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Constitutional Law - Criminal Procedure - Right to Counsel at Lineup

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Recent Decisions

CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—RIGHT TO COUNSEL AT LINEUP—The United States Supreme Court has held that a lineup conducted prior to indictment is not a critical stage of the prosecution and therefore the sixth amendment right to counsel is not applicable.

Kirby v. Illinois, 406 U.S. 682 (1972).

Petitioner was identified by a victim as one of two men who had robbed him. The identification occurred at a station house confrontation shortly after the accused's arrest. Following indictment and trial, at which the victim told of his identification of petitioner and stated that he was one of the men who had robbed him, a verdict of guilty was rendered. Petitioner appealed alleging errors of constitutional dimension[1] but, the Appellate Court of Illinois, relying on the earlier decision of the supreme court of that state in *People v. Palmer*,[2] held that the identification testimony should not be suppressed as petitioner had no right to counsel at a pre-indictment lineup. Certiorari was granted[3] to determine whether this ruling was in conflict with the holdings in *United States v. Wade*[4] and *Gilbert v. California*.[5]

Whether the fact that in both *Wade* and *Gilbert* the suspects had been indicted prior to being made to appear in a lineup[6] was significant in regard to the attachment of the right to counsel, or purely incidental,

1. People v. Kirby, 121 Ill. App. 2d 323, 257 N.E.2d 589 (1970).
2. 41 Ill. 2d 571, 244 N.E.2d 173 (1969). In an interesting turnabout the Appellate Court of Illinois has recently reversed itself and held that the *Wade-Gilbert* per se exclusionary rule, *see* note 4 *infra*, does apply to pre-indictment lineups. People v. Dismuke, 3 Ill. App. 3d 553, 278 N.E.2d 152 (1972). It viewed Coleman v. Alabama, 399 U.S. 1 (1970), as authoritatively interpreted for it in People v. Adams, 46 Ill. 2d 200, 263 N.E.2d 490 (1970), making explicit the scope of *Wade-Gilbert*.
3. Kirby v. Illinois, 402 U.S. 995 (1971).
4. United States v. Wade, 388 U.S. 218 (1967).
5. Gilbert v. California, 388 U.S. 263 (1967). The United States Supreme Court ruled, *inter alia*, that suspects required to participate in a post-indictment lineup had the constitutional right to have counsel present. If counsel was not present, no in-court identification whose source was such a lineup would be admissible into evidence. The test to be applied as to the source was that of Wong Sun v. United States, 371 U.S. 471, 488 (1963), which held that illegally obtained evidence is admissible only if additionally obtained in a legal fashion which is sufficiently distinguished to purge the taint of the primary illegality.
6. The term lineup refers to lining up a number of individuals for the purpose of identification of the perpetrator of a crime by a witness or victim while the term showup applies to the exhibition of a single suspect for the same purpose. Courts do not differentiate between the two situations in the applicability of the right to counsel and the term lineup is generally used to refer to both situations and will be so used hereinafter. *See* United States v. Wade, 388 U.S. 218, 229 (1967).

was unclear from the opinion of Mr. Justice Brennan in those cases,[7] and has been the source of a diversity of opinion in the lower courts during the past five years.[8] *Kirby v. Illinois*[9] resolved the conflict by deciding that that the *Wade-Gilbert* per se exclusionary rule is not applicable to pre-indictment confrontations.[10]

Mr. Justice Stewart, speaking for a plurality[11] in *Kirby v. Illinois*, began his analysis by disposing of the idea that the rule of *Miranda v. Arizona*[12] might have any applicability to the *Kirby* case.[13] This was necessary to his exegesis since *Miranda* granted the right to counsel to a suspect at the time "custodial interrogation" begins.[14] Justice Stewart asserted that the *Wade* Court rejected the petitioner's fifth amendment claims,[15] which is accurate with regard to part I of the *Wade* opinion.[16] However, part II of *Wade*[17] dealt with the issue of right to counsel at a pre-trial confrontation to preserve the defendant's basic right to a fair trial and used *Escobedo v. Illinois*[18] and *Miranda*[19] as examples of the right to counsel concept. That concept is in no way limited to the protection of fifth amendment rights;[20] rather it is linked to and has been broadened for the preservation of the accused's right to a fair trial.[21] As Mr. Justice Brennan noted in his dissent in *Kirby*,

7. It is only in the introductory paragraph of his opinion in *Wade*, in the context of forming the issue, that Justice Brennan mentions that the lineup was a post-indictment one. 388 U.S. at 219.

8. As pointed out in Justice Brennan's dissent in the instant case, Kirby v. Illinois, 406 U.S. 682, 704 n.14 (1972), the overwhelming majority of state courts have read *Wade* and *Gilbert* as applying to any lineup and eight courts of appeals have shown an extraordinary unanimity in so holding.

9. 406 U.S. 682 (1972).

10. *Id.*

11. Only three justices joined the opinion. Mr. Justice Powell concurred only in the result. 406 U.S. at 691.

12. 384 U.S. 436 (1966).

13. 406 U.S. at 687-88.

14. 384 U.S. at 471.

15. 406 U.S. at 687.

16. 388 U.S. at 221-23. Wade claimed that merely being forced to appear in a lineup violated his privilege against self-incrimination, but the Court relying upon the distinction drawn in Schmerber v. California, 384 U.S. 757, 761 (1966), held that such an appearance was not of a testimonial nature and therefore not within the purview of the fifth amendment.

17. 388 U.S. at 223-27.

18. 378 U.S. 478 (1964).

19. 384 U.S. 436 (1966).

20. 388 U.S. at 226.

21. *See* Coleman v. Alabama, 399 U.S. 1 (1970); Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967); 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); White v. Maryland, 373 U.S. 59 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961); Johnson v. Zerbst, 304 U.S. 458 (1938); Powell v. Alabama, 287 U.S. 45 (1932). *Wade* and *Gilbert* represent the first time the Court utilized the right to counsel to protect other sixth amendment rights such as the right of an

". . . Wade specifically relied upon *Miranda* in establishing the constitutional principle that controls the applicability of the Sixth Amendment guarantee of the right to counsel at pretrial confrontations."[22] To say that *Miranda* is not pertinent in this pre-trial confrontation case is to make a rearguard attack upon the rationale of *Wade* and may, in addition, bode ill for the future application of the *Miranda* doctrine.

Turning to the sixth amendment, Justice Stewart in *Kirby* traced the development of the constitutional guarantee of the right to counsel[23] and found that the common point of attachment of that right is "the initiation of adversary judicial criminal proceedings."[24] He concluded that a post-indictment lineup is a "critical stage of the prosecution"[25] since an indictment is one of the means by which the above mentioned proceedings can be initiated,[26] but that a preindictment lineup is merely a segment of a routine police investigation.[27] Not only is it not a "critical stage of the prosecution,"[28] it is not a stage of the prosecution at all but is merely preliminary thereto.

Wade and *Gilbert* contained the first examination by the Court of an accused's right to counsel at a lineup.[29] In the intervening five years there was substantial litigation revolving about this issue in the lower courts,[30] but the Supreme Court did not speak to the point during that

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accused to confront the witnesses against him and the right of cross-examination of those witnesses. 63 Nw. U.L. Rev. 251, 254-55 (1968).

22. 406 U.S. at 692 n.2.

23. 406 U.S. at 688-89.

24. *Id.* at 689.

> It 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. It is only then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the "criminal prosecutions" to which alone the explicit guarantees of the Sixth Amendment are applicable.

Id.

25. *Id.* at 690.

26. *Id.* at 689.

27. *Id.* at 690.

28. *Id.* at 689-90.

29. In 1965 the Court denied certiorari in the case of Williams v. United States, 345 F.2d 733 (D.C. Cir.), *cert. denied*, 382 U.S. 962 (1965). It was in this case that Judge Burger, now Chief Justice Burger, referred to the right-to-counsel-at-a-lineup argument as a "Disneyland contention." 345 F.2d at 736 (Burger, J., concurring).

30. *See* Wilson v. Gaffney, 454 F.2d 142 (10th Cir. 1972); Government of 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. 1970); United States v. Ayers, 426 F.2d 524 (2d Cir. 1970); United States v. Broadhead, 413 F.2d 1351 (7th Cir. 1969); Rivers v. United States, 400 F.2d 935 (5th Cir. 1968); 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); Palmer v. State, 5 Md. App. 691, 249 A.2d 482 (1969); Commonwealth v. Guillory, 356 Mass. 591, 254 N.E.2d 427 (1970); People v. Sutton,

period.[31] As noted by the commentators,[32] there was considerable discussion concerning the pre-post-indictment dilemma. The few state court cases limiting *Wade-Gilbert* to post-indictment situations[33] did so in a cursory fashion, relying principally upon a single sentence of Mr. Justice Brennan's opinion in *Gilbert*.[34] *People v. Fowler*[35] contains perhaps the best expression of reasons for not restricting the rule of *Wade-Gilbert* to the facts of those cases: (1) the presence or absence of the conditions which led the court to term the proceedings a "critical stage" are not dependent upon whether formal prosecution has been initiated; (2) the authorities cited and language used in part II of *Wade* indicate the Court intended the rule to apply to any confrontation between witnesses and accused; (3) the dissenting and concurring opinion of Justice White shows clearly that he believed the new rule to apply to any confrontation; and (4) the Court in *Stovall v. Denno* strongly inferred that the pre-indictment confrontation therein would have been governed by *Wade-Gilbert* if the new rule was not applied prospectively.[36]

In *Kirby*, however, the Court rejected this reasoning and chose instead to limit the right to counsel for the protection of sixth amendment rights to "critical stages of the prosecution," with prosecution being initiated either by formal charge, preliminary hearing, indictment, information, or arraignment.[37] In focusing upon "critical stages

21 Mich. App. 312, 175 N.W.2d 860 (1970); Thompson v. State, 85 Nev. 134, 451 P.2d 704 (1969); State v. Wright, 274 N.C. 84, 161 S.E.2d 581 (1968); State v. Isaacs, 24 Ohio App. 2d 115, 265 N.E.2d 327 (1970); Commonwealth v. Whiting, 439 Pa. 205, 266 A.2d 738 (1970); *In re* Holley, 107 R.I. 1615, 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).

31. Because Stovall v. Denno, 388 U.S. 293 (1967), a companion case to *Wade* and *Gilbert*, held that those cases were to be applied prospectively, it took some time for a case to work its way through the appellate process to be used as a vehicle to determine the scope of or clarify the *Wade-Gilbert* rule.

32. *See* Alpert, *The Right to Counsel at a Lineup*, 4 CRIM. L. BULL. 385, 394 (1968); Quinn, *In the Wake of Wade: The Dimensions of the Eyewitness Identification Cases*, 42 U. COLO. L. REV. 135, 143-44 (1970); Comment, *United States v. Wade: The Pre/Post Indictment Dilemma*, 4 JOHN MARSHALL J. 316 (1971); Comment, *The Right to Counsel During Pretrial Identification Proceedings—An Examination*, 47 NEB. L. REV. 740, 744, 747 (1968); 63 NW. U.L. REV. 251, 257 (1968); 14 VILL. L. REV. 535, 543 (1969); 9 WM. & MARY L. REV. 528, 533 (1967).

33. State v. Fields, 104 Ariz. 486, 455 P.2d 964 (1969); Perkins v. State, 228 So. 2d 382 (Fla. 1969); People v. Kirby, 121 Ill. App. 2d 323, 257 N.E.2d 589 (1970); State v. Walters, 457 S.W.2d 817 (Mo. 1970); Buchanan v. Commonwealth, 210 Va. 664, 173 S.E.2d 792 (1970).

34. 388 U.S. at 272.

35. 1 Cal. 3d 335, 461 P.2d 643, 82 Cal. Rptr. 363 (1969).

36. *Id.* at 342-44, 461 P.2d at 648-50, 82 Cal. Rptr. at 368-70.

37. 406 U.S. at 689. The term "information" may contain a latent ambiguity. In the federal system an information is a formal accusation which differs from an indictment

of the prosecution," the Court would seem to be upon sound adjudicatory ground as it is "criminal prosecutions" that the sixth amendment specifically applies to.[38] But, while focusing upon these formal stages the Court neglected to mention the broad policy reasons[39] which underlay its decisions in *Wade* and *Gilbert* and led it to conclude that ". . . the confrontation compelled by the state between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial."[40] These policy considerations, which many have noted as being equally cogent in both pre- and post-indictment circumstances,[41] are conspicuous by their absence in *Kirby*. This can be interpreted as a manifestation of the present Court's reluctance to paint with a broad brush when construing the rights of the accused.

In addition to the apparent rejection of this judicial philosophy, limiting counsel at lineups in this formalistic fashion may have created more practical problems for police and counsel. As it stands now a suspect may be apprehended and brought to the station house and generally questioned. If this then becomes "custodial interrogation," counsel must be provided.[42] If the police decide to stage a lineup, counsel will probably have to withdraw; but if, subsequent to the lineup, "custodial interrogation" recommences, presumably counsel must again be pro-

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only in that it is brought by a prosecutor rather than a grand jury. United States v. Borger, 7 F. 193, 196 (C.C.S.D.N.Y. 1881); 8 J. MOORE, FEDERAL PRACTICE ¶ 117.02 (2d ed. 1972). An information is also considered the equivalent of an indictment in most states. 42 C.J.S. *Indictments & Informations* § 11 (1944). In Pennsylvania, however, it is unconstitutional to proceed solely upon an information if the offense is an indictable one. PA. CONST. art. 1, § 10. When an information is used in Pennsylvania it is generally an accusation made before a magistrate on which an indictment is later based, Commonwealth v. Clarke, 55 Pa. Super. 435, 440 (1913). If "information," as used in the opinion, is construed in this broad sense, it may be possible for defendants in Pennsylvania courts to invoke the *Kirby* rule at an earlier stage than their counterparts in other jurisdictions. *But see* PA. R. CRIM. P. 104 (comment).

38. "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

39. Factors prevalent at lineups which may affect the right to a fair trial are: (1) the manner in which the suspect is presented to the witnesses for pre-trial identification may be highly suggestive; (2) once a witness has picked out an accused at a lineup he is not likely to change his mind later on; (3) lineups are prevalent in "violent crime" prosecutions and a victim may be dominated by vengeance; (4) the accused's inability to reconstruct what transpired at the lineup may deprive him of any opportunity to attack the credibility of the witness' courtroom identification. 388 U.S. at 228-32.

40. *Id.* at 228.

41. *See* Wilson v. Gaffney, 454 F.2d 142, 144 (10th Cir. 1972); People v. Fowler, 1 Cal. 3d 335, 342-44, 461 P.2d 643, 648-50, 82 Cal. Rptr. 363, 368-70 (1969). *See also* Comment, *United States v. Wade: The Pre/Post Indictment Dilemma*, 4 JOHN MARSHALL J. 316, 325 (1971).

42. Miranda v. Arizona, 384 U.S. 439 (1966).

vided.[43] Alternatively, a suspect may be caught, generally questioned, and then placed in a lineup. If "custodial interrogation" does not begin until after his tentative identification in the lineup, the right to counsel is postponed until then.

The real practical impact of the holding in *Kirby v. Illinois* is that there will be few *Wade*-type lineups in the future. All police and prosecutor need to do is arrange for the lineup to take place prior to the initiation of a criminal prosecution. Since this can probably be done in a large majority of cases, there may be few instances in the future where such lineups will be held and, therefore, counsel will be effectively precluded at trial from reconstructing the events at the lineup.

While many have questioned what the function of an attorney at a lineup could or should be,[44] it is unfortunate that the *Wade-Gilbert* per se exclusionary rule has been obviated in this manner. Either the Court should have overruled *Wade-Gilbert* as an unfortunate and impractical experiment which did not serve the purpose intended or the rule should have been extended to pre-indictment confrontations as Mr. Justice Brennan, its author, seems to have intended it to be.[45] To look to a mechanical test rather than the varying needs of persons in trouble with the law is not only a rejection of the policy considerations which played a dominant role in the rationale of *Wade-Gilbert* but it represents a turning away from the principles of constitutional adjudication which have come to prevail in the past several years.

Although the Court may continue to pay lip service to the policy considerations set forth in *Wade* and *Gilbert*, it has in *Kirby* established a precedent for a rigid, formal approach to right to counsel issues. *Kirby v. Illinois* manifests a definite pause in the continuing enunciation of the right to counsel concept.

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43. *Id. But see* People v. Hill, 39 Ill. 2d 125, 233 N.E.2d 367 (1968).
44. *See* Comment, *Protection of the Accused at Police Lineups*, 6 COLUM. J.L. & SOC. PROB. 345, 354-60 (1970); Comment, *Lawyers and Lineups*, 77 YALE L.J. 390, 396-402 (1967).
45. Kirby v. Illinois, 406 U.S. 682, 696-99 (1972) (dissenting opinion).