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The Right to Counsel in Pretrial Custodial Identification Proceedings, People v. Bustamante, 634 P.2d 927 (Cal.)

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THE RIGHT TO COUNSEL IN PRETRIAL CUSTODIAL IDENTIFICATION PROCEEDINGS

People v. Bustamante, 30 Cal. 3d 88, 634 P.2d 927, 177 Cal. Rptr. 576 (1981)

In *People v. Bustamante*,[1] the California Supreme Court relied on the state constitution[2] to extend an accused's right to counsel to preindictment[3] custodial lineups.[4]

Police officers arrested defendant on suspicion of robbery[5] and other crimes.[6] While defendant was in custody, a witness to the robbery positively identified him in a preindictment lineup. The witness reaffirmed his identification at trial. Although defendant had requested counsel

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1. 30 Cal. 3d 88, 634 P.2d 927, 177 Cal. Rptr. 576 (1981).

2. CAL. CONST. art. I, § 15 states:

> The defendant in a criminal cause has the right to a speedy public trial, to compel attendance of witnesses in the defendant's behalf, to have the assistance of counsel for the defendant's defense, to be personally present with counsel, and to be confronted with the witnesses against the defendant. The Legislature may provide for the deposition of a witness in the presence of the defendant and the defendant's counsel.

A series of recent California cases have interpreted this provision of the California Constitution independently of United States Supreme Court decisions interpreting parallel provisions of the federal constitution. *See, e.g.,* People v. Chavez, 26 Cal. 3d 334, 605 P.2d 401, 161 Cal. Rptr. 762 (1980).

3. For purposes of this Comment, the term "preindictment" encompasses the period prior to the filing of an information for felony prosecutions and the filing of a formal complaint in misdemeanor prosecutions. The California Supreme Court in *Bustamante* similarly defined "preindictment." 30 Cal. 3d at 91 n.1, 634 P.2d at 929, 177 Cal. Rptr. at 578. For statutes defining the use of an indictment or complaint, see, *e.g.,* CAL. PENAL CODE §§ 737, 740 (Deering 1982); FED. R. CRIM. P. 3, 7. *See also infra* note 54.

4. Lineups, showups, and photograph displays are the custodial identification procedures most frequently used in criminal investigations and prosecutions. In lineups and showups the police present the suspect to the witness in person. See *infra* note 31 for a brief discussion of lineup and showup procedures.

The photograph display procedure entails a presentation by the police of an array or "lineup" of several photographs from which the witness identifies the suspect. For a discussion of the dangers and constitutional safeguards of the various identification procedures, see Grano, Kirby, Biggers & Ash, *Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?,* 72 MICH. L. REV. 717 (1974). For current developments in case law on the right to counsel at pretrial identification proceedings, see N. SOBEL, EYEWITNESS IDENTIFICATION (1981); Note, *The Right to Counsel: Attachment Before Criminal Judicial Proceeding?,* 47 FORDHAM L. REV. 810 (1979).

5. Defendant's appeal to the California Supreme Court focused solely on his robbery conviction. 30 Cal. 3d at 94, 634 P.2d at 930, 177 Cal. Rptr. at 579.

6. The State ultimately charged defendant with robbery, burglary, theft of a gun, receipt of stolen property, possession of a firearm, possession of cocaine, and possession of concentrated cannabis. *Id.* at 93, 634 P.2d at 930, 177 Cal. Rptr. at 579.

prior to the lineup, none was provided until sometime after the identification proceeding.[7]

At trial, the defense moved to exclude the witness's in-court identification testimony from evidence, contending that it was based on a custodial lineup during which the State violated defendant's right to counsel.[8] The trial court denied the motion and the jury subsequently convicted defendant.[9] The defendant appealed the conviction[10] on the ground that the trial court erred in admitting the identification testimony.[11] In a plurality decision, the California Supreme Court[12] reversed the conviction and *held*: Under the California Constitution, an accused has a right to assistance of counsel at a preindictment lineup.[13]

The sixth amendment to the United States Constitution, ratified in 1791, guarantees criminal defendants the right to assistance of counsel in federal prosecutions.[14] In *Gideon v. Wainwright*,[15] the United States

7. *Id.* at 93, 634 P.2d at 930, 177 Cal. Rptr. at 579. The facts do not specify the point at which the defendant first received counsel's assistance.

8. *Id.* at 93, 634 P.2d at 930, 177 Cal. Rptr. at 579. Prior to trial, the defense moved to challenge the witness' lineup identification on the same grounds. The trial court denied the motion. *Id.* The victim of the crime identified the defendant at the preliminary hearing, and repeated this identification at trial. The defendant did not object to the victim's identification testimony, however, because there were no due process violations at the preliminary hearing identification. *Id.*

9. *Id.* In addition to the robbery conviction, the jury convicted defendant of receiving stolen property, being an ex-felon in possession of a firearm, possessing cocaine, and possessing concentrated cannabis. The jury acquitted defendant on the charges of burglary and theft of a stolen gun. *Id.*

10. People v. Bustamante, 110 Cal. App. 3d 981, 168 Cal. Rptr. 298 (1980).

11. The absence of counsel at a police lineup conducted after June 12, 1967, is reversible error. Any suspect participating in a custodial lineup after the Supreme Court decisions of United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967), is entitled to counsel as a matter of right. *See also infra* note 33 and accompanying text.

12. The California Supreme Court sat en banc.

13. 30 Cal. 3d at 101-02, 634 P.2d at 935-36, 177 Cal. Rptr. at 584-85.

14. In 1789 Congress passed the sixth amendment with almost no debate. Rachow, *The Right to Counsel: English and American Precedents,* 11 WM. & MARY Q. 1, 21-26 (1954). The sixth amendment reads in part:

> 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, which district shall have previously ascertained by law, 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 defense.

U.S. CONST. amend. VI, § 1.

Historically, the right to counsel was a procedural right available to defendants in selected criminal and capital cases in England. *See generally* Note, *An Historical Argument for the Right to Counsel During Police Interrogation,* 73 YALE L.J. 1000, 1018 n.99 (1964). Historians and com-

Supreme Court extended the specific guarantees of the sixth amendment to the states through the due process clause of the fourteenth amendment.[16] In addition to the sixth and fourteenth amendment safeguards, criminal defendants at the state level are guaranteed the right

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mentators on English law agree that a defendant prosecuted in a criminal trial for a felony or a lesser wrong could receive legal assistance at pleadings of exception and at other intervals during trial. Case law, statutes, and Yearbooks do not clearly define the stages of the criminal trial at which the assistance of counsel attached.

The criminal defendant's right to counsel was preserved in common law England as an absolute right. In sixteenth century England, however, courts began to limit the assignment of counsel by establishing a distinction between fact and law on issues in a criminal trial. Courts began to restrict the right to assistance of counsel to defendants pleading matters of law and denied advice of counsel on issues or demonstrations of fact. Frequently courts narrowly construed what constituted questions of law, further limiting an accused's right to counsel. Jaeger, *The Right to Counsel During Police Interrogation: The Aftermath of Escobedo,* 53 CALIF. L. REV. 337, 347 n.57 (1965). English courts denied defendants accused of treason the assistance of counsel. The use of witnesses to introduce and illustrate factual issues developed concurrently with the right to counsel. The courts maintained that witness confrontations and accusations of treasonous conduct were matters of fact, not law, and thus the defendant was not entitled to counsel. *See* Russel's Case, 9 How. St. Tr. 577 (1683); Raleigh's Case, 1 How. St. Tr. 236 (1603). For a history of the development of the right to counsel in common law England, see generally 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 244-72 (1883); 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 607-20 (1936 ed.).

American courts did not adhere to the distinction articulated in English statutes and cases, and thus, did not similarly restrict the right to counsel. Eleven of the thirteen colonies abolished the dichotomic application of right to counsel either expressly or by implication in colonial statutory provisions or constitutions granting the accused the right to the assistance of counsel: Connecticut, Delaware, Georgia, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, and Vermont. *See* Note, *supra*, at 1030-31.

15. 372 U.S. 335 (1963).

16. The *Gideon* Court stated: "[A] provision of the Bill of Rights which is fundamental and essential to a fair trial is made obligatory upon the States by the Fourteenth Amendment." *Id.* at 342. The pertinent portion of the fourteenth amendment provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

Previously, in Powell v. Alabama, 287 U.S. 45 (1932), the Supreme Court recognized that indigent defendants in capital cases were entitled to assistance of counsel at trial and at stages prior to trial. The Court relied on the due process clause of the fourteenth amendment rather than the sixth amendment right to counsel guarantee. *See infra* notes 19-24 and accompanying text. In 1938, the Court applied the sixth amendment right to counsel to federal felony prosecutions. Johnson v. Zerbst, 304 U.S. 458 (1938). The *Johnson* Court, however, refused to extend the right to counsel to state felony prosecutions. In Betts v. Brady, 316 U.S. 455 (1942), the Court reaffirmed *Johnson* and held that the "due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment." *Id.* at 461-62. The *Betts* Court interpreted the due process clause narrowly and concluded that counsel's assistance at

to counsel by parallel state constitutional provisions.[17] Although the

state criminal prosecutions was a matter of state law and not a right protected by the federal constitution. *Id.*

In 1963, the Supreme Court overruled *Betts* in Gideon v. Wainwright, 372 U.S. 335 (1963). *See supra* notes 15-16 and accompanying text. By granting indigent defendants the right to counsel in all state criminal prosecutions, the Court in *Gideon* determined that the due process clause of the fourteenth amendment fully incorporated the sixth amendment guarantee of the right to counsel. *See generally* C. WHITEBREAD, CRIMINAL PROCEDURE 514-19 (1980).

17. By 1789, the states had enacted statutes and ordinances expressly granting defendants the assistance of counsel at criminal trials. North Carolina passed a statute providing that "every person accused of any crime or misdemeanor whatsoever, shall be entitled to counsel in all matters which may be necessary for his defense, as well to facts as to law. . . ." 1 N.C. REV. LAWS 225 (1777) (Iredell & Martin eds. 1804), *cited in* Note, *supra* note 14, at 1029. In addition, several other states enacted similar provisions granting a defendant the right to counsel in felony as well as misdemeanor prosecutions. *See* S.C. PUB. LAWS 25 (1731) (Grimke ed. 1790); 2 Z. SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 392, 398-99 (1796). Delaware, New Jersey, and Pennsylvania relied on the Penn Charter of 1701 to grant defendants the right to counsel in criminal trials, explicitly extending the common law right: "[A]ll criminals shall have the same Privileges of Witness and Council as their Prosecutors." PENN CHARTER art. V (1701), *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS COLONIAL CHARTERS AND ORGANIC LAWS 3079 (Thorpe ed. 1909) [hereinafter cited as THORPE]. *See also* DEL. CONST. art. XXIV (1776), *reprinted in* 1 THORPE, *supra*, at 566; N.J. CONST. art. XVI (1776), *reprinted in* 5 THORPE, *supra*, at 2597. New Hampshire, Massachusetts, Pennsylvania, and Vermont enacted constitutional provisions that included the assistance of counsel as part of an accused's right to defend himself in a criminal trial: "Every subject shall have a right . . . to be fully heard in his defence by himself, and counsel." N.H. CONST. pt. 1, art. XV (1784), *reprinted in* 4 THORPE, *supra*, at 2455. *See also* MASS. CONST. pt. 1, art. XII (1780), *reprinted in* 3 THORPE, *supra*, at 1891; PENN. CONST. art. IX (1776), *reprinted in* 5 THORPE, *supra*, at 3083; VT. CONST. ch. I, § 10 (1777), *reprinted in* 6 THORPE, *supra*, at 3741. The Maryland Constitution of 1776 simply provided that defendants in criminal prosecutions are entitled to counsel. MD. CONST. art. XIX, *reprinted in* 3 THORPE, *supra*, at 1688. New York's constitution explicitly guaranteed that "in every trial, impeachment or indictment for crimes or misdemeanors, the party impeached or indicted shall be allowed counsel, as in civil actions." N.Y. CONST. art. XXXIV (1777), *reprinted in* 5 THORPE, *supra*, at 2635.

After the states ratified the United States Constitution, Georgia and Rhode Island drafted constitutional provisions ensuring the accused the right to counsel. The Georgia constitution of 1798 provided that "no person shall be debarred from advocating or defending himself or counsel, or both." GA. CONST. art. III, § 8, *reprinted in* 2 THORPE, *supra*, at 799. Rhode Island modified its Declaration of Rights to include a right to counsel provision similar to that of the sixth amendment. R.I. REV. PUB. LAWS 80-81, § 6 (1798). *See generally* W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 18-22 (1955); Note, *supra* note 14, at 1055-57.

Today, 49 states have constitutional provisions entitling a defendant to the assistance of counsel in criminal prosecutions. Alaska, Iowa, Michigan, Minnesota, New Jersey, Rhode Island and West Virginia adopted wording similar to that of the sixth amendment. *See, e.g.,* ALASKA CONST. art. I, § 11 ("In all criminal prosecutions the accused . . . is entitled to have the assistance of counsel for his defense.") *See also* IOWA CONST. art 1, § 10; MICH. CONST. art. 1, § 20; MINN. CONST. art. 1, § 6; N.J. CONST. art. 1, ¶ 10; R.I. CONST. art. 1 § 10; W. VA. CONST. art. 3, § 14. In 37 states, the accused is entitled to be defended by counsel, by himself, or by both. *See* ALA. CONST. art. 1, § 6; ARIZ. CONST. art. 2, § 24; ARK. CONST. art. 2, § 10; CAL. CONST. art. 1, § 15; COLO. CONST. art. 2, § 16; CONN. CONST. art. 1, § 8; DEL. CONST. art. 1, § 7; FLA. CONST. art. 1,

right to counsel is firmly established in both state and federal jurisdictions, courts disagree on the stage of the criminal proceeding at which the right must attach.[18]

In 1932, in *Powell v. Alabama*,[19] the Supreme Court recognized that a defendant's right to a fair trial is contingent upon the extension of his right to counsel beyond the boundaries of the trial itself.[20] Although the *Powell* Court specifically held that an indigent offender in a capital case is entitled to a court-appointed attorney,[21] the Court additionally asserted that a defendant's right to counsel encompasses pretrial proceedings[22] from arraingment to the beginning of trial.[23] In reaching

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§ 16; IDAHO CONST. art. 1, § 13; ILL. CONST. art. 1 § 8; IND. CONST. art. 1, § 13; KAN. CONST. BILL OF RTS., § 10; KY. CONST. § 11; ME. CONST. art. 1, § 6; MASS. CONST. § 13; MISS. CONST. art. 3, § 26; MO. CONST. art. 1, § 18(a); MONT. CONST. art. 2, § 24; NEB. CONST. art. 1, § 11; NEV. CONST. art. 1, § 8; N.H. CONST. pt. 1, art. 15; N.M. CONST. art. 2, § 14; N.Y. CONST. art. 1, § 6; N.D. CONST. art. 1, § 13; OHIO CONST. art. 1, § 10; OKLA. CONST. art. 2, § 20; OR. CONST. art. 1, § 11; PA. CONST. art. 1, § 9; S.C. CONST. art. 1, § 14; S.D. CONST. art. 6, § 7, TENN. CONST. art. 1, § 9; TEX. CONST. art. 1, § 10; UTAH CONST. art. 1, § 12; VT. CONST. ch. 1, art. 10; WASH. CONST. art. 1, § 22; WIS. CONST. art. 1, § 7; WYO. CONST. art. 1, § 10.

Five state constitutions have notably different provisions for the right to counsel. GA. CONST. art. 1, § 2-111 ("a defendant is to have the privilege and benefit of counsel"); HAWAII CONST. art. 1, § 11 ("right to assistance of counsel and, if the accused is indigent, the appointment of counsel"); LA. CONST. art. 1, § 13 (same); MD. CONST. DECL. OF RTS., art. 21 ("an accused is to be allowed counsel"); N.C. CONST. art. 1, § 23 ("the accused has the right to counsel").

In Blue v. State, 558 P.2d 636 (Alaska 1977), and People v. Jackson, 39 Mich. 323, 217 N.W.2d 22 (1974), the Alaska and Michigan Supreme Courts, by relying on their state constitutional provisions, granted defendants counsel in state criminal prosecutions at stages in which the United States Supreme Court, in Kirby v. Illinois, 406 U.S. 682 (1972), did not require counsel. *See* ALASKA CONST. art. I, § 11; MICH. CONST. art. 1, § 20. *See also supra* notes 47-52 and accompanying text.

Virginia is the only state that safeguards a criminal defendant's right to counsel by statute, *see* VA. CODE §§ 19.2-157 to .2-163 (1950 & Supp. 1982), and by judicial interpretation, *see, e.g.,* Timmons v. Peyton, 360 F.2d 327 (4th Cir. 1966); Noe v. Cox, 320 F. Supp. 849 (W.D. Va. 1970).

18. *See infra* notes 19-61 and accompanying text.

19. 287 U.S. 45 (1932). In *Powell*, defendants charged with rape did not have legal assistance at their arraignment. On the morning of the trial the judge designated counsel to represent defendants, although the record indicated the court-appointed attorney exerted at most casual efforts in representing the defendants. The jury found defendants guilty of rape and sentenced them to death. The United States Supreme Court reversed on the ground that the state denied the defendant a fair trial and right to counsel in violation of the fourteenth amendment. *Id.* at 52-56.

20. *Id.* at 57.

21. *Id.* at 71. The *Powell* Court held:

> [I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law. . . .

Id.

22. Pretrial proceedings include arraignment, *see, e.g.,* Hamilton v. Alabama, 368 U.S. 52

this conclusion, the Court reasoned that these stages constitute a "critical period" of the adversary criminal process.[24]

Subsequently, in *Hamilton v. Alabama*,[25] the Warren Court, relied on the *Powell* opinion to hold that a defendant's right to counsel attaches at "any critical stage"[26] in the criminal proceeding. Thereafter, state and federal courts frequently applied the critical stage test to grant counsel at arraignments,[27] preliminary hearings,[28] and custodial

(1961); Salty v. Adams, 465 F.2d 1023 (2d Cir. 1972); McLean v. Maxwell, 2 Ohio St. 2d 226, 208 N.E.2d 139 (1965), preliminary hearing, *see, e.g.,* Coleman v. Alabama, 399 U.S. 1 (1970); United States v. Pate, 430 F.2d 639 (7th Cir. 1970); State v. Owens, 391 S.W.2d 248 (Mo. 1965), and custodial interrogation, *see, e.g.,* Massiah v. United States, 377 U.S. 201 (1964); United States *ex rel.* Dickerson, 430 F.2d 462 (3d Cir. 1970); State v. Alford, 98 Ariz. 124, 402 P.2d 551 (1965).

23. 287 U.S. at 57. *Powell* firmly established the necessity of counsel in a pretrial context: "[The accused] requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Id.* at 69. The *Powell* Court recognized that preparation of a defendant's case during the pretrial stages would ultimately affect the defendant's right to a fair trial. The delay or denial of appointing an attorney before trial would "amount to a denial of effective and substantial aid in that regard." *Id.* at 53. Later cases shared the *Powell* Court's concern that an inadequately prepared defense would derrogate an accused's right to a fair trial. *See, e.g.,* White v. Maryland, 373 U.S. 59 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961); United States *ex rel.* Reed v. Anderson, 461 F.2d 739 (3d Cir. 1972).

24. The Supreme Court defined the "critical period" of criminal proceedings as "the time of [the defendants'] arraignment and the beginning of their trial, when consultation, thorough-going investigation and preparation [are] vitally important. . . . [Defendants are] as much entitled to such aid during that period as at the trial itself." 287 U.S. at 57.

25. 368 U.S. 52 (1961).

26. The *Hamilton* Court reasoned that what happens in a "critical stage of a criminal proceeding . . . may affect the whole trial. Available defenses may be irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes." *Id.* at 54.

The Supreme Court has developed a two-part test to determine whether a specific element in a criminal prosecution constitutes a "critical stage:" whatever occurs at that particular stage must affect the whole trial; jeopardizing the defendant's right to a fair trial; and counsel's assistance during that particular stage must have the capacity to help ensure procedural fairness to the defendant. *See generally* C. WHITEBREAD, *supra* note 16, at 521.

In *Hamilton*, the Court determined that arraignment constitutes a critical stage in Alabama criminal proceedings. The Court reasoned that if the Alabama defendant fails to plead his defenses at arraignment, they are waived for the remainder of the prosecution. ALA. CODE tit. 15, § 279 (1959 & Supp. 1973) (Alabama criminal code in effect at the time the Supreme Court decided *Hamilton*).

27. *See, e.g.,* Saltys v. Adams, 465 F.2d 1023 (2d Cir. 1972); Tucker v. State, 42 Ala. App. 174, 157 So. 2d 229 (1963); State v. Morrocco, 2 Conn. Cir. Ct. 568, 203 A.2d 161 (1964); People v. Combs, 19 A.D.2d 639, 241 N.Y.S.2d 104 (1963); McLean v. Maxwell, 2 Ohio St. 2d 226, 208 N.E.2d 139 (1965); Moorer v. State, 244 S.C. 102, 135 S.E.2d 713, *cert. denied,* 379 U.S. 860 (1964).

28. Coleman v. Alabama, 399 U.S. 1 (1970). *See, e.g.,* White v. Maryland, 373 U.S. 59 (1963); United States v. Pate, 430 F.2d 639 (7th Cir. 1970); Kemplen v. Maryland, 428 F.2d 169 (4th Cir. 1970); Freeman v. State, 87 Idaho 170, 391 P.2d 542 (1964); People v. Morris, 30 Ill. 2d

interrogations.[29]

In 1967, in *United States v. Wade*,[30] the Supreme Court held that postindictment lineups[31] constituted a "critical stage"[32] in federal crim-

406, 197 N.E.2d 433 (1964); State v. Young, 194 Kan. 242, 398 P.2d 584 (1965); Commonwealth v. O'Leary, 347 Mass. 387, 198 N.E.2d 403 (1964); State v. Owens, 391 S.W.2d 248 (Mo. 1965); Rainsberger v. State, 81 Nev. 92, 399 P.2d 129 (1965); Sanders v. Cox, 74 N.M. 524, 395 P.2d 353, *cert. denied,* 379 U.S. 978 (1965); Pettit v. Rhay, 62 Wash. 2d 515, 383 P.2d 889 (1963); Sparkman v. State, 27 Wis. 2d 92, 133 N.W.2d 776 (1965).

29. *See* Massiah v. United States, 377 U.S. 201 (1964) (right to counsel should " 'apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse.' " *See also* Brewer v. Williams, 430 U.S. 387 (1977); Escobedo v. Illinois, 378 U.S. 478 (1964); Spano v. New York, 360 U.S. 315 (1959); United States *ex rel.* Dickerson v. Rundel, 430 F.2d 462 (3d Cir. 1970); Brown v. Crouse, 425 F.2d 305 (10th Cir. 1970); State v. Alford, 98 Ariz. 124, 402 P.2d 551 (1965); People v. White, 233 Cal. App. 2d 765, 43 Cal. Rptr. 905 (1965); Harris v. State, 162 So. 2d 262 (Fla. 1964); Carson v. Commonwealth, 382 S.W.2d 85 (Ky. 1964), *cert. denied,* 380 U.S. 938 (1965); Johnson v. State, 238 Md. 140, 207 A.2d 643 (1965); State v. Lanzo, 44 N.J. 560, 210 A.2d 613 (1965); State v. Neely, 239 Ore. 487, 398 P.2d 482 (1965); Commonwealth v. Patrick, 416 Pa. 437, 206 A.2d 295 (1965); Cooper v. Commonwealth, 205 Va. 883, 140 S.E.2d 688 (1965). *See generally* Note, *The Pretrial Right to Counsel,* 26 STAN. L. REV. 399 (1974); Note, *The State Responses to* Kirby v. United States, 1975 WASH. U.L.Q. 423.

30. 388 U.S. 218 (1967). In *Wade*, police arrested defendant for bank robbery after an indictment had been returned. Prior to trial, federal agents directed defendant to participate in a lineup with five or six other persons. Each member of the lineup wore strips of tape on their faces, similar to those allegedly worn by the robbers, and were ordered to say "put the money in the bag." Both witnesses positively identified defendant. Although the court had appointed counsel to represent defendant, the attorney was not present at the pretrial lineup. At the trial, the witnesses reconfirmed their positive identification of defendant. *Id.* at 220.

31. Lineups and showups are the two types of custodial identification procedures. In a showup, the police present the lone suspect to the witness for identification. Showups are either arranged or accidental. N. SOBEL, *supra* note 4, at §§ 2-15 to -21. In a proper lineup or "identification parade," police direct the suspect and five or six other persons of similar height, age, and general appearance to line up or parade before witness. Lineups are most often used in cases of robbery and rape. The lineup has become a means frequently employed by the police to "provide them with fairly strong evidence of identity on which to proceed with their investigations and to base an eventual prosecution." Williams & Hammelman, *Identification Parades, Part I,* 1963 CRIM. L. REV. 479, 480. The Senate exemplified the popularity of eyewitness identification in its committee hearings on the Omnibus Crime Control and Safe Streets Act of 1968, when it described eyewitness identification as "an essential prosecutorial tool." S. REP. NO. 1097, 90th Cong., 2d Sess. 53 (1968), *cited in* Levine & Tapp, *The Psychology of Criminal Identification: The Gap from* Wade *to* Kirby, 121 U. PA. L. REV. 1079, 1082 (1973). *See generally* N. SOBEL, *supra* note 4; P. WALL, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES (1965).

The development of a defendant's rights in showup identification procedures has been similar to that of the lineup except the courts usually assume a vigorous position against the use of a showup as a custodial identification method. *See, e.g.,* Stovall v. Denno, 388 U.S. 293 (1967); People v. Anderson, 389 Mich. 155, 205 N.W.2d 461 (1973). For an overview of the development of the rights of the accused in showups, see generally Grano, *supra* note 4; Pulaski, Neil v. Biggers: *The Supreme Court Dismantles the* Wade *Trilogy's Due Process Protection,* 26 STAN. L. REV. 1097 (1974).

32. The *Wade* Court described the pretrial identification confrontation as critical because

inal prosecutions during which the accused must be afforded the right to counsel.[33] The Court reasoned that the dangers inherent in lineup

"the results might well settle the accused's fate and reduce the trial itself to a mere formality." 388 U.S. at 224. The prejudicial effect that a pretrial custodial lineup has on the trial rests on the "common experience that, once a witness has picked out the accused at the lineup, he is not likely to go back on his word later on, so that in practice the issue of identity may . . . for all practical purposes be determined there and then before the trial." Williams & Hammelman, *supra* note 31, at 482.

The Court distinguished pretrial lineups from other "preparatory step[s] in the gathering of the prosecutor's evidence." 388 U.S. at 227. The Court held counsel's presence to be unnecessary during such evidence-gathering procedures as taking blood samples, *see* Schmerber v. California, 384 U.S. 757 (1966); fingerprinting, *see* Woods v. United States, 397 F.2d 156 (9th Cir. 1968); taking photographs of the accused, *see* Sandoval v. State, 172 Colo. 383, 473 P.2d 722 (1970); and physical examination and measurement of the accused, *see* State v. Hughes, 244 La. 774, 154 So. 2d 395 (1963). These identification methods, reasoned the Court, are based on scientific techniques with limited variables; defense counsel could accurately reconstruct the given procedure at trial and could effectively cross-examine witnesses about it. The Court concluded that "[these procedures] are not critical stages since there is minimal risk that . . . [defendant's] counsel's absence at such stages might derrogate from his right to a fair trial." 388 U.S. at 227-28.

33. Justice Brennan argued that the Court must "scrutinize any pretrial confrontation" to assess whether defendant needs counsel to preserve his fifth and sixth amendment rights. 388 U.S. at 227. The Court based its holding on the "principle that in addition to counsel's presence at trial, the accused is guaranteed that he 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 derrogate from the accused's right to a fair trial." *Id.* at 226.

In addition to extending the right to counsel at postindictment lineups, the *Wade* Court announced an exclusionary sanction to be imposed whenever a defendant's right to counsel at pretrial lineups has been violated. On cross-examination, the *Wade* defendant's counsel revealed that the witnesses previously identified defendant at an uncounseled lineup. Defense counsel sought to strike the in-court identification testimony of the bank witnesses, alleging that it was based on the uncounseled lineups. *Id.* at 239-40. The Court held that identifications resulting from improperly conducted pretrial lineups are inadmissible as evidence at trial. In addition, the Court held that in-court identification testimony based on improper lineups could be excluded. In establishing the exclusionary sanction, the *Wade* Court recognized that pretrial lineups are often used by the prosecution to "crystallize" the witness' memory for later identification of defendant. The Court, however, refused to establish an automatic exclusionary rule for in-court identifications based on uncounseled lineups. *Id.* at 240.

To lessen the severity of the exclusionary sanction, the *Wade* Court employed the independent source test established by the Supreme Court in Wong Sun v. United States, 371 U.S. 471, 488 (1963). 388 U.S. at 240-41. The Court held that if the State could "establish by clear and convincing evidence" that the in-court identification was based on observations independent of the unconstitutional lineups, then the in-court identification would be admitted into evidence. *Id.* at 240. The Supreme Court enumerated several factors useful in determining whether the in-court identification has a source independent of the illegal pretrial lineup, including:

> the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification. It is also relevant to

identifications[34] may seriously jeopardize the accused's right to a fair trial.[35] Counsel present at the identification proceeding[36] could detect suggestive actions,[37] avoid the risks of mistaken identification,[38] and

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consider those facts which, despite the absence of counsel, are disclosed concerning the conduct of the lineup.

Id. at 241 (footnote omitted).

In a companion case, Gilbert v. California, 388 U.S. 263 (1967), the Supreme Court automatically excluded the in-court identification of eyewitnesses, determining that the identification was the direct result of an improper pretrial lineup. Upon direct examination of the witnesses, the State demonstrated that these witnesses had previously identified the defendant at a post-indictment lineup at which counsel was absent. The Court determined that the in-court identification was the "direct result of the illegal lineup 'come at by exploitation of [the primary] illegality.'" 388 U.S. at 272-73 (quoting Wong Sun v. United States, 371 U.S. 471, 488 (1963)). The Court in *Gilbert* determined that evidence of an unconstitutional pretrial lineup identification is not admissible in a state criminal trial.

The Court held further that evidence of an illegal pretrial lineup must be excluded per se from the State's case-in-chief. In reaching its holding, the Court reasoned that in such a situation the uncounseled pretrial identification bolstered the in-court identification and the State should not be afforded an opportunity to establish alternative sources for the irreparably tainted in-court identification. *Id.* at 273.

34. Justice Brennan reasoned that lineups are inherently dangerous and threaten a defendant's right to a fair trial:

> The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. . . . A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification. . . .

Moreover,

> [i]t is a matter of common experience that, once a witness has picked out the accused at the lineup, he is not likely to go back on his word later on, so that in practice the issue of identity may . . . for all practical purposes be determined there and then, before the trial.

388 U.S. at 228-29 (footnote omitted).

35. *See supra* notes 23 & 26.

36. The presence of counsel at lineups would eliminate or reduce the risks of suggestion and abuse, ensure defendant's right to confront his accusors, and protect defendant's right to a fair trial by enabling counsel to effectively cross-examine witnesses and reconstruct the lineup procedure in court. N. SOBEL, *supra* note 4, at §§ 2-21 to -24. *See* United States v. Wade, 388 U.S. 218, 229-38 (1967); Pointer v. State, 380 U.S. 400, 404-06 (1965); Levine & Tapp, *supra* note 31, at 1081-87, 1124-25; Note, *The Pretrial Right to Counsel, supra* note 29, at 399; Note, *The State Responses to* Kirby v. United States, *supra* note 29, at 423. For a discussion on the limited and ineffective role performed by counsel at lineups, see Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification,* 29 STAN. L. REV. 969 (1977).

37. Factors contributing to the suggestive nature of lineups include: the witness' knowledge that one of the persons in the lineup is the suspect; the intentional contrast of physical characteristics among the participants in the lineup; the witness' familiarity with participants in the lineup; knowledge possessed by the other participants of who the suspect is; distinctive placement of the suspect in the line; and distinctive clothing worn by the suspect. Williams & Hammelman, *supra* note 31, at 486-90. *Accord* Moore v. Illinois, 434 U.S. 220 (1977) (after hearing prosecution's

permit informed challenges to witnesses in court.[39] In a companion case, *Gilbert v. California*,[40] the Court extended the *Wade* holding to state prosecutions.[41] The majorities in *Wade* and in *Gilbert*, however, failed to determine the earliest pretrial stage at which the right could attach.[42] Absent such guidance, many state and federal courts construed *Wade* and *Gilbert* liberally,[43] granting the defendant a right to

evidence, police told victim she was going to see her assailant before she positively identified him); Foster v. California, 394 U.S. 440 (1969) (accused placed in lineup where he was only tall man wearing a hat); Gilbert v. California, 388 U.S. 263 (1967) (witnesses communicated with each other before and during lineup); Saltys v. Adams, 465 F.2d 1023 (2d Cir. 1972) (witness saw photo of suspect before observing suspect in lineup). The informality of postarrest, pretrial lineup identifications minimizes the use of procedural safeguards that diminish suggestion. *See* United States v. Wade, 388 U.S. 218 (1967); United States v. Roth, 430 F.2d 1137 (2d Cir. 1970), *cert. denied,* 400 U.S. 1021 (1971); Long v. United States, 424 F.2d 799 (D.C. Cir. 1969). *See generally* N. SOBEL, *supra* note 4; P. WALL, *supra* note 31.

38. Scientists have conducted experiments to evaluate the reliability of lineup identifications. Although performed under favorable conditions, all experiments demonstrated a high degree of inaccuracy associated with eyewitness identification. *See* Brown, *An Experience in Identification Testimony,* 25 J. AM. INST. CRIM. L. & CRIMINOLOGY 621 (1935); Chenoweth, *Police Training Investigates the Fallibility of the Eye Witness,* 51 J. CRIM. L. CRIMINOLOGY & P.S. 378 (1960); Vickery & Brooks, *Time-Spaced Reporting of a "Crime" Witnessed by College Girls,* 29 J. CRIM. L. CRIMINOLOGY & P.S. 371 (1938).

39. Accurate recollection of the custodial lineup at trial would enable the defense to conduct a "meaningful cross-examination" of the eyewitness, safeguarding defendant's right to confront the witnesses against him. 388 U.S. at 232, 235.

40. 388 U.S. 263 (1967).

41. *Id.* at 270. *See supra* note 33. A second preindictment identification case decided in the same term was Stovall v. Denno, 388 U.S. 298 (1967). The Court in *Stovall* noted that the *Wade-Gilbert* decisions could not be applied retroactively and established an alternate due process challenge. The accused could attack the pretrial lineup on the ground that "the confrontation . . . was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law." *Id.* at 301-02. Since *Stovall*, the Supreme Court has employed the due process standard to determine whether the pretrial identification procedure used was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U.S. 377, 384 (1968) (photograph identification). *Accord* Manson v. Brathwaite, 432 U.S. 98 (1977) (photographic identification); United States v. Ash, 413 U.S. 300 (1973) (same); Neil v. Biggers, 409 U.S. 188 (1972) (showup); Kirby v. Illinois, 406 U.S. 682 (1972) (police station showup); Coleman v. Alabama, 399 U.S. 1 (1970) (witness confronted the suspect prior to corporeal lineup); Foster v. California, 394 U.S. 440 (1968) (photographic identification).

42. Although defendant in *Wade* was identified during a postindictment lineup, 388 U.S. at 237, the Court did not indicate that counsel's assistance could only attach at this stage. *Id.* at 226-39. Justice Black objected to the majority's equivocal criterion and emphasized that a defendant is entitled to counsel at identification "regardless of when the identification occurs, in time or place, and whether before or after indictment or information." *Id.* at 251 (Black, J., concurring in part and dissenting in part).

43. *See, e.g.,* People v. Fowler, 1 Cal. 3d 335, 461 P.2d 643, 82 Cal. Rptr. 363 (1969); State v. Singleton, 253 La. 18, 215 So. 2d 838 (1968), *vacated,* Johnson v. Louisiana, 408 U.S. 932 (1972); Palmer v. State, 5 Md. App. 691, 249 A.2d 482 (1969); Commonwealth v. Guillory, 356 Mass. 591,

counsel at preindictment and preinformation lineups.[44]

In 1972, however, the Supreme Court in *Kirby v. Illinois*[45] restricted the *Wade-Gilbert* rule[46] and limited attachment of the right to counsel to postindictment custodial lineups.[47] In a plurality opinion, the Court held that because any procedure occurring before the "initiation of adversary judicial criminal proceedings"[48] was not critical,[49] no right to counsel could then attach. The Court maintained that the fifth amend-

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254 N.E.2d 427 (1970); People v. Hutton, 21 Mich. App. 312, 175 N.W.2d 860 (1970); Thompson v. State, 85 Nev. 134, 451 P.2d 704, *cert. denied,* 396 U.S. 893 (1969); State v. Wright, 274 N.C. 84, 161 S.E.2d 581 (1968), *cert. denied,* 396 U.S. 934 (1969); State v. Isaacs, 24 Ohio App. 2d 115, 265 N.E.2d 327 (1970); Commonwealth v. Whiting, 439 Pa. 205, 266 A.2d 738, *cert. denied,* 400 U.S. 919 (1970); *In re* Holley, 107 R.I. 615, 268 A.2d 723 (1970); Martinez v. State, 437 S.W.2d 842 (Tex. Crim. App. 1969); State v. Hicks, 76 Wash. 2d 80, 455 P.2d 943 (1969); Hayes v. State, 46 Wis. 2d 93, 175 N.W.2d 625 (1970). The California Supreme Court in People v. Fowler concluded:

> [T]he *Wade* and *Gilbert* rules are not limited in their application to lineups occurring after indictment. . . . The presence or absence of those conditions attendant upon lineups which induced the high court to term such proceedings 'a critical stage of the prosecution' at which the right to counsel attaches is certainly not dependent upon the occurrence or nonoccurrence of proceedings formally binding a defendant over for trial.

1 Cal. 3d 335, 342, 461 P.2d 643, 648-49, 82 Cal. Rptr. 363, 368-69 (1969).

Several states declined to apply the *Wade-Gilbert* ruling to preindictment or preinformation lineups. *See, e.g.,* State v. Fields, 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).

44. Most of the United States circuit courts found no distinction between lineups held before or after filing an indictment, information, or complaint. These courts held that the right to counsel should attach at either stage. *See, e.g.,* Wilson v. Gaffney, 454 F.2d 142 (10th Cir.), *cert. denied,* 409 U.S. 854 (1972); Virgin Islands v. Callwood, 440 F.2d 1206 (3d Cir. 1971); United States v. Greene, 429 F.2d 193 (D.C. Cir. 1970); Cooper v. Picard, 428 F.2d 1351 (1st Cir. 1970); United States v. Phillips, 427 F.2d 1035 (9th Cir.), *cert. denied,* 400 U.S. 867 (1970); United States v. Ayers, 426 F.2d 524 (2d Cir.), *cert. denied,* 400 U.S. 842 (1970); United States v. Broadhead, 413 F.2d 1351 (7th Cir. 1969), *cert. denied,* 396 U.S. 1017 (1970); Rivers v. United States, 400 F.2d 935 (5th Cir. 1968).

45. 406 U.S. 682 (1972).

46. *See supra* notes 30-42 and accompanying text.

47. In the absence of defendant's counsel, witnesses positively identified defendant in a police station showup before the State filed a complaint or an indictment against him. The *Kirby* Court held that *Wade* and *Gilbert* did not apply to preindictment confrontations. Thus, the witness's in-court identification, although it was based on a preindictment showup, was admissible because it did not violate defendant's sixth amendment right to counsel. 406 U.S. at 684-87, 690-91.

48. The Court maintained that the "initiation of judicial criminal proceedings . . . is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified." *Id.* at 689. Accordingly, the *Kirby* Court held any proceeding that occurred before filing a formal charge to be antecedent to the initiation of judicial criminal proceedings.

The dissent in *Kirby* argued that the Court's distinction between preindictment and postindict-

ment's due process guarantee[50] affords the accused adequate protection against the risks[51] surrounding pretrial confrontations conducted prior to the formal commencement of prosecution proceedings.[52]

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ment identification proceedings was irrelevant. Reemphasizing the *Wade* Court's reasoning, Justice Brennan, joined by Justices Douglas and Marshall, argued that:

> *Wade* did not require the presence of counsel at pretrial confrontations for identification purposes simply on the basis of an abstract consideration of the words 'criminal prosecutions' in the sixth amendment. Counsel is required at those confrontations because [of] 'the dangers inherent in eyewitness identification and the suggestability inherent in the context of the pretrial identification.'

Id. at 696-97 (Brennan, J., dissenting). *See* Grano, *supra* note 4, at 725-30; Note, *The Pretrial Right to Counsel, supra* note 29, at 410-13; Note, *The State Responses to* Kirby v. United States, *supra* note 29, at 432-34.

In 1977, the Supreme Court in Moore v. Illinois, 434 U.S. 220 (1977), modified *Kirby*'s holding that the right to counsel could attach only after filing an indictment or information. In *Moore*, the Supreme Court clarified the "initiation of adversary judicial criminal proceedings" standard established in *Kirby* by determining that not only the return of an indictment but also the filing of a complaint marks the commencement of adversarial judicial proceedings. *Id.* at 228. In *Moore*, the suspect participated in a postcharge, preindictment identification showup without the assistance of counsel. The Court held the identification confrontation unconstitutional. Although the State had not yet filed a formal indictment, the filing of a complaint was sufficient to commence judicial criminal proceedings under Illinois law. *Id. See* ILL. REV. STAT. ch. 38, § 111 (1975).

49. 406 U.S. at 690. *See supra* notes 26 & 32 and accompanying text.

50. The pertinent text of the fifth amendment reads: "No person shall be . . . compelled in any criminal case to be . . . deprived of life, liberty, or property without due process of law. . . ." U.S. CONST. amend. V.

In offering the accused the alternative due process safeguard, the Court adhered to the rationale presented in Stovall v. Denno, 368 U.S. 298 (1967).

51. *See supra* notes 34-35 & 37-38.

52. The dissent in *Kirby* contended that the distinction between investigatory procedures occurring before and those occurring after the commencement of adversary proceedings "exalts form over substance." 406 U.S. at 697-99. The dissent argued that once the accused is in the custody of the police "or otherwise deprived of his freedom of action in any significant way . . . our adversary system of criminal proceedings commences." *Id.* at 698 n.6 (Brennan, J., dissenting) (quoting Miranda v. Arizona, 384 U.S. 436, 477 (1966)).

The California Supreme Court also criticized the *Kirby* preindictment-postindictment dichotomy:

> [W]e think it clear that the establishment of the date of formal accusation as the time wherein the right to counsel at lineup attaches could only lead to a situation wherein substantially all lineups would be conducted prior to indictment or information. We cannot reasonably suppose that the high court . . . would announce a rule so susceptible of emasculation by avoidance.

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

Opponents of *Kirby* assert that defendants especially need the assistance of counsel at preindictment identification proceedings. They argue that this is the stage when misidentification, which could result in the conviction of innocent persons at trial, is most likely to occur. N. SOBEL, *supra* note 4, at §§ 2-10 to -11; Williams & Hammelman, *supra* note 31, at 83.

Police and prosecutors, on the other hand, welcomed the *Kirby* limitation. They believed that limiting the scope of the right to counsel to postindictment proceedings would expedite criminal

A majority of state courts have adopted *Kirby*,[53] using the "commencement of formal judicial proceedings"[54] standard as a guideline for determining when to extend to a defendant his sixth amendment right to counsel. A few states,[55] however, refuse to conform to the Supreme Court restriction and continue to apply *Wade*'s critical stage rationale.[56] These states circumvent the limitation imposed by *Kirby* and extend the right to counsel to preindictment custodial lineups by

investigations. *See* N. SOBEL, *supra* note 4, at §§2-10 to -11; Comment, *The Right to Counsel at Lineups*: Wade *and* Gilbert *in the Lower Courts,* 36 U. CHI. L. REV. 830, 839 (1969).

53. *See, e.g.,* State v. Taylor, 109 Ariz. 518, 514 F.2d 439 (1973); State v. Bragg, 371 So. 2d 1080 (Fla. Dist. Ct. App. 1979); Hunt v. Hopper, 232 Ga. 53, 205 S.E.2d 303 (1974); State v. Sadler, 95 Idaho 524, 511 P.2d 806 (1973); Winston v. State, 263 Ind. 8, 323 N.E.2d 228 (1975); Williamson v. State, 201 N.W.2d 490 (Iowa 1972); State v. Rudolph, 332 So. 2d 806 (La.), *cert. denied,* 429 U.S. 982 (1976); State v. Rowe, 314 A.2d 407 (Me. 1974); Jackson v. State, 17 Md. App. 167, 300 A.2d 430 (1973); Commonwealth v. Stanley, 363 Mass. 102, 292 N.E.2d 694 (1973); State v. Carey, 296 Minn. 214, 207 N.W.2d 529 (1973); Hobson v. State, 285 So. 2d 464 (Miss. 1973); Reed v. Warden, 89 Nev. 141, 508 P.2d 2 (1973); Stewart v. State, 509 P.2d 1402 (Okla. Crim. App. 1973); State v. Delahunt, 401 A.2d 1261 (R.I. 1979); State v. McLeod, 260 S.C. 445, 196 S.E.2d 645 (1973). Missouri and Wisconsin have adhered to *Kirby* but have criticized its reasoning. *See, e.g.,* State v. Gray, 503 S.W.2d 457 (Mo. Ct. App. 1973); State v. Taylor, 60 Wis. 2d 506, 210 N.W.2d 873 (1973).

The New York Supreme Court articulated specific exceptions to the *Kirby* holding. *See* People v. Banks, 73 A.D.2d 907, 424 N.Y.S.2d 439 (1980) (suspect retained counsel on prior charges; right to counsel on new charges automatically attaches); People v. Coleman, 43 N.Y.2d 222, 371 N.E.2d 819, 401 N.Y.S.2d 57 (1977) (same). *Contra* State v. Marks, 226 Kan. 704, 602 P.2d 1344 (1979) (the right to counsel does not attach to preindictment lineups on new charges when suspect detained on prior charge); State v. Montgomery, 596 S.W.2d 735 (Mo. Ct. App. 1980) (same); State v. Puckett, 46 N.C. App. 719, 266 S.E.2d 48, *appeal dismissed,* 270 S.E.2d 115 (N.C. 1980) (although defendant in police custody on another charge, absence of counsel at preindictment lineup on new charge was not unconstitutional per se). In addition, both New York and Alabama grant the accused the right to the assistance of counsel at a postarrest, preindictment identification if the accused has already retained counsel. *See* Sparks v. State, 376 So. 2d 834 (Ala. Crim. App. 1979); People v. Blake, 35 N.Y.2d 331, 320 N.E.2d 625, 361 N.Y.S.2d 881 (1974).

54. The Illinois criminal code provides: "When authorized by law, a prosecution may be commenced by: (a) a complaint, (b) an information, (c) an indictment." ILL. REV. STAT. ch. 38, § 111-1 (1980).

The documents of indictment and information are commonly used to charge a suspect with a felony; a complaint is most often used to charge a suspect with a misdemeanor. The type of charging document employed in particular circumstances will vary and depend upon the criminal offense and the state. The term "formal charges" generally refers to an indictment, information, or complaint. A majority of state criminal codes contain provisions similar to those in the Illinois criminal code.

55. Alaska, Michigan, Pennsylvania, and now California reject the *Kirby* approach. *See infra* notes 56-58 and accompanying text.

56. *See* Blue v. State, 558 P.2d 636, 642 (Alaska 1977); People v. Jackson, 391 Mich. 323, 339, 217 N.W.2d 22, 27-28 (1974); People v. Bustamante, 30 Cal. 3d 88, 98-99, 634 P.2d 927, 933-34, 177 Cal. Rptr. 576, 582-83 (1981); People v. Anderson, 389 Mich. 155, 171-72, 205 N.W.2d 461, 467-68 (1973); Commonwealth v. Richman, 320 A.2d 351, 361 (1974) (Eagen, J., concurring).

broadly interpreting the *Kirby* definition of "adversary criminal proceedings"[57] or by relying on the state constitutional provisions establishing the right to counsel.[58]

In *People v. Bustamante*,[59] California became the third state to circumvent the *Kirby v. Illinois* restriction and to extend the right to counsel to preindictment lineups[60] by relying on a parallel state constitutional guarantee.[61] Writing for the majority, Justice Tobriner initially considered earlier United States Supreme Court decisions for guidance.[62] He noted, however, that California courts are not bound by these decisions in interpreting provisions of the California Constitution.[63]

Justice Tobriner proceeded to apply the critical stage standard, set forth by the Supreme Court in *United States v. Wade*,[64] to determine whether the section of the California Constitution that guarantees a criminal defendant the right to counsel extends to a pretrial lineup.[65] He asserted that because a properly conducted lineup is invaluable in augmenting the reliability of identification testimony and because mistaken identifications substantially influence the outcome of the trial, the pretrial lineup constitutes a "critical stage" in a criminal proceeding.[66] Justice Tobriner held that a fairly conducted lineup is essential to the protection of innocent defendants[67] and that although the defense counsel plays a limited role during this proceeding, his presence helps

57. The court in Commonwealth v. Richman, 320 A.2d 351 (Pa. 1974), for example, determined that arrest signaled the commencement of judicial proceedings in Pennsylvania. *Id.* at 353.

58. *See, e.g.*, Blue v. State, 558 P.2d 636 (Alaska 1977); People v. Jackson, 391 Mich. 323, 217 N.W.2d 22 (1974). The Supreme Court of Alaska declared that it "is not limited by decisions of the United States Supreme Court or by the United States Constitution when interpreting the state constitution. The Alaska Constitution may have broader safeguards than the minimum federal standards." 558 P.2d at 641. The Michigan Supreme Court adopted similar reasoning. 391 Mich. at 337-38, 217 N.W.2d at 27.

59. 30 Cal. 3d 88, 634 P.2d 927, 177 Cal. Rptr. 576 (1981).

60. *See supra* notes 4 & 31.

61. *See supra* note 2.

62. Justices Mosk, Newman and Weiner joined in the majority opinion. Justice Tobriner presented a state constitutional argument similar to that espoused by the Alaska Supreme Court in Blue v. State, 558 P.2d 636 (Alaska 1977). *See supra* note 58.

63. 30 Cal. 3d at 97, 634 P.2d at 932, 177 Cal. Rptr. at 581-82.

64. 388 U.S. 218, 224 (1967). For a discussion of *Wade*, see *supra* notes 30-39 and accompanying text.

65. 30 Cal. 3d at 98-102, 634 P.2d at 933-35, 177 Cal. Rptr. at 582-85.

66. *Id.*

67. *Id.* at 99, 634 P.2d at 934, 177 Cal. Rptr. at 583.

to safeguard a defendant's rights.[68]

After concluding that a defendant's right to counsel extends to pretrial lineups,[69] Justice Tobriner considered the question of whether the right should be limited to postindictment lineups.[70] He condemned the Supreme Court's restriction of the right to counsel to postindictment proceedings in *Kirby* as "wholly unrealistic,"[71] stating that a defendant frequently requires counsel's assistance prior to the filing of formal charges.[72] Justice Tobriner further maintained that any burden on police investigations resulting from an extension of the right to counsel to preindictment lineups is not substantial enough to deny the defendant this safeguard.[73] In support of this contention, he noted that during the five years between *Wade* and *Kirby*, California criminal defendants were provided with counsel at preindictment lineups with no significant

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68. *Id.* Justice Tobriner explained that

> [a] requirement for counsel at lineups encourages the police to adopt regulations to ensure the fairness of the lineups . . . and to follow those regulations. . . . The attorney may detect inadvertent suggestive actions not within the scope of prostective regulations. Finally, counsel's observations will help him to prepare for cross-examination of the identifying witness and for argument at trial.

Id.

69. *Id.* at 100, 634 P.2d at 934-35, 177 Cal. Rptr. at 583-84. Justice Tobriner contended that "[s]ince the presence of counsel can contribute significantly to the protection of his client from misidentification, defendant is entitled to have counsel present to assist him at that critical juncture." *Id.*

70. *Id.* at 101-02, 634 P.2d at 935-36, 177 Cal. Rptr. at 584-85.

71. *Id.* at 100, 634 P.2d at 935, 177 Cal. Rptr. at 584.

72. *Id.* Justice Tobriner reasoned that limiting the attachment of the right to counsel to postindictment proceeding as advocated in *Kirby* would render defendant's right to counsel ineffective at later stages in the criminal process:

> [T]o limit the right to counsel at a lineup to postindictment lineups would as a practical matter nullify that right. 'The defendant who most needs protection from erroneous identification is one who is implicated primarily or solely by eyewitness testimony. Yet, because of this lack of noneyewitness evidence, an identification of the defendant in a lineup or showup would be necessary to justify formal charges or arraignment. Consequently, the crucial confrontation necessarily will be held before the initiation of formal judicial proceedings when the defendant can be deprived of counsel. Thus *Kirby* removes the protective effects of counsel's presence precisely when the danger of convicting an innocent defendant upon a mistaken identification is greatest. furthermore, after *Kirby*, the policy may defeat the aims of *Wade* and *Gilbert* in *any* case simply by delaying formal charges and holding the lineup in the absence of defense counsel.'

Id. at 101, 634 P.2d at 935, 177 Cal. Rptr. at 584 (quoting Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification,* 29 STAN. L. REV. 969, 996 (1977)). Thus, the majority believed that the formalistic approach of "initiation of adversary judicial proceedings" espoused in *Kirby* can be easily circumvented by police, effectively defeating the safeguard of the right to counsel.

73. *Id.* at 101, 634 P.2d at 935, 177 Cal. Rptr. at 584.

impediment on police investigations.[74] The *Bustamante* majority concluded that the California Constitution guarantees the criminally accused the right to assistance of counsel at preindictment custodial lineups.[75]

Writing for the concurrence,[76] Chief Justice Bird[77] disagreed with the court's observation in dictum that counsel's role at a lineup is "limited."[78] Rather, she maintained that counsel must assume an active role at pretrial lineups not only to ensure that proper procedures are used and to provide effective assistance, but also to protect the constitutional right of the defendant to meaningful cross-examination of witnesses at trial.[79]

Justice Richardson, the sole dissenter, disapproved of the majority's "selective reliance" on the state constitution to supersede the limitations established by the United States Supreme Court.[80] He endorsed

74. *Id.* The majority noted, however, that the absence of counsel at a pretrial identification proceeding would be excusable under exigent circumstances "[i]f conditions require immediate identification without even minimal delay, or if counsel cannot be present within a reasonable time, such exigent circumstances will justify proceeding without counsel." *Id.* at 101-02, 634 P.2d at 935, 177 Cal. Rptr. at 584 (footnote omitted).

75. The court held further that its decision would render the in-court identification testimony in question inadmissible unless the trial court, on remand, found that the testimony rested on a "basis independent from and untainted by the improper lineup." *Id.* at 103, 634 P.2d at 936, 177 Cal. Rptr. at 585.

The *Bustamante* court also considered the retroactive effect of its holding. Recognizing that prior to *Bustamante*, police, prosecutors and courts did not extend the right to counsel to preindictment lineups, the court declined to apply the decision retroactively. Moreover, the court believed that the decision denying retroactive application would avoid disruption of prior investigations and pending prosecutions. *Id.* at 102, 634 P.2d at 936, 177 Cal. Rptr. at 585.

People v. Cook, 22 Cal. 3d 67, 583 P.2d 130, 148 Cal. Rptr. 605 (1978), controlled with respect to Bustamante's appeal. *Cook* held that decisions overruling earlier rulings on criminal procedure should apply to the individual who raised the procedural issue on appeal. 30 Cal. 3d at 102, 634 P.2d at 936, 177 Cal. Rptr. at 585.

76. *Id.* at 104-06, 634 P.2d at 937-38, 177 Cal. Rptr. at 586-88.

77. Justice Staniforth joined in the concurring opinion. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 109, 634 P.2d at 940, 177 Cal. Rptr. at 589 (citing People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976) (Richardson, J., dissenting)). Justice Richardson believed that personal disagreement among a majority of members of a state court is insufficient reason to reject a United States Supreme Court ruling. He argued that, absent unique or distinguishing characteristics of a state case, there is no justification for the state supreme court to depart from the United States Supreme Court's interpretation of a constitutional provision that is virtually identical to the state constitutional provision. 16 Cal. 3d at 118-19, 545 P.2d at 283-84, 127 Cal. Rptr. at 371-72 (Richardson, J., dissenting).

the rationale set forth by the Supreme Court in *Kirby v. Illinois*,[81] contending that the application of the critical stage test should be restricted to "criminal prosecutions."[82] Justice Richardson also adopted the *Kirby* Court's argument that the filing of formal charges signals the commencement of the adversarial criminal justice process.[83] Relying on *Kirby*'s distinction between the investigation and prosecution stages of a criminal proceeding, the dissent asserted that lineups conducted during custodial investigations are not "critical" merely because of their potential unreliability.[84] Justice Richardson reasoned that the due process standard of the fourteenth amendment affords the accused adequate protection against abuses of identification procedures.[85]

In addition, Justice Richardson maintained that counsel's role at a lineup is passive and that such presence does not provide the accused with absolute protection against mistaken identification or suggestiveness.[86] He argued that an extension of the right to counsel during preindictment lineups would only impose unnecessary burdens and delays on police investigations[87] and concluded that the majority's rejection of *Kirby* was "unnecessary and unwise."[88]

The *Bustamante* Court correctly concluded that counsel's presence at all pretrial lineups is essential to a complete and effective defense of the criminally accused.[89] The highly prejudicial impact that an improperly conducted preindictment lineup could have on a criminally accused at trial, in terms of both the possibility of mistaken identification[90] and the deprivation of effective cross-examination,[91] certainly renders this

81. 30 Cal. 3d at 106, 634 P.2d at 938, 177 Cal. Rptr. at 587.

82. *Id.* at 107, 634 P.2d at 938, 177 Cal. Rptr. at 588.

83. *Id.* at 106-07, 634 P.2d at 938, 177 Cal. Rptr. at 587-88.

84. *Id.*

85. *Id.* at 107-08, 634 P.2d at 939, 177 Cal. Rptr. at 588. Justice Richardson contended that:

> any abuse of identification procedures, including improperly suggestive lineups, may be fully reviewed under applicable due process standards . . . . As stressed by the high court in *Kirby*, '*Stovall* strikes 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.'

Id.

86. *Id.* at 108-09, 634 P.2d at 939-40, 177 Cal. Rptr. at 589 (citations omitted).

87. Justice Tobriner maintained that "harried police personnel busily engaged in an ongoing investigation are further shackled because they may well be unable accurately to determine whether or not a true 'exigency' exists." *Id.* at 108-09, 634 P.2d at 940, 177 Cal. Rptr. at 589.

88. *Id.* at 109, 634 P.2d at 940, 177 Cal. Rptr. at 589.

89. *See id.* at 99-101, 634 P.2d at 934-35, 177 Cal. Rptr. at 583-84.

90. *See supra* notes 34, 37, 38 & 71-72 and accompanying text.

91. *See supra* notes 36, 39, 68-69 & 71-72 and accompanying text.

stage of the criminal prosecution "critical." In *People v. Bustamante* the California Supreme Court recognized that identical risks of misidentification and suggestion are present in all custodial lineups, whether they are conducted before or after the filing of formal charges.[92] As the *Bustamante* majority concluded, the imposition of the *Kirby* restriction would "exalt form over substance"[93] and effectively deny the defendant his constitutional right to a fair trial, as well as his right to counsel.[94]

The dissent's distinction between investigatory and adversary judicial proceedings, adopted from *Kirby v. Illinois*,[95] suggests that the dangers inherent in pretrial identification procedures[96] threaten a defendant's right to a fair trial only when the identification occurs *after* the filing of formal charges.[97] Unless the state decides not to prosecute, however, the effect of an improperly conducted preindictment lineup is as detrimental to the defendant at trial as is an improperly conducted postindictment lineup.[98] In addition, the due process safeguard advocated in *Kirby*[99] and reiterated in Justice Richardson's dissent in *Bustamante*[100] provides an inadequate substitute for the presence of counsel at a preindictment lineup. Defense counsel's absence during pretrial identification proceedings renders him unable to make informed challenges to the credibility and admissibility of the State's identification evidence at trial.[101]

The California Supreme Court's reliance on its state constitution as an independent source granting the right to counsel represents a valid exercise of its authority and is not without precedent.[102] The Supreme Courts of Alaska[103] and Michigan,[104] for example, have successfully relied on state constitutional guarantees of the right to counsel to cir-

92. 30 Cal. 3d at 100-01, 634 P.2d at 935, 177 Cal. Rptr. at 584.
93. *Id.* *See supra* note 52.
94. 30 Cal. 3d at 100-01, 634 P.2d at 935, 177 Cal. Rptr. at 584.
95. *Id.* at 106-08, 634 P.2d at 938-39, 177 Cal. Rptr. at 587-88.
96. *Id.* *See supra* notes 34-38 & 72 and accompanying text.
97. 30 Cal. 3d at 106-08, 634 P.2d at 938-39, 177 Cal. Rptr. at 587-88.
98. *Id.* at 100-01, 634 P.2d at 935, 177 Cal. Rptr. at 504.
99. *See supra* notes 50-52 and accompanying text.
100. *See supra* note 85 and accompanying text.
101. *See supra* notes 36-39 & 68 and accompanying text.
102. *See supra* note 58 and accompanying text.
103. *Id.*
104. *Id.*

cumvent the *Kirby* holding.[105]

The *Kirby* holding, advocated in a majority of jurisdictions,[106] ignores the substantial risks of prejudice to a defendant resulting from improperly conducted preindictment identification procedures.[107] The assumption that the dangers inherent in custodial lineups become viable only after the commencement of formal judicial proceedings is without merit. The presence of counsel during a pretrial lineup—whether conducted before or after the filing an indictment or complaint—is essential to preserve the defendant's right to a fair trial.

J.A.S.

105. *See supra* notes 55-58 and accompanying text.
106. *See supra* notes 53-54 and accompanying text.
107. *See supra* notes 34-39, 66-67 & 71-72 and accompanying text.