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CONSTITUTIONAL LAW — RIGHTS OF CRIMINAL DEFENDANTS —
COUNSEL'S PRESENCE IS NOT REQUIRED AT PRE-INDICTMENT
IDENTIFICATION CONFRONTATIONS.

Kirby v. Illinois (U.S. 1972)

Petitioner, after having been arrested, was confronted by a robbery victim at the police station and was identified by the victim without the petitioner's counsel being present.¹ At the subsequent robbery trial, the victim reaffirmed his previous identification and petitioner was convicted. On appeal, petitioner argued that since he did not have the aid of counsel at the identification confrontation, the per se exclusionary rule of *United States v. Wade*² and *Gilbert v. California*³ precluded the use of testimony that related to such a confrontation at the trial. The Appellate Court of Illinois upheld petitioner's conviction and held that the rule of *Wade* and *Gilbert* did not apply to pre-indictment identification proceedings.⁴ The Supreme Court of the United States affirmed the state court's decision, and in a plurality opinion,⁵ asserted that the right to counsel at identification confrontations attaches only upon the initiation of "adversary judicial proceedings." *Kirby v. Illinois*, 406 U.S. 682, 688 (1972).

The right to counsel has been recognized by the Supreme Court as "fundamental and essential to a fair trial."⁶ Moreover, the sixth amendment guarantee⁷ has not been limited to representation by counsel at the trial itself, but has been applied by the Court to various pretrial confrontations between the accused and the state.⁸ For example, counsel's aid was deemed by the Court to be a constitutional requirement at the arraignment in

1. Petitioner, upon being stopped by the police, who were investigating a different crime, produced identification items that bore the name "Shard." He was arrested when he failed to explain adequately how these items came into his possession. Thereupon, the victim was brought to the station by the police, and he identified the petitioner in a face-to-face confrontation. *Kirby v. Illinois*, 406 U.S. 682, 684 (1972).

2. 388 U.S. 218 (1967).

3. 388 U.S. 263 (1967).

4. *People v. Kirby*, 121 Ill. App. 2d 323, 257 N.E.2d 589 (1970).

5. Mr. Justice Stewart wrote a plurality opinion in which the Chief Justice and Justices Blackmun and Rhenquist joined. Mr. Justice Powell concurred in the result and simply stated that he would not extend the *Wade-Gilbert* (see notes 14-24 and accompanying text *infra*) per se exclusionary rule. He gave no other reasons for filing a separate concurring opinion and stated no objections to any point raised in Justice Stewart's opinion. 406 U.S. at 691. Dissenting were Justices Brennan, Douglas, Marshall, and White.

6. *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963).

7. The sixth amendment provides in part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; 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 defence.

U.S. CONST. amend. VI.

8. As early as 1932, in *Powell v. Alabama*, 287 U.S. 45 (1932), the Court recognized the period between the arraignment and the beginning of trial to be a critical period of the proceedings. Denial of counsel's aid during that stage of the proceedings was deemed to be a denial of due process of law since appointed counsel was unable to prepare effectively for trial. *Id.* at 59.

Hamilton v. Alabama,⁹ and at the preliminary hearing in *Coleman v. Alabama*.¹⁰ The Court adjudged both proceedings to be "critical stages" of the prosecution wherein the presence of counsel might have protected valuable rights fundamental to a fair trial.¹¹ An additional test for determining the point at which the right to counsel attached in a criminal proceeding was formulated by the Court in *Escobedo v. Illinois*.¹² In *Escobedo*, the Court held:

[W]hen the process shifts from investigatory to accusatory — when its focus is on the accused and its purpose is to elicit a confession — our adversary system begins to operate, and, *under the circumstances here*, the accused must be permitted to consult with his lawyer.¹³

In *Wade*, the Court decided that, for sixth amendment purposes, a post-indictment lineup was a "critical stage" of the proceedings.¹⁴ The *Wade* Court reasoned that counsel's presence at identification confrontations would have the effect of minimizing several hazards of potential unfairness inherent in identification procedures.¹⁵ The hazards considered by the Court to be important included: (1) improper suggestion by the prosecution to the identifying witnesses, either intentionally or unintentionally;¹⁶ (2) the reluctance of witnesses to contradict their own prior identification at the trial;¹⁷ (3) the inability of the defense to reconstruct the confrontation

9. 368 U.S. 52 (1961). The Court decided that since the defense of insanity is lost if not pleaded at the arraignment under Alabama law (ALA. CODE tit. 15, § 423 (1958)), such an arraignment is a critical stage of the criminal proceeding. 368 U.S. at 53.

10. 399 U.S. 1 (1970). The Court determined that the "guiding hand" of counsel is essential at the preliminary hearing to protect the accused against an "erroneous or improper prosecution." The Court stated that counsel's presence at this stage of the prosecution might have four effects. First, skilled cross examination of the witnesses might expose fatal weaknesses in the state's case and lead the magistrate to refuse to bind the accused over; second, interrogation of witnesses could serve as a basis for impeachment at the trial; third, trained counsel can better discover the state's case which would facilitate the preparation of a defense; fourth, counsel can be influential, by his arguments at the preliminary hearing, in securing an early psychiatric examination or bail. *Id.* at 9.

11. 399 U.S. at 9; 368 U.S. at 53.

12. 378 U.S. 478 (1963). In *Escobedo*, the petitioner was arrested and taken to police headquarters for interrogation in connection with the fatal shooting of his brother-in-law eleven days before. The police interrogated petitioner and refused his many requests to see his lawyer who was present in the police station. Finally, the petitioner made a damaging statement which was admitted at the trial and led to his conviction.

13. *Id.* at 492 (emphasis added).

14. 388 U.S. at 237.

15. *Id.* at 236.

16. The *Wade* Court found:

"The influence of improper suggestion upon the identifying witnesses probably accounts for more miscarriages of justice than any other single factor — perhaps it is responsible for more such errors than all factors combined."

Id. at 229, quoting WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 26 (1971).

17. The *Wade* Court relied on a secondary source for this proposition as well: "It is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then before the trial."

388 U.S. at 229, quoting Williams & Hammelmann, *Identification Parades: Part I*, [1963] CRIM. L. REV. 479, 482.

at the trial;¹⁸ (4) the danger posed to objective identification when the identifying witness was also the victim of the crime;¹⁹ and (5) the unlikelihood that suspects would be alert to subtle unfairness at identification confrontations, and the probability that, even if the suspect were alert to such unfairness, the unlikelihood that he would be believed at trial over the positive identification of an eyewitness.²⁰ The danger created by unfairness in identification proceedings was recognized by the *Wade* Court as a threat to a defendant's right to confront meaningfully the witnesses against him at the trial, as well as a threat to the reliability of evidence procured from such proceedings.²¹ The *Wade* Court concluded:

The trial which might determine the accused's fate may well not be that in the courtroom but that at the pre-trial confrontation, with the state aligned against the accused, the witness, the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no effective appeal from the judgment there rendered by the witness — "that's the man."²²

The *Wade* Court, therefore, created a per se exclusionary rule for testimony derived from a post-indictment identification in the absence of counsel.²³

The question with which the *Kirby* Court was concerned involved a determination of the scope of the *Wade-Gilbert* rule.²⁴ The Court asserted that the initiation of judicial criminal proceedings "is the starting point of our whole system of adversary criminal justice"²⁵ and the point at which the "explicit guarantees of the Sixth Amendment are applicable."²⁶ The *Kirby* majority looked to the decisions following *Powell v. Alabama*²⁷ that concerned the expanded application of the right to counsel and concluded that, in each case, with the exception of *Escobedo*, the individual had already been formally brought within the adversary system by some positive action by the state.²⁸ The Court dismissed *Escobedo* as inapposite to the

18. The Court recognized that an identification confrontation without the presence of counsel was analogous to problems caused by privacy in secret interrogations. "Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on . . ." 388 U.S. at 230, quoting *Miranda v. Arizona*, 384 U.S. 436, 448 (1965). A concomitant danger goes to the reliability of testimony obtained under such police-controlled conditions.

19. This danger was of particular relevance to the present case since Shard was the victim of the robbery. See note 1 *supra*.

20. 388 U.S. at 218. The *Wade* Court stated further:

Improper influences may go undetected by a suspect, guilty or not, who experiences the emotional tension which might be expected when one is confronted with potential accusers.

Id. at 231, citing *Williams & Hammelmann*, *supra* note 17, at 489.

21. 388 U.S. at 235.

22. *Id.* at 235-36.

23. *Id.* at 240-41.

24. *Gilbert v. California*, 388 U.S. 263 (1967), applied the *Wade* per se exclusionary rule to state criminal trials. *Id.* at 273.

25. 406 U.S. at 689.

26. *Id.* at 689-90.

27. 287 U.S. 45 (1932).

28. *Id.* at 688-89. See generally *Coleman v. Alabama*, 399 U.S. 1 (1970); *Gilbert v. California*, 388 U.S. 263 (1967); *United States v. Wade*, 388 U.S. 218 (1967); *Massiah v. United States*, 377 U.S. 201 (1964); *White v. Maryland*, 373 U.S. 59

present case, saying that the purpose of the *Escobedo* decision was “to guarantee full effectuation of the privilege against self-incrimination . . . [and] not to vindicate the constitutional right to counsel as such.”²⁹ The *Wade* case was distinguished on the grounds that the *Wade* confrontation occurred after the indictment.³⁰ The *Kirby* Court asserted, however, that a suspect would, nevertheless, have some constitutional recourse — that is, through the fifth and fourteenth amendments — if the identification procedure was found to be “unnecessarily suggestive and conducive to irreparable mistaken identification.”³¹ In support of the proposition, *Stovall v. Denno*³² was relied upon by the Court as having struck “the appropriate constitutional balance between the right of a suspect to be protected from prejudicial procedures and the interest of society in the prompt and purposeful investigation of an unsolved crime.”³³

The dissenting Justices rejected the majority’s position that the initiation of formal judicial proceedings was necessary before the right to counsel at an identification confrontation could attach. They asserted that the controlling principle for applying the right to counsel at pretrial confrontations has been to determine if counsel’s presence was necessary to preserve the defendant’s basic right to a fair trial.³⁴

Further, the dissent rejected the Court’s assertion that *Escobedo* was inapposite to the present case, noting that, in *Wade*, the Court had specifically referred to the *Escobedo* decision as one that guaranteed that the accused “‘need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel’s absence might derogate from the accused’s right to a fair trial.’”³⁵ According to the majority, counsel was deemed necessary by the *Escobedo* Court only to protect the accused’s fifth and fourteenth amendment rights against compulsory self-incrimination;³⁶ the majority did not discuss the *purpose* for counsel’s presence. However, the dissenting Justices pointed out the *Wade* Court’s analysis that “nothing decided in the opinions in (*Escobedo* and *Miranda* [*v. Arizona*, 384 U.S. 436 (1965)]) links the right to counsel only to protection of Fifth Amendment rights”³⁷ and concluded that the purpose of counsel at a pretrial confrontation has been to protect the defendant’s right to a fair trial from being damaged by unfairness at such confrontations.³⁸ Clearly, the majority’s position that an accused is entitled to counsel at a pretrial identification only after the initiation of formal

(1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Hamilton v. Alabama*, 368 U.S. 52 (1961); *Johnson v. Zerbst*, 304 U.S. 458 (1938).

29. 406 U.S. at 688–89.

30. *Id.* at 690.

31. *Id.* at 691.

32. 388 U.S. 293 (1967).

33. 406 U.S. at 691.

34. *Id.* at 694.

35. *Id.*, quoting *United States v. Wade*, 388 U.S. 218, 226–27 (1967).

36. 406 U.S. at 694.

37. *Id.*, quoting *United States v. Wade*, 388 U.S. 218, 226 (1967). For a discussion of the *Miranda* decision, see notes 60–62 and accompanying text *infra*.

38. 406 U.S. at 689.

judicial proceedings³⁹ has created a new starting point for analyzing sixth amendment questions. Significantly, this holding is somewhat difficult to reconcile with the doctrine enunciated by the Court in prior cases.⁴⁰ What the *Kirby* Court has done is to shift the focus away from the rights sought to be protected, in favor of an emphasis upon the procedural formalities inherent in the criminal justice system. Absent such "formalities," these "rights" do not attach and the necessity of counsel is, therefore, abrogated.

The dissenting Justices were not in agreement with this change in emphasis and attached much greater significance to the *Wade* decision than did the majority.⁴¹ The *Wade* Court had concluded that the post-indictment lineup was a "critical stage" of the prosecution wherein a person was entitled to counsel on the grounds that such confrontations contained many hazards of potential unfairness.⁴² The dissenting Justices in *Kirby* argued that the *Wade* rationale should have been employed in the disposition of the present case⁴³ because the hazards discussed in *Wade* are no less damaging to an accused's chances for a fair trial simply because they have occurred prior to formal state action. It can be argued that on the facts of the present case the danger of improper suggestion by the police is even greater. A witness in a face-to-face confrontation is likely to consider that the police would not have apprehended a man whom they did not have good reason to suspect was the perpetrator of the crime.⁴⁴ It does not seem that a witness at the trial would be any more likely to contradict his prior identification of the suspect simply because the initial identification took place prior to the initiation of formal state prosecutorial action. The likelihood that unfairness at the confrontation would be detected by a pre-indictment suspect is arguably slight since, not having been formally charged by the state, the suspect is probably not as sensitive to procedural abnormalities as he would be were he already indicted. Furthermore, the pre-indictment suspect is certainly not as sensitive to the potential problems as his attorney would be. Moreover, the inability of a suspect identified at a pre-indictment confrontation to reconstruct effectively any unfairness that he did detect and to be believed by the jury is certainly not substantially different from the instance of a post-indictment confrontation.

The *Wade* Court was concerned with the effects of unfairness at identification proceedings on the quality both of proof and of representation

39. *Id.* at 691.

40. *See* United States v. Wade, 388 U.S. 218, 227 (1967).

41. The dissent presented a detailed discussion of *Wade*. *See* 406 U.S. at 692-700 (dissenting opinion).

42. *Id.* at 696-97.

43. *Id.* at 696-97, 704. In a one sentence dissenting opinion, Mr. Justice White asserted that the *Wade* and *Gilbert* cases governed the present case and compelled reversal. *Id.* at 705.

44. The suggestion that the police had good reason to hold the suspect might influence the witness to make a positive identification, when if a different identification technique such as a lineup were used he might not. Young, *Due Process Considerations in Police Showup Practices*, 6 CRIM. L. BULL. 373, 378 (1970).

at trial and not with the initiation of formal judicial proceedings.⁴⁵ The dissenting Justices in *Kirby* asserted that the *Wade* decision was not based upon an “abstract consideration of the words ‘criminal prosecutions’ in the Sixth Amendment,” but was firmly grounded upon the serious threats against a fair trial posed by unfairness at identification procedures.⁴⁶ The *Kirby* majority, however, did not discuss the *Wade* Court’s reasoning in determining the *Wade* confrontation a “critical stage,” but merely discounted its applicability to the present case because the *Wade* confrontation occurred after the indictment.⁴⁷

The *Kirby* Court asserted that unfairness in identification procedures could be remedied by application of the safeguards provided by the due process clause of the fourteenth amendment. It may be questioned, however, whether this method provides the most efficient constitutional vehicle to lessen the hazards of potential unfairness in identification procedures. The Supreme Court in *Gilbert* was essentially faced with the same dilemma and noted that:

Only a *per se* exclusionary rule . . . 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. In the absence of legislative regulations adequate to avoid the hazards to a fair trial which inhere in lineups as presently conducted, the desirability of deterring the constitutionally objectionable practice must prevail over the undesirability of excluding relevant evidence.⁴⁸

The reason that the *per se* exclusionary rule was adopted was to deter unfair police practices in the absence of legislative or local administrative regulations.⁴⁹ Cases decided under the fourteenth amendment due process clause certainly could not have the same deterrent effect upon unfair police practices as could a *per se* exclusionary rule.

Traditionally, due process violations have been examined by the Court on a case-by-case basis. In each instance, the totality of the circumstances have been examined by the Court in order to determine whether some compelling exigency justified the use of testimony obtained through prejudicial identification techniques.⁵⁰ The *Wade–Gilbert* rule was not designed to protect an individual from flagrantly unfair police identification procedures, but rather to protect him from the subtle abuses inherent in such procedures which may derogate from the accused’s right to a fair trial. The *Kirby* Court cited the due process approach applied in *Stovall* as the

45. 406 U.S. at 696.

46. *Id.*

47. *Id.* at 690.

48. 388 U.S. at 273.

49. The *Wade* Court asserted that the risks of abuse and unintentional suggestion at lineup proceedings — potential impediments to a meaningful confrontation at trial — were the bases of the *per se* exclusionary rule of tainted evidence obtained at such proceedings in the absence of counsel. The rule was designed as a regulatory measure in lieu of either legislative or administrative rules for such proceedings. 388 U.S. at 239.

50. *Stovall v. Denno*, 388 U.S. 293, 302 (1967).

constitutional answer to questions involving the admissibility of evidence obtained from pre-indictment identification confrontations.⁵¹ However, as the dissent noted, the *Stovall* decision was decided on due process grounds because the Court deemed that the purpose of the *Wade-Gilbert* rule would best be served if applied prospectively.⁵² In *Stovall*, the confrontation took place before the commencement of any formal prosecution by the state because *Stovall's* arraignment was postponed until he was able to retain counsel.⁵³ Yet, the *Stovall* Court stated that the accused raised "the same alleged constitutional errors in the admission of allegedly tainted identification evidence that were before us [in *Wade* and *Gilbert*]." ⁵⁴ The *Stovall* Court found that case to be a fitting vehicle to determine if the *Wade-Gilbert* rule was to be applied retroactively.⁵⁵ Thus, in a procedural setting somewhat similar to the present case, the Court denied relief to *Stovall* on the grounds that the purpose of the *Wade-Gilbert* rule was best served if applied prospectively,⁵⁶ and *not* because the confrontation occurred before the initiation of formal judicial proceedings.

The effect of the Court's decision on future cases involving the right to counsel prior to trial is in one respect very clear; the right does not attach until the initiation of formal judicial proceedings. Thus, the initial point of analysis for courts in future cases will not be whether the confrontation was a "critical stage" wherein valuable rights necessary to a fair trial could be won or lost, but whether the state has formally charged the accused with the commission of a crime. Therefore, there remains the question as to whether the *Escobedo* holding — requiring counsel's presence when the criminal process shifts from investigatory to accusatory — should be applied to future cases. The *Kirby* Court said⁵⁷ that *Escobedo* was limited to its facts by the Court in *Johnson v. New Jersey*.⁵⁸ Notwithstanding the fact that the *Wade* Court relied on *Escobedo* in its decision and that *Wade* was decided *after* the *Johnson* case, the actual

51. 406 U.S. at 691.

52. The criteria the *Stovall* Court used to determine whether the per se exclusionary rule was to be applied retroactively were:

- (a) the purpose to be served by the new standards;
- (b) the extent of the reliance by law enforcement authorities on the old standards; and
- (c) the effect on the administration of justice of retroactive application of the new standards.

388 U.S. at 297.

53. 406 U.S. at 702.

54. *Id.* at 703, quoting *Stovall v. Denno*, 388 U.S. 293, 294 (1967).

55. 388 U.S. at 297.

56. *Id.*

57. 406 U.S. at 689.

58. 384 U.S. 719, 733-34 (1965). The *Johnson* Court dealt with the question of the prospective application of the *Escobedo* rule and the *Miranda* guidelines. The Court stated that the *Miranda* guidelines would apply prospectively from the date of the *Miranda* decision because it was not clear from the holding of *Escobedo* that such guidelines would be handed down by the Court. The plurality interpreted the *Johnson* Court's recognition of the need for additional guidelines found by the *Miranda* Court to insure fairness in situations different than those in *Escobedo* to be a limitation of the *Escobedo* holding to its facts. *Id.* at 734. See note 12 and text accompanying note 13 *supra*.

language of *Escobedo* is narrow enough to sustain the *Johnson* interpretation.⁵⁹

It would seem, however, that the importance of *Escobedo* was diminished by the Court in *Miranda v. Arizona*.⁶⁰ The *Miranda* Court extended the right to counsel to custodial interrogations in order to preserve the defendant's right against self-incrimination.⁶¹ The *Miranda* decision would clearly apply to fact situations similar to *Escobedo*.⁶² Thus it seems that the relevance of *Escobedo* is more historical than practical.

The impact of the present decision on the administration of criminal justice by the states remains to be seen. In *Commonwealth v. Lopes*,⁶³ the Supreme Judicial Court of Massachusetts has applied the decision of the present case and has thereby overruled prior Massachusetts decisions which had held that counsel was required at identification proceedings that preceded the initiation of formal judicial proceedings. The Missouri Supreme Court, in *Arnold v. State*,⁶⁴ found that, in light of the *Kirby* decision, defendants were entitled to the presence of counsel at any lineup held after the complaint was filed, even if such lineup preceded the filing of formal indictment or information. It is apparent then that it will be within the province of each state to make its own determination as to when the proceedings are "formal," thereby requiring the right to counsel.

Similarly, the impact of the present decision on police practices also remains to be seen. Since it is now constitutionally permissible for lineups to be held in the absence of counsel when such lineups precede the initiation of formal judicial proceedings, it is quite conceivable that most identification confrontations will now be conducted before the filing of formal charges. While the *Kirby* Court did not suggest means for deterring unfairness in identification procedures, it, nevertheless, did not deny the existence of such potential unfairness. Thus, with the present decision, *Wade* will conceivably lose much of its impact as a means for assuring fairness at identification confrontations.

Prior to the present decision, the test for determining when the right to counsel attached at pretrial confrontations was whether or not such a confrontation was a "critical stage" in the proceedings. The *Kirby* Court has abrogated this test and asserted that the initiation of formal judicial proceedings is a condition precedent to the constitutionally required presence of counsel. However, while the plurality determined that counsel was not required at the pre-indictment identification confrontation, it did not refute

59. See text accompanying note 13 *supra*.

60. 384 U.S. 436 (1965).

61. *Id.* at 457-58.

62. The *Miranda* decision makes clear that once the police have a suspect in custody and have focused their suspicion on him, as the police had done in *Escobedo* (see note 12 *supra*), that suspect is entitled to warnings outlining his rights, including his right to have counsel present at the interrogation.

63. _____ Mass. _____, 287 N.E.2d 118 (1972). A rape victim identified the defendant as her assailant at a lineup that occurred two months after the crime. The identification was admitted against the defendant and the court ruled that it was admissible in light of *Kirby*, despite the fact that counsel was not present.

64. 484 S.W.2d 248 (Mo. 1972).