of cameras and sound equipment to record the identification proceedings for playback later. Such a safeguard would better serve the "quest for truth".[82] In addition to cameras and sound recorders, the Court could have suggested a minimum of six persons as participants in the lineup with a suspect, all of similar appearance and dress. Rules such as these would squarely face and solve the problem which *Kirby* basically ignored.

As it stands, *Kirby's* effect on police procedure could well be that most identification confrontations will now take place before indictment, and thus before the right to counsel attaches.[83] Such a procedure does not protect the suspect nor society from erroneous identification.

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80. A show up is generally conceded to be the most unfair of all identification procedures. Stovall v. Denno, 388 U.S. 293, 302 (1967); Foster v. California, 394 U.S. 440, 443 (1969).

81. *See* Read, *supra* note 69; Murray, *supra* note 22; Note, 63 Nw. U.L. Rev. 251 (1968).

82. Tehan v. Shott, 382 U.S. 406, 416 (1966).

83. People v. Fowler, 1 Cal. 3d 335, 344, 82 Cal. Rptr. 363, 370, 461 P.2d 643, 650 (1969).