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Criminal Law: Self-Incrimination: Right to Council

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settlement of the estate.[43] These should not be deemed as exclusive, and innocent third party banks should not be forced to carry a heavy liability to serve those ends. The *Marin* case loosens the absolute grip of the trustee on the property of the bankrupt, and, in so doing, achieves another end which should be sought in bankruptcy proceedings. If the Court would have placed the decision on surer grounds, we could be sure of further equitable results in this area. As it is, we can only hope that the Court will continue on its present path.

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Criminal Law: Self-Incrimination: Right to Counsel: After having been indicted for conspiring to rob a federally insured bank and after counsel had been appointed to represent him, the accused was placed in a lineup for identification purposes. In the lineup he was required to repeat the words used by the robber, as were the others in the lineup. His appointed counsel was not notified and was not present. Although the United States Supreme Court held in *United States v. Wade*[1] that the accused's Fifth Amendment privilege against self-incrimination had not been infringed, it did hold that his Sixth Amendment right to the assistance of counsel had been violated. While the opinion of the Court and the separate opinions of Justices Black, White and Fortas are helpful in clarifying certain questions in the law, they do raise further questions which are left unanswered.

The first part of the Court's opinion relates to the alleged violation of the accused's privilege against self-incrimination. There are two basic theories of what constitutes self-incrimination. The first is that self-incrimination includes any compulsion of an individual to cooperate in any way in his prosecution. The second is that self-incrimination includes only compelled communication from an individual. The Court stated in *Schmerber v. California*[2] that only evidence of a testimonial or communicative nature falls within the privilege. In *Wade* the Court makes it clear that all speech is not necessarily communicative, even when the words uttered are those used by the person who committed the crime: ". . . he was required to use his voice as an identifying physical characteristic, not to speak his guilt."[3] Mr. Justice Black in his dissent from this point relies on his dissent in *Schmerber*,[4] where he suggested that obtaining any evidence from the suspect by compulsion violates the Fifth Amendment privilege. He does not imply, however, that *Schmerber* is

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[43] Kuechner v. Irving Trust, 299 U.S. 445, 452 (1937). *Cf.* Bailey v. Grover, 88 U.S. 342, 346 (1874).

[1] 388 U.S. 218 (1967).

[2] 384 U.S. 757, 761 (1966), where a blood sample was taken from a suspect (over his objection) to determine its alcohol content.

[3] 388 U.S. 218, 222-23 (1967).

[4] 384 U.S. 757, 773 (1966).

distinguishable on the ground that there the suspect was not required to speak.

Mr. Justice Fortas, on the other hand, considers *Schmerber* distinguishable because in that case the individual was not compelled to actively cooperate—"to accuse himself by a volitional act. . . ."[5] His argument is primarily historical. Nevertheless, history does not support his position as completely as Mr. Justice Fortas suggests, for it may also be argued from history that compulsion of the accused to speak for identification purposes only does not fall within the privilege. "The privilege against self-incrimination came to be formulated in opposition to attempts to extract from an accused person a statement *concerning his guilt or innocence.*"[6] [Emphasis added]. Wigmore asserts that "unless some attempt is made to secure a communication—written, oral or otherwise—upon which reliance is to be placed as involving [the accused's] consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a testimonial one."[7] He apparently suggests that the accused may be required to cooperate fully in the investigation with the exception of testimonial compulsion.[8] The cases in which the point has been discussed are in conflict.[9] In fact, not until the decision in *Schmerber v. California*[10] was the foundation laid for some clarification, and not until the decisions in the instant case and its companion, *Gilbert v. California,*[11] was the issue decided by the Supreme Court.

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[5] 388 U.S. 218, 261 (1967).

[6] Weintraub, *Voice Identification, Writing Exemplars and the Privilege Against Self-incrimination,* 10 VAND. L. REV. 485, 491 (1957).

[7] 8 WIGMORE, EVIDENCE §2265 (McNaughten rev. 1961).

[8] Wigmore includes as not violative of the privilege against self-incrimination fingerprinting, photographing, measuring of a suspect, imprinting of other portions of a suspect's body, examination of the body for identifying characteristics or evidence of disease or crime, extraction of substance from inside the body for purposes of analysis, removing clothing from or putting it on a suspect, requiring a suspect to speak or write for identification, or to appear in court, stand, assume a stance, walk or make a particular gesture, and to submit to an examination for sanity. He suggests that requiring a subject to the use of truth serum or the lie detector is on the boundary line because his knowledge despite his will to the contrary is extracted. 8 WIGMORE §2265 (McNaughten rev. 1961).

The United States Supreme Court has quite clearly indicated, however, that lie detector tests and other tests "seemingly directed to obtain 'physical evidence'" would violate the accused's privilege against self-incrimination because they "may actually be directed to eliciting responses which are essentially testimonial." Schmerber v. California, 384 U.S. 757, 764 (1966).

See also, cases cited at note 12, *infra.*

[9] Weintraub, *Voice Identification, Writing Exemplars and the Privilege Against Self-incrimination, supra* note 6 at 503-05; Compare Aaron v. State, 271 Ala. 70, 122 So.2d 360 (1960); State v. King, 84 N.J. Super. 297, 201 A.2d 758 (1964).

[10] 384 U.S. 757 (1966).

[11] 388 U.S. 263 (1967), where compelling an accused to give a handwriting exemplar was held not violative of his privilege against self-incrimination. By analogy, it seems that the use of "voice prints" would not be objectionable on the ground of self-incrimination.

Although Mr. Justice Fortas' "active cooperation" test may have a logical basis, the majority of the Court has decided that the "testimonial or communicative nature" test is a natural development of the law in this area and is now firmly established in determining whether or not the particular compulsion is within the privilege. This decision does not, of course, preclude state courts from interpreting their state constitutional or statutory provisions regarding self-incrimination according to Justice Fortas' theory, thereby prohibiting any compulsion of the accused to speak or "actively cooperate".[12]

The remainder of the Court's opinion relates to the right to counsel claim. The decision is based on the Court's determination that the lineup is a "critical stage" of the prosecution, and therefore a stage at which counsel's assistance is necessary to assure a meaningful defense.[13] The standard which the Court will use in deciding whether or not a particular step in the Government's case is a critical stage is suggested in the Court's discussion of the various types of physical and chemical identification tests: "they are not critical stages since there is minimal risk that [the accused's] counsel's absence at such stages might derogate from his right to a fair trial."[14] It seems that the Court will decide the issue on a case by case basis by determining whether or not the particular procedure involved only a slight risk of violating the accused's constitutional rights. The majority in *Wade* found substantial risk in the confrontation of an accused for identification.

The historical argument of the Court is founded upon the basic "right to counsel" cases.[15] The cases decided prior to *Escobedo v. Illinois*[16] were concerned with the right to counsel either after indictment, at the time of arraignment, or at some other critical *judicial* proceeding. The only major exception is the case of *Massiah v. United States*.[17] In *Massiah* there was no judicial proceeding involved, but the suspect had

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[12] *Cf.* Weintraub, *Voice Identification, Writing Exemplars and the Privilege Against Self-incrimination, supra* note 6 at 490. The Wisconsin Supreme Court has suggested that the Wisconsin constitution art. I, §8 (privilege against self-incrimination) may be violated if the accused is *forced* to cooperate and he objects, but that there is no violation if the suspect is told what to do and he does it voluntarily. Rogers v. State, 180 Wis. 568, 571, 193 N.W. 612, 613 (1923) (suspect required to wear clothes similar to those worn by the robber). The Wisconsin court has also held that the issues of guilt and insanity must be separated in a criminal trial under certain circumstances because of the compulsory mental examination, but this decision is based upon the testimonial and communicative nature of inculpatory statements made during such an examination. State *ex. rel.* LaFollette v. Raskin, 34 Wis.2d 607, 627, 150 N.W.2d 318, 328 (1967).

[13] 388 U.S. 218, 225 (1967).

[14] 388 U.S. 218, 228 (1967).

[15] Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 201 (1964); Hamilton v. Alabama, 368 U.S. 52 (1961); Powell v. Alabama, 287 U.S. 45 (1932).

[16] 378 U.S. 478 (1964).

[17] 377 U.S. 201 (1964) (obtaining incriminating statements by surreptitious means).

retained counsel and had been released on bail. *Escobedo v. Illinois* and *Miranda v. Arizona,*[18] the first cases to hold that there is a right to counsel before the institution of judicial proceedings, dealt with a suspect's right to have counsel present to protect his Fifth Amendment privilege against self-incrimination during police interrogation. The Court stated in *Wade,* however, that "nothing decided or said in the opinions in the cited cases links the right to counsel only to the protection of Fifth Amendment rights."[19] As will be seen later, the Court is concerned in the instant case with the protection of the accused's sixth amendment right to confront the witnesses against him.

It may be interesting to speculate as to whether the Court intended the holding to be limited to an extension of the cases decided prior to *Miranda* and *Escobedo* (since Wade had been indicted and counsel had been appointed), or whether the right to counsel is extended to all lineups, whenever conducted. Such speculation could probably result in only one conclusion, however, because the attitude and logic of the Court's opinion as a whole indicate quite clearly that the right is to be extended to suspects as well as persons accused of crime. This is true in spite of the generous use of words such as "accused" and "post-indictment" which taken alone seem to indicate the contrary. Mr. Justice White is aware of the possibility of a confrontation prior to indictment and concludes:

> The rule applies to any lineup, to any other techniques employed to produce an identification and *a fortiori* to a face-to-face encounter between the witness and the suspect alone, regardless of when the identification occurs, in time or place, and whether before or after indictment or information.[20]

Justice White's conclusion finds support in logic, for if an accused's rights are likely to be "irretrievably lost" as the result of a prejudicial lineup, it would not seem to matter when the lineup occurs.

Another argument of the Court is founded upon commentaries and cases which relate to the many possibilities of improper suggestion in identification procedures and the defendant's inability to recognize them or to establish their existence at trial. The Court points out that the suggestion may be intentional or unintentional but, in either case, it may be subtle and undetectable by witnesses and participants. The Court apparently assumes that counsel are generally able to detect such improper suggestion. Justice White in his dissent states that the majority must assume that counsel cannot discover the circumstances of the pretrial identification from other sources.[21] Perhaps the majority does not make this assumption in view of the Supreme Court's apparent desire

[18] 384 U.S. 436 (1966).
[19] 388 U.S. 218, 226 (1967).
[20] 388 U.S. 218, 251 (1967).
[21] 388 U.S. 218, 252-253 (1967).

to curb improper police practices by its decisions, regardless of whether there are adequate means to discover them and prevent the use of the fruits of such practices.[22] If the accused himself cannot detect prejudicial suggestion and it is not discoverable from other sources, defense counsel will not be able to effectively cross-examine the prosecution's witnesses at trial, for unless counsel is present at the lineup he will not be in a position to discover the facts and circumstances which may raise the inference of a prejudicial lineup. To this extent the Court's argument is well-supported by case law, in that the accused's right to confront witnesses is denied if he cannot effectively cross-examine them.[23]

The effect of *Wade* on both judicial and extrajudicial proceedings is the final problem to be examined. There is a distinction to be made between a courtroom identification which is made after a lineup identification at which the accused's counsel was not present and testimony concerning the lineup identification itself. As to the former, the instant case holds that it is not to be excluded *per se,* but that the prosecution must be given the opportunity "to establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the lineup identification."[24] The Court thus adopts the rule of *Wong Sun v. United States.*[25] The test is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."[26] The problem is, of course, that it is difficult if not impossible to show that the in-court identification is not the "fruit" of the lineup identification.[27]

As to testimony concerning the lineup identification of the uncounseled participant, which is normally used to bolster the courtroom identification, the *per se* exclusionary rule implied in *Wade* is expressed in the companion case of *Gilbert v. California:* "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]

The extension of the right to counsel to extrajudicial proceedings such as the lineup may not increase the burden upon law enforcement authorities as much as it might seem. The opinion nowhere states what the result will be if an accused's counsel is present at a lineup which he

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[22] Miranda v. Arizona, 384 U.S. 436, 447 (1966).
[23] *Cf.* Pointer v. Texas, 380 U.S. 400 (1965), and cases cited; *See also* Smith v. Illinois, 88 S.Ct. 748 (1968).
[24] 388 U.S. 218, 240 (1967).
[25] 371 U.S. 471, 488 (1963).
[26] MAGUIRE, EVIDENCE OF GUILT, 221 (1959).
[27] *Cf.* Justice Black's dissent, 388 U.S. at 248.
[28] 388 U.S. 263, 273 (1967). It should be noted at this point that the exclusionary rules of *Wade* and *Gilbert* will not be applied retroactively by the Supreme Court. Stovall v. Denno, 388 U.S. 293 (1967).

alleges is prejudicial. There does not seem to be any ground upon which the accused could refuse to participate in the lineup, because the Court has also held in the instant case that compelling an accused to participate in a lineup does not violate his privilege against self-incrimination. The only possible basis for refusal to participate is that the right to counsel may not really be meaningful if all counsel can do is raise an objection at trial; but if counsel were allowed to object to the accused's participation at the time of the lineup, the identification stage might be "transformed into an adversary proceeding not under the control of a judge."[29] It is doubtful that the Court intended to do more than preserve the right to have improperly obtained evidence excluded at trial, for the fear of exclusion and the resulting heavy burden on the prosecution ought to be sufficient to insure fairness in the lineup.

The Court also makes the same provision for an "intelligent waiver" of counsel as it did in *Miranda*. The opinion does not, however, attempt to define "intelligent waiver" as it relates to the right to have counsel present at a lineup. The question of whether or not there has in fact been an intelligent waiver of counsel will necessarily have to be determined according to the law of the jurisdiction in which the question arises.[30]

There is an apparent inconsistency in the Court's decision with regard to courtroom identifications which are not preceded by any prior confrontations. If the accused is not subjected to any pre-trial confrontation for identification at all, then the first time he will be identified will be in the courtroom, and there the element of suggestion is obvious.[31] This may not be of much significance, however, for if the identity of the accused is really in question, some type of pre-trial confrontation will be a necessity. Justice White argues that the prosecution will be prejudicially delayed in that a suspect will have to be provided counsel before he can be identified or cleared, which could otherwise be done shortly after arrest.[32] This will probably not prove to be too great an additional burden, because the police will, in all likelihood, want to question the suspect, and their conduct in doing so will be governed by *Miranda v. Arizona*,[33] so counsel will be required anyway unless waived.

It will be up to the various jurisdictions to apply the *Wade* decision

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[29] 388 U.S. 218, 256 (1967).

[30] In Wisconsin guidelines have been set out by the Supreme Court in the case of State *ex. rel.* Burnett v. Burke, 22 Wis.2d 486, 492, 126 N.W.2d 91, 95 (1964). If they are not strictly adhered to, however, the waiver of counsel is not necessarily ineffective. State *ex. rel.* Kline v. Burke, 27 Wis.2d 40, 45, 133 N.W.2d 405, 407-08 (1965); Creighbaum v. State, 35 Wis.2d 17, 24-25, 150 N.W.2d 494, 497 (1967). An important question in Wisconsin is whether or not the accused has the *capacity* to understand his circumstances and thus to intelligently waive his right to counsel. Browne v. State, 24 Wis.2d 491, 511a, 129 N.W.2d 175, 184 (1964). *Miranda* is quite clear on what does *not* constitute a waiver. Miranda v. Arizona, 384 U.S. 436, 475-477 (1966).

[31] *Cf.* Justice White's dissent, 388 U.S. at 253.

[32] 388 U.S. 218, 255 (1967).

[33] 384 U.S. 436 (1966).

to their own criminal procedure. The problem is that the Supreme Court has not left much room for deviation from the principles laid down. One question which might arise is whether or not the decision should be applied retrospectively. It is doubtful that the question will be answered in the affirmative because this decision is of the type which affects only a police procedure which was considered acceptable before the decision.[34] The only other question which seems to be left open is whether or not the decision should be limited to its facts—to the situation in which an accused has been indicted and has retained counsel before he is placed in a lineup. The foregoing discussion and a recognition that the Supreme Court is telling state courts and law enforcement agencies to be aware of and to avoid techniques of identification which may be suggestive should provide an answer to that question.[35]

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Federal Income Taxation: the Commissioner's "Sleep or Rest" Interpretation Sustained: In United States v. Correll,[1] the Supreme Court held that a taxpayer on a business trip may "deduct the cost of his meals only if his trip requires him to stop for sleep or rest."[2] This decision has effected a renaissance of the Treasury's interpretation, which had previously endured judicial hostility from the Sixth[3] and Eighth Circuits,[4] and the Tax Court,[5] while receiving favorable treatment from the First Circuit.[6]

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[34] This is the reasoning of the Wisconsin Supreme Court in cases concerning a rule of federal constitutional law the only effect of which is to strike down a police procedure acceptable at the time of trial. State *ex. rel.* LaFollette v. Raskin, 30 Wis.2d 39, 139 N.W.2d 667 (1966). *See also*, Riemers v. State, 31 Wis.2d 457, 466, 143 N.W.2d 525, 530 (1966) (*Miranda* and *Escobedo* not to be applied retrospectively in Wisconsin).

[35] The Wisconsin Supreme Court has clearly limited *Escobedo* to its facts and seems to take a narrower attitude toward the right to counsel than does the United States Supreme Court. Holloway v. State, 32 Wis.2d 559, 563-565, 146 N.W.2d 441, 443-444 (1966); State v. Burnett, 30 Wis.2d 375, 383-384, 141 N.W.2d 221, 225 (1966); Browne v. State, 24 Wis.2d 491, 511f-g, 131 N.W.2d 169, 171-72 (1964). Nevertheless, it is difficult to understand how the Wisconsin court could narrowly interpret *Wade*.

[1] United States v. Correll, 88 S.Ct. 445 (1967).

[2] *Id.* at 445.

[3] Correll v. United States, 369 F.2d 87 (6th Cir. 1966), where the Court held "the Commissioner's overnight or sleep or rest rule, bears no rational relation to the business necessity of the meal expenses". *Id.* at 89.

[4] Hanson v. Commissioner, 289 F.2d 391 (9th Cir. 1962), where the Court erroneously relied on Williams v. Patterson, Note 16 *infra*, to allow a deduction where the taxpayer did not obtain sleep or rest.

[5] William v. Bagley, 46 T.C. 176 (1966), where the Tax Court abandoned the previously strict adherence to the overnight rule as the sole criteria of determining the business travel deduction.

[6] Commissioner v. Bagley, 374 F.2d 204 (1st Cir. 1967), where the court held "that fairness to the greatest number of people, and at the same time a practical administrative approach which will not permit every meal-purchasing taxpayer to take pot lunch in the courts, is to accept the Commissioner's Sleep or Rest Rule." *Id.* at 207.