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The Right to Counsel During Pretrial Identification Proceedings—An Examination

John W. Atwood
University of Nebraska College of Law

THE RIGHT TO COUNSEL DURING PRETRIAL IDENTIFICATION PROCEEDINGS— AN EXAMINATION*

In *United States v. Wade*,[1] and companion cases,[2] the Supreme Court of the United States focused constitutional attention on pretrial identification procedures, and, after a comprehensive examination of the area decided that pretrial identification procedures were a *critical stage* in the proceedings against an accused and that thereby the sixth amendment right to counsel applied to the states as incorporated by the due process clause of the fourteenth amendment. Thus, the court indicated that pretrial identification proceedings, conducted after June 12, 1967,[3] will receive judicial scrutiny before any such pretrial identification evidence is admissable in court.

The purpose of this comment is twofold. First, it seeks to clarify the present state of the law involving pretrial identification proceedings in light of the impact of these decisions by discussing what counsel *may* and *may not* do when representing a client who is to be subjected to a pretrial identification proceeding. Second, it urges the adoption of reforms vitally necessary for the welfare of the state, its law enforcement officials, and the bar.

I. CONSTITUTIONAL BACKGROUND

It will be helpful at this point to briefly discuss the constitutional evolution of the right to counsel clause of the sixth amendment.

The first landmark decision was decided in *1932* when in *Powell v. Alabama*,[4] the court held:

> All that it is necessary now to decide, as we do decide, is that in 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 to him as a necessary requisite of due process of law; and that duty is not discharged by an assignment *at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.*[5]

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* This article was completed prior to the passage of Ttile II of the "Omnibus Crime Control and Safe Streets Act of 1968" which attempts to legislatively reverse the Supreme Court's recent decisions concerning admissibility of confessions and eye witness testimony.

1 388 U.S. 218 (1967).

2 Gilbert v. California, 388 U.S. 263 (1967); Stovall v. Denno, 388 U.S. 293 (1967).

3 The *Wade* and *Gilbert* decisions were made non-retroactive in Stovall v. Denno, 388 U.S. 293 (1967).

4 287 U.S. 45 (1932).

5 287 U.S. at 71 (1932) (emphasis added).

After *Powell*, the court held in *Johnson v. Zerbst*[6] that the sixth amendment requires the furnishing of counsel by the federal government to federal indigent defendants. This progressive trend was reversed when *Betts v. Brady*[7] held that the sixth amendment applied only to trials in the federal courts and that the due process clause of the fourteenth amendment *did not* incorporate the specific guarantees of the sixth amendment albeit a denial of a combination of rights may deprive a litigant of due process.

The indication that *Betts* rested on unsound grounds was made apparent when *Hamilton v. Alabama*[8] (holding that arraignment in a capital case is a *critical stage* in the proceedings against an accused) marked the beginning of the sixties, a revolutionary decade in criminal law history.

First the court overruled *Betts v. Brady*[9] in *Gideon v. Wainwright.*[10] In *Gideon* the court held that the due process clause of the fourteenth amendment incorporates the sixth amendment thus making the sixth amendment obligatory on the states.

Next, the court decided *Douglas v. California,*[11] which held that defendants were denied equal protection of the law where they were denied benefit of counsel in their mandatory appeal from a trial court verdict.

Finally to remove all doubt as to their intention, the Court in *White v. Maryland*[12] unanimously reaffirmed *Hamilton*, holding that arraignment is a *critical stage* in a capital case and therefore defense counsel must be present.

The court next turned to its supervisory powers over the federal courts and held in *Massiah v. United States*[13] that defendant's fifth and sixth amendment rights were violated. The court in quoting *Powell* said:

> This view no more than reflects a constitutional principle established as long ago as *Powell v. Alabama* (citation omitted) where the court noted that '... during perhaps the most critical period of the proceedings ... that is to say from the time of arraignment until the beginning of their trial, when consultation, thorough going investigation and preparation (are) vitally important, the defendants ... (are) as much entitled to such aid (of counsel) during that period as at the trial itself.'[14]

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6 304 U.S. 458 (1938).
7 316 U.S. 455 (1942).
8 368 U.S. 52 (1961).
9 316 U.S. 455 (1942).
10 372 U.S. 335 (1963).
11 372 U.S. 353 (1963).
12 373 U.S. 59 (1963).
13 377 U.S. 201 (1964).
14 377 U.S. 201, 205 (1964).

Massiah was a federal case and the sixth amendment "directly applied."[15] Twenty-two days later the court decided *Escobedo v. Illinois*,[16] which held that where an investigation is no longer general in nature but is *focused upon a particular suspect* and police have not effectively warned him of his constitutional rights the accused has been denied his right of assistance of counsel and no statement elicited by police during such illegal interrogations could be used against him. Thus, the sixth amendment applied to the states through the fourteenth amendment and pretrial interrogation was a *critical stage* in the proceedings against an accused.

The court further clarified its stand in *Miranda v. Arizona*[17] where it held that if a person in custody was to be interrogated at all he must be informed in "clear and unequivocal terms"[18] of his constitutional rights including his right to have a lawyer appointed to represent him. The court also pointed out that the accused will be presumed not to have waived his rights. However, seven days after *Miranda* was decided the court drew a line when in *Schmerber v. California*[19] they held that evidence of petitioner's blood taken over the objection of Schmerber and his counsel did not violate his fourth, fifth, or sixth amendment rights.[20]

Finally, the court continued its trend when in *In re Gault*[21] the court held that the fourteenth amendment due process clause applies to delinquency adjudication which could result in a youth's confinement.

It is in this historical light that we now turn to a discussion of right to counsel at pretrial identification proceedings.

II. WHERE ARE WE NOW

A. The Decisions

Vital at this point is an in-depth analysis of what exactly is the scope of the *Wade, Gilbert v. California* and *Stovall v. Denno* holdings.

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15 *Id.* at 205.
16 378 U.S. 478 (1964).
17 384 U.S. 436 (1966).
18 384 U.S. 436, 467-68 (1966).
19 384 U.S. 757 (1966).
20 The Court construed the right to counsel claim to be a limited one and indicated that petitioner's claim was devoid of any issue of counsel's ability to have assisted petitioner in respect to any of the rights he did possess.
21 387 U.S. 1 (1967).

(1) *United States v. Wade*

Billy Joe Wade allegedly robbed a federally insured bank in Eustace, Texas on September 21, 1964. The robber wore a small strip of tape on each side of his face and, so attired, pointed a pistol at the female cashier, handed her a pillow case and said something like, "put the money in the bag." Following an indictment on March 23, 1965, Wade was arrested on April 2. Counsel was appointed to represent him on April 26.

Fifteen days *after* counsel had been appointed to represent him, an FBI agent, without giving notice to Wade's lawyer, arranged to have two bank employees observe a lineup made up of Wade and five or six other prisoners conducted in a courtroom of the local county courthouse. Each member of the lineup wore strips of tape and repeated the words "put the money in the bag." Wade was identified as the bank robber by both of the bank employees.

Faced with a constitutional attack of Wade's conviction on both fifth and sixth amendment grounds the court first held: "Neither the lineup itself nor anything shown by this record that Wade was required to do in the lineup violated his privilege against self-incrimination."[22] However, the court went on to say that although none of petitioner's fifth amendment rights were violated, that in this case, contrary to *Schmerber*[23] counsel was "indispensable to protect Wade's most basic right as a criminal defendant—his right to a fair trial at which the witnesses against him might be *meaningfully cross-examined.*"[24]

Thus, the constitutional gravamen of the pretrial identification is not the participation in the identification by the suspect, but rather the conducting by the police of any pretrial identification in absence of a lawyer to insure that the suspects constitutional rights have been respected.

With this constitutional question in mind the court turned to procedure. It said that "a per se exclusionary rule would be unjustified,"[25] but by the same token felt that a rule which solely excluded testimony concerning identification at the lineup itself, without regard to the in-court identification which was sure to follow, would be an empty rule at best. Therefore, the majority decided that

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22 388 U.S. 218, 221 (1967).

23 " "Our rejection of the right to counsel claim in *Schmerber* rested on our conclusion in that case that '[n]o issue of counsel's ability to assist petitioner in respect of any rights he did possess is presented.' " " *Id.* at 223 (citations omitted).

24 388 U.S. 218, 223-24 (1967) (emphasis added).

25 *Id.* at 240.

the test as set out in *Wong Sun v. United States*[26] would be the proper test to use. That test is as follows:

> "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."[27]

The court indicates that in application of this test several factors must be considered which are as follows: (1) what prior opportunity did the eye witness have to observe the alleged criminal act; (2) whether there was any discrepancy between any pre-lineup description and the defendant's actual in-court description; (3) any identification prior to the lineup of someone other than the defendant; (4) the identification by the use of pictures of the defendant prior to the lineup; (5) failure to identify the defendant on a prior occasion; and (6) the lapse of time between the alleged act and the lineup identification.[28]

The court also indicates that a very relevant question in any determination of the admissibility of an identification made in court, will be whether such in-court identification was based upon an illegal pretrial identification or on the contrary whether it was of independent origin.

The court briefly mentioned the concept of waiver and indicated that the state will have the obligation of proving that the defendant did in fact waive his right to counsel. With the *Miranda* case on the books this should be a hard burden for the state to overcome. However, the majority specifically pointed out the possibility of the application of the harmless error doctrine.[29]

Thus, after June 12, 1967,[30] any post-indictment pretrial identification of a suspect conducted in the absence of his counsel and absent an intelligent waiver of that right, will result in a hearing to determine whether the courtroom identification is of *independent origin* or the direct result of a prior illegal pretrial identification.

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[26] 371 U.S. 471 (1963).

[27] United States v. Wade, 388 U.S. 218, 241 (1967), citing Wong Sun v. United States, 371, U.S. 471, 488 (1963), which cited MAGUIRE, EVIDENCE OF GUILT, 221 (1959).

[28] 388 U.S. 218, 241 (1967).

[29] "We therefore think the appropriate procedure to be followed is to vacate the conviction pending a hearing to determine whether the in-court identifications had an independent source, or whether, in any event, the introduction of the evidence was harmless error, Chapman v. California, 386 U.S. 18." 388 U.S. 218, 242 (1946).

[30] "We hold that *Wade* and *Gilbert* affect only those cases and all future cases which involve confrontations for identification purposes conducted in absence of counsel after this date." Stovall v. Denno, 388 U.S. 293, 296 (1967).

(2) *Gilbert v. California*

Jesse James Gilbert was convicted in California of the armed robbery of the Mutual Savings and Loan Association of Alhambra and the murder of a police officer during the course of the robbery. During the course of the robberies a handwritten note was used. During pretrial interrogation petitioner requested counsel and refused to answer any questions without counsel's advice. He later did answer some questions and at that time gave handwriting examples, which were later used against him in court. Hours after the robbery, police had broken into Gilbert's apartment and acquired some photographs of him which were immediately shown to the witnesses. Sixteen days after he had been indicted and appointed counsel he was identified at a lineup which was conducted without any notice having been given to his counsel.

The court applied the *Wade* rule and held that it was constitutional error to admit the in-court identifications without first determining whether or not they were of independent origin and not tainted by the illegal lineup.

However, concerning the fact that nine witnesses testified on the stand that they identified Gilbert at a pretrial showup, the court held that such testimony was a direct result of the illegal[31] pretrial lineup, "come at by exploitation of (the primary) illegality."[32] The court held:

> The State is therefore not entitled to an opportunity to show that that testimony had an independent source. 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.[33]

Therefore, adding the *Gilbert* holding to the *Wade* holding we conclude that any post-indictment identification proceeding conducted against an accused who is not represented by counsel and who has not intelligently waived that right results in a hearing to determine whether any subsequent in-court identification would have an origin separate and apart from the pretrial confrontation. In addition, if a pretrial lineup is conducted in absence of counsel then *no* witness will be allowed to testify in court as to results of said illegal lineup.

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[31] Illegal in the sense that counsel was not present.

[32] 388 U.S. 263, 273 (1967), citing Wong Sun v. United States, 371 U.S. 471, 488 (1963).

[33] 388 U.S. 263, 273 (1967).

(3) *Stovall v. Denno*

Petitioner allegedly stabbed a doctor, inflicting a fatal wound, and also stabbed the doctor's wife eleven times in the kitchen of the doctor's Long Island home. While the doctor's wife lay in critical condition in the hospital, five policemen and two members of the district attorney's staff brought a Negro suspect to her hospital room for identification purposes. One officer finally asked her if he was the man and she then so identified him from her hospital bed. Petitioner was not given any time to obtain counsel before he underwent the hospital identification. At the petitioner's trial, the wife made an in-court identification, and both she and the officers testified as to her hospital room identification. Petitioner was convicted and sentenced to death.

The court held that the *Wade* ruling was not to be applied retroactively. However, *Stovall* goes much further than the retroactivity issue.

The court articulates an avenue of attack even though *Wade* and *Gilbert* are not retroactive; that attack was that the confrontation resulted in such a degree of unfairness that it infringed defendant's right to due process of law. The court phrased the issue as follows:

> [W]hether petitioner, although not entitled to the application of *Wade* and *Gilbert* to his case, is entitled to relief on his claim that in any event the confrontation conducted in this case was so unnecessarily suggestive and conducive to inexorable mistaken identification that he was denied due process of law.[34]

The court recognized this attack as separate and apart from a right to counsel claim. They held that the proper test for determining whether due process has been violated "*... depends on the totality of the circumstances surrounding it.*"[35] When analyzing the facts of *Stovall* and comparing the tests used with the holding it is urged that one can easily come to a misunderstood conclusion. Even though the facts indicate that the showup Stovall was forced to undergo was one of the most suggestive procedures possible,[36] the

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[34] Stovall v. Denno, 388 U.S. 293, 301-02 (1967).

[35] 388 U.S. 293, 302 (1967); *See* Simmons v. United States, 88 S. Ct. 967 (1968); Biggers v. State of Tennessee, 88 S. Ct. 979 (1968); Crume v. Beto, 383 F.2d 36 (5th Cir. 1967); State v. Nelson, 223 Ga. 497, 156 S.E.2d 341 (1967) and State v. Sears, 182 Neb. 384, 155 N.W.2d 332 (1967), for an application of this test.

[36] "The practice of showing suspects singly to persons for the purpose of identification has been widely condemned." Stovall v. Denno, 388 U.S. 293, 302 (1967). Not only was Stovall shown singly to the doctor's wife but he was also handcuffed and was the only Negro in the room.

fairness alone was not the sole question when determining whether due process requirements had been met. Here the court attached great weight to the fact that the doctor's wife was in danger of dying. Applying the totality of circumstances test it concluded that the fact that death was imminent was a controlling circumstance. Other than this the court has set out virtually no guidelines as to what is a violation of due process and there is strong indication that this area will be handled on a case to case basis.

B. THE POST-PRE INDICTMENT QUESTION

As before mentioned, the court goes to great pains to point out the potential for prejudice in an eye witness identification, thus necessitating counsel's presence at this *critical stage*. However, by holding *Wade* and *Gilbert* to their facts the court avoids the question of whether only post-indictment eye witness identification confrontations are protected by a right to counsel. It seems hard to believe that there could be any real difference in the potential for prejudice in a post-indictment and a pre-indictment confrontation yet with *Wade* and *Gilbert* as precedent this is exactly the situation today. Therefore, if a suspect is placed in a lineup at any time prior to indictment, counsel's presence is not a constitutional requisite.[37] At this writing, at least two state appellate courts have indicated that when they can no longer apply the non-retroactivity of the *Stovall* holding they might distinguish *Wade* and *Gilbert* in this manner.[38] Exactly why the court so restricted *Wade* and *Gilbert* is not clear. Certainly, the court wants to give the state law enforcement agencies notice that there is a necessity for reform in this area and that certain minimum standards must be complied with. The best guess seems to be that the court will handle this area on a case by case method, which will give the police time to adjust their procedure. However, it still is hard to escape the logic that if lineups are indeed so fraught with potential prejudice that this stage is *critical* thus making counsel's presence mandatory, then whether a suspect has been indicted or not should not be important.

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[37] At least not by a literal reading of the opinion.

[38] *See* State v. Matlock, 49 N.J. 491, 231 A.2d 369, 373, n.1 (1967) and State v. Sinclair, 49 N.J. 525, 231 A.2d 565, 575 n. 1 (1967), "Defendant was not represented by counsel when the three witnesses saw him for pretrial identifications. The United States Supreme Court has just held that a post-indictment viewing of the accused by a witness arranged by the police to determine identification is a critical stage at which the accused has a sixth amendment right to be represented by counsel. (citations omitted). In the present case the prior identifications occurred *before* and not *after* the indictment . . . ." *See also* People v. Crosslin, —— Cal. 2.d ——, —— P.2d ——, 60 Cal. Rptr. 309, 318 (1967). "[T]he case at bench is distinguishable from *Wade* and *Gilbert* in that the lineup identification occurred *prior* to the appointment of counsel to represent him . . . ."

The likely motive of the court for so restricting *Wade* and *Gilbert* is simply that they didn't want to go too far, too fast. If this was their goal it seems to be quite effective. On the one hand the Court has made their position clear to the federal and state courts. On the other hand the decisions are restrictive enough that guilty men will not go free due to a change in the law.

Accepting the case by case approach, and with no knowledge as to the scope of any clarification decision, it becomes important at this stage to analyze what counsel *may* and *may not* do in the pretrial eye witness identification area, as a result of this decision.

C. FUNCTION OF COUNSEL

The *Wade, Gilbert* and *Stovall* decisions leave many questions unanswered. Perhaps one of the most important issues the decisions avoid is the problem of what function to the system and to the client can counsel fulfill. May he act as an active adversary in the police station itself? Or is his sole function that of a witness to the proceedings?

At this point a brief description of the various kinds of pretrial confrontations is in order. In the main, there seem to be two distinct kinds of confrontations. The first type is known as the show-up and is defined as follows:

> [A] mode of identification other than an identification parade is a show-up, **the presentation of a single suspect to a witness** for purposes of identification. Together with its aggravated forms, it constitutes the most grossly suggestive identification procedure now or ever used by the police.[39]

Show-ups then are any exposure of the suspect to the witness on a one-to-one basis, either "accidently" or otherwise.

Wall defines a lineup as follows:

> First, in order to distinguish it from a show-up, the lineup was defined above to mean any procedure where more than one person is presented to the witness for purposes of identification. As will be pointed out later, however, the number of persons in the lineup obviously has an important bearing upon its fairness, and the smaller the number of participants, the more will the lineup resemble a show-up, and partake of all its weaknesses.[40]

The first function the attorney's presence at the pretrial identification fulfills is that of a witness. In the words of the *Wade* court:

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39 P. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 27 (1965) [hereinafter cited as Wall].

40 *Id.* at 41.

> But as is the case with secret interrogations, there is serious difficulty in depicting what transpires at lineups and other forms of identification confrontations. 'Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact went on... *Miranda v. Arizona, supra,* (citation omitted). For the same reasons, the defense can seldom reconstruct the manner and mode of lineup identification for judge and jury at trial.... In any event, neither witnesses nor lineup participants are apt to be alert for conditions prejudicial to the suspect, and if they were, it would likely be of scant benefit to the suspect since neither witnesses nor lineup participants are likely to be schooled in the detection of *suggestive influences.*[41]

This raises the issue of what is suggestive and could be a contributing factor in inducing a witness into making a faulty identification.[42]

The first thing the attorney should do when faced with an impending lineup is to determine who the witness is and exactly what is the witness's relationship to the suspect. Ordinarily it will be criminal-victim, however, other relationships might exist which would cast doubt upon the objectivity of any subsequent identification.[43] Counsel should then concern himself with the particular physical surroundings in which the suspect was identified. If the suspect was allegedly observed in the rain or in the evening, obviously a brightly lit stage would not be the best setting for a lineup, and might lead to mistaken identity.[44]

The next step would be for the attorney to ascertain what was the verbal description (if any) given to the police when they first learned of the crime.[45]

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41 United States v. Wade, 388 U.S. 218, 229-30 (1967).

42 *See generally* Murray, *The Criminal Lineup at Home and Abroad,* 1966 UTAH L. REV. 610; Wall, *supra* note 39. Napley, *Problems of Affecting the Presentation of the Case for a Defendant,* 66 COL. L. REV. 94 (1966); Williams, *Identification Parades,* 1955 CRIM. L. REV. 525; Williams and Hammelmann, *Identification Parades,* Parts I and II, 1963 CRIM. L. REV. 479-490, 545-555; Comment, *Constitutional Ramifications of the Lineup,* 12 VILL. L. REV. 135 (1966); Comment, *The Right to Counsel During Police Identification Procedures,* 45 TEXAS L. REV. 504 (1967).

43 Thus, a police-inspired witness could possibly have been a co-conspirator or someone who could have an alterior motive for identifying any particular suspect.

44 Wall, *supra* note 39, at 63, also a witness identified a suspect the second time a lineup was conducted, after the lighting had been changed in People v. Oparka, 85 Ill. App. 2d 33, 228 N.E.2d 291 (1967).

45 One commentator urges that witnesses be required to duly attest any description of the alleged criminal before any identification be permissable. Marshall, *Evidence, Psychology and the Trial: Some Challenges to Law,* 63 COL. L. REV. 197, 229 (1963); *see also* Wall, *supra* note 39, at 97; Williams, *Identification Parades,* 1955 CRIM. L. REV. 525, 552; and State v. Chaney, 425 P.2d 1010 (1967).

After determining what the original description was, the attorney should next determine as best he can, if the witness has been shown a photograph of his client and if so he should note if it were a single photograph or one of the many.[46]

Upon this determination he should then attempt to ascertain if his client had *at any time* confronted the witness since he had been taken into custody, and if this has happened he should determine in what factual situation this confrontation occurred.[47]

He should note if there is more than one witness attempting to identify a suspect and, if so, whether they are kept separate from each other or are allowed to view the lineup together. He should also note if they communicate in any way and who, if anyone, they picked out of the lineup.[48]

The attorney should then observe the lineup and note: (1) the number of participants;[49] (2) the attire of the participants;[50] (3) their similarity (*e.g.*, height, race, weight, age, etc.) or dissimilarity;[51] (4) prospective positions in the line; and (5) any comments

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[46] *See* Simmons v. United States, 88 S.Ct. 967 (1968); People v. Evans, 39 Cal. 2d 242, 246 P.2d 636 (1952). All of the authorities known to this writer condemn the showing of a single picture of the suspect to the witness prior to the holding of an identification procedure. The trouble is that in such a situation, when a witness identifies a suspect in a lineup one doesn't know whether she is identifying the picture she was shown or the alleged wrongdoer.

[47] Any such confrontation is condemned by the authorities. *See* Wall, *supra* note 39, at 30; Williams, *Identification Parades*, 1955 CRIM. L. REV. 525, 529; Napley, *Problems of Effecting the Presentation of the Case for a Defendant*, 66 COL. L. REV. 94, 99 (1966). Wade was confronted by witnesses in the hall prior to being brought into the lineup. Counsel could have prevented this by making sure that the halls were cleared and, if not, cleared them himself if he were present.

[48] "The lineup in *Gilbert*, . . . , was conducted in an auditorium in which some one hundred witnesses to several alleged state and federal robberies charged to Gilbert made wholesale identifications of Gilbert as the robber in each other's presence, a procedure said to run counter to the most elementary precepts of the psychology of suggestion." United States v. Wade, 388 U.S. 218, 234 (1967) (citations omitted).

[49] As mentioned before, the fewer members in the lineup, the more it resembles a show-up.

[50] The members of the line should be similarly attired. *See* Murray, *The Criminal Lineup at Home and Abroad*, 66 UTAH L. REV. 610, 628 (1966).

[51] Attempts should be made to have a line which is very similar in age, looks, etc. However, this is often difficult to accomplish. The attorney should note how each person does or does not resemble his client so that he may use this information on cross-examination. The extent of potential for prejudice in this situation is directly proportional to the extent that the members of the line are dissimilar. Thus six white men in a line with one Negro could be prejudicial if a Negro was known to have committed the crime.

which they are asked to make. He should also determine the names and addresses of all the presiding police officers and especially the participants in the lineup.[52]

He should finally ask the witness who identifies the suspect to sign an affidavit stating something to the effect that any identification was completely voluntary and was not influenced by any police suggestion as to any particular suspect.[53] The witness should then verify, by position in line, which member of the line he or she identified.

The next issue immediately presenting itself is what function can counsel perform other than witnessing the pretrial identification? The majority opinion in *Wade* avoids this potentially volatile problem, yet Justice White in his dissent voices his fear of what might be a result of the majority opinion's position:

> Counsel's interest is in not having his client placed at the scene of the crime, regardless of his whereabouts. Some counsel may advise their clients to refuse to make any movements or to speak any words in a lineup or even to appear in one... Others will not only observe what occurs and develop possibilities for later cross-examination but will hover over witnesses and begin their cross-examination then, menacing truthful factfinding as thoroughly as the court fears the police now do. Certainly there is an explicit invitation to counsel to suggest rules for the lineup and to manage and produce it as best he can.[54]

Of course, no one knows whether the majority's opinion will elicit this response on the part of the bar but it is clear that the opinion leaves this delicate issue undisturbed for the time being. Since the decisions leave this issue unanswered, and assuming that lawyers will function as their own ethical conscience dictates, it then becomes important to analyze what is the scope of the clients' rights concerning pretrial identification confrontation, and what the attorney faces if he takes an active role in the procedure.[55]

Perhaps the first problem facing the defense attorney is who determines at what time a post-indictment identification is to be

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[52] This is important so that the attorney may recreate the scene of any prejudicial pretrial confrontation in court.

[53] If a witness would hesitate to sign such an affidavit, it might indicate that perhaps the police had *accidently* exposed the witness to the prisoner prior to the lineup. In any event, if the witness would indicate reluctance to sign such an affidavit, it might cast doubt on the fairness of the identification.

[54] United States v. Wade, 388 U.S. 218, 258-59 (1967).

[55] By active role, it is meant the role of adversary where the attorney is actually physically acting in the client's behalf.

held. The police, a representative of the prosecution's office,[56] the defense attorney, and the witness or witnesses will likely be in attendance. The defense attorney should consider: (1) how emotionally upset is the witness,[57] (2) whether he has had an opportunity to determine the basic requisite facts leading up to the necessity of the lineup, and (3) his own availability.

Perhaps the most difficult decision confronting the attorney in terms of the present state of the law is how he should advise his client regarding a request by the police to repeat any alleged words used at the scene of the crime. This was a five to four decision and there is an indication that the court could in the future interpret any such act as violating the suspect's right against self-incrimination.[58]

However, as the law stands today, no event at the lineup either voice identification, or the showing of pictures of the suspect to a witness prior to a lineup is a violation of the fifth amendment privilege against self-incrimination. Therefore, since voice identification at the lineup is not a violation of the fifth amendment, and at this point is a constitutionally acceptable procedure for the police, what would be the result of an attorney advising his client not to speak? And if he did so advise, and the police obtained a court order stating in effect that he must advise his client to speak, and the attorney standing on principle refused to follow the court order, has he then sent an invitation to the court to file a contempt of court charge against him? Also, perhaps the state could arraign the attorney on a suppression of evidence or obstruction of justice charge. Finally, at any time the attorney ceases to be only a witness and begins assuming the roles of pretrial arbitrator, negotiator, advisor and friend—what ethical problems, if any does he confront?

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[56] The presence of a representative of the prosecution is optional as the police officers fulfill this function. But certainly if he were present both the attorney for the defense and the attorney for the prosecution would be in a good position to conduct a fair lineup as it is both the prosecution's and the defense's sworn duty to insure that justice is done. For an encouraging example of such cooperation *see* Appendix One.

[57] A witness in a highly emotional state would seem to be less reliable than one who is calm and relaxed.

[58] The five justices who were of the opinion that compelling a suspect to speak for voice identification is not a violation of the Fifth Amendment were: J. White, J. Brennan, J. Stewart, J. Harlan and J. Clark. Those who felt such compulsion was a violation were: J. Black, J. Fortas, J. Douglas, and J. Warren. Justice Clark who voted with the majority has since left the court to be replaced by Justice Marshall who could be the swing vote in the future. *See also* Palmer v. Peyton, 359 F.2d 199 (4th Cir. 1967).

Canon 31 places the ultimate responsibility (and perhaps liability) on the attorney: "The responsibility for advising as to questionable transactions, for bringing questionable suits, *for urging questionable defenses,* is the lawyer's responsibility."[59] The issue here is whether the use of obstructionist tactics is in fact the urging of questionable defenses. It is the opinion of this writer that any defense urged in this area, if urged in complete honesty and good faith, is not a violation of Canon 31. Since the court has via *Wade, Gilbert* and *Stovall* opened this area to reform of its own accord, it can only expect that attorneys will act in a manner which best protects their clients' rights. In fact, Justice Black in his dissent said:

> Besides counsel's presence at the lineup being necesary to protect the defendant's specific constitutional rights to confrontation and the assistance of counsel at the trial itself, the assistance of counsel at the lineup is also necessary to protect the defendant's in-custody assertion of his privilege against self-incrimination, (citation omitted), for contrary to the court I believe that counsel may advise the defendant *not to participate* in the lineup or to participate only under certain conditions.[60]

Thus, it does not seem that advising a client not to submit to unfair identification methods would be urging a questionable defense. However, since eight members of the court agree that a lineup per se is not self-incrimination an attorney should refrain from advising a client to not participate unless absolutely positive that to not so advise in a particular situation would do his client irreparable harm.

The attorney must, commensurate with his personal and the the profession's Code of Ethics, make the final decision as to whether to be only a witness or an adversary in each situation. He cannot remove himself from the problem by removing himself from the case without coming in conflict with Canon 4.[61]

An attorney who feels that he should advise his client throughout the police station identification to prevent any unfairness finds support in Canon 5:

> It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound, by all fair and hon-

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59 ABA CANONS OF PROFESSIONAL ETHICS No. 31.

60 United States v. Wade, 388 U.S. 218, 246 (1967) (emphasis added).

61 "A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf." ABA CANONS OF PROFESSIONAL ETHICS No. 4.

> orable means to present *every defense* that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due proces of law....[62]

Canon 39 indicates that in any event counsel may actively elicit any information concerning the identification from the identifying witness, if he does so in good faith.[63]

Perhaps, the attorney acting as an adversary and as a witness in good faith and for good cause, may be the only safeguard against irreparable harm to his client. However, with cooperation between the prosecution and the defense keeping the welfare of both the system and the client in mind, this issue should only be academic. An example of such cooperation is set out in the Appendix.

III. WHERE ARE WE GOING?

As before mentioned the court does a thorough job of analyzing the pretrial identification procedures and of recognizing the potential for prejudicial error at this *critical stage* of the proceedings against an accused, however, the Court only in a cursory manner involves itself with the confusion which results when rule-books must be rewritten.

Certainly the Court points to the possibility of legislative reform as a solution in making the comment that:

> Legislative or other regulations, such as those of local police departments, which eliminate the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial may also remove the basis for regarding the stage as 'critical', but neither Congress nor the federal authorities have seen fit to provide a solution.[64]

The Court indicated that perhaps a special counsel could serve as a substitute counsel to observe the lineup to insure that the identification proceedings were conducted fairly.[65] However, query whether a substitute counsel would continue to protect his *tem-*

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[62] ABA CANONS OF PROFESSIONAL ETHICS No. 5. (emphasis added)

[63] "A lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of opposing counsel or party. In doing so, however, he should scrupulously avoid any suggestion calculated to induce the witness to suppress or deviate from the truth, or in any degree to affect his free and untrammeled conduct when appearing at the trial or on the witness stand." ABA CANONS OF PROFESSIONAL ETHICS No. 39.

[64] United States v. Wade, 388 U.S. 218, 239 (1967).

[65] "Moreover, we leave open the question whether the presence of substitute counsel might not suffice where notification and presence of the suspect's own counsel would result in prejudicial delay." 388 U.S. 218, 237 (1967).

porary clients' rights with the same vigor as permanent counsel. Also, how does this suggestion square with the Canons of Professional Ethics[66] and isn't there certainly a humane consideration involved?[67] Finally, how likely is it that a substitute counsel will become a bureaucrat who cooperates to a large extent with the police and whose ultimate employer is the state?

At a cursory glance, revision of police regulations seems to be tenable enough, but on closer inspection some acute if not insurmountable problems become apparent. If it would be possible that (1) all the police departments were to so change their regulations in some approved manner which would insure that to a great degree suggestiveness would be curtailed, and, (2) the Supreme Court could be assured that this had in fact been done, then perhaps, as the argument goes, the stage would no longer be critical. But how realistic is this approach?

In the first place any such course would take several years (at the minimum) for the states to adopt. And secondly, if the stage no longer becomes critical and counsel stays at home completely trustful of the actions of police does not the very *secrecy* argument that the court presented so aptly in its opinion come back into existence, and aren't we then right back where we started, with no effective remedy against a police breach of their rule-book? For if the police break the rules it becomes apparent that the rules of the game are such that it usually is never found out. It is common knowledge that policemen have a strong sympathy and affinity for fellow policemen, thus there may be witnesses to any police breach of the rules but these witnesses are only fellow officers, doing a job together, and they certainly will have no desire to aid the other side.[68] Therefore, it seems that counsel's presence at such "critical" stages of the pretrial confrontations will be necessary for some time.

The court quoted with approval one commentator's ideal statute.[69] Certainly, a comprehensive statute would be a step in the right direction, for such a statute would then allow an attorney to specifically base his comments to the police concerning any viola-

[66] "The right of an attorney or counsel to withdraw from employment, once assumed, arises only from good cause. Even the desire or consent of the client is not always sufficient . . . ." ABA CANONS OF PROFESSIONAL ETHICS No. 44.

[67] *E.g.*, what about the suspect who gets shuffled from one counsel to another? Does he not lose some confidence in the process?

[68] *See* Justice Black's dissent in Wolf v. Colorado, 338 U.S. 25 (1949), where he points out the untenability of recourse to the police for a wrong incurred.

[69] United States v. Wade, 288 U.S. 218, 236 n. 26 (1967).

tion of specific statutory guarantees and the suspect would then, if adequately represented by competent counsel, be insured of an identification as fair as is practical.

Perhaps a better solution more in line with what actually happens is available. Since the *Wade, Gilbert* and *Stovall* decisions give attorneys a new weapon in their defense arsenal, many attorneys have, (not surprisingly) used these cases to support an appellate attack on the constitutionality and fairness of the clients' convictions.[70] These attacks have not seemed to concern the appellate courts as they have first applied the non-retroactivity holding of *Stovall* and then they have examined the confrontations, found them not to unnecessarily suggestive and conducive to irreparable mistaken identification that appellant was denied due process of law"[71] which is determined by "the totality of the circumstances surrounding it."[72] This way of handling the situation is fine for the present, while non-retroactivity can be used as an easy out, but what about the turmoil which may result when the floodgates are opened on the courts and most identifications occurring after June 12, 1967, are challenged?

A look at *People v. Smiley*[73] is in order. Counsel made a motion for a pretrial hearing to determine whether the police lineup or show-up was "unnecessarily suggestive and conducive to irreparable mistaken identification,"[74] thus depriving defendant of due process of law. The District Attorney's office opposed the motion on the following grounds: (1) the *Stovall* decision does not make mandate

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70 See United States v. Tomaiolo, 378 F.2d 26 (2d Cir. 1967); United States v. Reed, 376 F.2d 226 (7th Cir. 1967); State v. Chaney, —Cal. 2d—, 428 P.2d 1004,— Cal. Rptr.— (1967); People v. Crosslin, —Cal. 2d—, —P.2d—, 60 Cal. Rptr. 309 (1967); People v. Boone, —Cal. 2d —,—P.2d—, 60 Cal. Rptr. 275 (1967); People v. Cook, —Cal. 2d —,— P.2d —, 60 Cal. Rptr. 133 (1967); People v. Diaz, —Cal. 2d —, 427 P.2d 505, 58 Cal. Rptr. 729 (1967); State v. Trotter, 4 Conn. Cir. 185, 230 A.2d 618 (1967); People v. Conway, —Ill. App. 2d —, 228 N.E.2d 548 (1967); People v. Williams 84 Ill. App. 2d 1, 228 N.E.2d 501 (1967); People v. Oparka, —Ill. App. 2d —, 228 N.E.2d 291 (1967); People v. McIntosh, 82 Ill. App. 2d 90, 227 N.E.2d 76 (1967); State v. Nelson 223 Ga. 497, 156 S.E.2d 341 (1967); Nadalski v. State, 1 Md. App. 304, 229 A.2d 598 (1967); Dorlch v. State, 1 Md. App. 2d 173, 229 A.2d 148 (1967); State v. Jones, — Minn. —, 152 N.W.2d 67 (1967); State v. Garrity, — Minn. —, 151 N.W.2d 773 (1967); State v. Romero, 95 N.J. Super. 482, 231, A.2d 830 (1967); State v. Sinclair, 49 N.J. 525, 231 A.2d 565 (1967); State v. Matlock, 49 N.J. 491, 231 A.2d 369 (1967); People v. Milburn, 19 N.Y.2d 910, 227 N.E.2d 893, 281 N.Y.S.2d 98 (1967).

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

72 *Id. at* 302.

73 54 Misc. 2d 826, 284 N.Y.S.2d 265 (Sup. Ct. 1967).

74 *Id* at 826, 284 N.Y.S.2d at 265.

a hearing; (2) the unconstitutionality can only be attacked after conviction; (3) that if a hearing be granted it only may be granted after the defendant exhausted his cross-examination. In support of the third ground the District Attorney argued that it would be an undue burden on a victim to have to testify twice.

Justice Martinis ordered the hearing reasoning that:

> There is no legislative provision or judicial precedent for granting the type of hearing here requested,... (citation omitted) the courts must improvise as was done in 'search and seizure' and 'involuntary confessions' so that hearings would be held to conform with the requirements thereof. The ruling in *Stovall* implicitly appears to require that a hearing be held upon a proper showing.[75]

Finally Justice Martinis ended his opinion by advising:

> However, should this case reach appellate review or for future guidance to trial justices on this issue, it is humbly suggested, from personal experience and observation in the instant procedure, that upon proper cause being shown by the defendant, a *pre-trial* (italics in original) hearing be conducted, inasmuch as the hearing could become long and protracted, while the trial is in suspension, with the jurors becoming inconvenienced, worn and impatient awaiting the resumption of the trial and with further consideration of the added expense to the state.[76]

Certainly Justice Martinis is to be commended for instituting effective reform at the trial level where defendant will not have to appeal to be granted his full right to a fair trial. However, perhaps the best solution to this problem is to proceed one step further then the able trial judge did.

It is the opinion of this writer that the most tenable solution to this problem on both a nationwide and a state level is the removal of the pretrial identification stage from the police department and have any pretrial identification conducted under the supervision and scrutiny of a neutral magistrate. It seems that such a solution would be both practical and would fulfill constitutional requirements. A reading of several of the recent cases concerning appellate decisions decided after June 12, 1967, shows that often lineups are conducted by the police in a courthouse, a fact which would indicate that a magistrate would be easily accessible. Also, such judicial presence would greatly minimize any attacks on the fairness of identification since it would be the magistrates sworn duty to conduct a fair identification.

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[75] *Id.* at 828, 284 N.Y.S.2d at 267.

[76] *Id.* at 830, 284 N.Y.S.2d at 269.

A statute[77] is necessary which would set out certain procedures which would limit, to as practical a degree as possible, any suggestiveness; and when the identification is finished the magistrate would file an affidavit, duly certified by two or more impartial witnesses that the identication process was conducted in accordance with statutory requirements of fairness and objectivity. Concerning the problem of the police inducing *accidental* prejudicial identification show-ups, if any evidence indicated that a witness had confronted the suspect prior to the judicial courthouse identification then a hearing would have to be held to determine any prejudice that might have resulted.

As a final safeguard, the identifying witness would also file a sworn written affidavit that he had not confronted the suspect which he identified prior to the trial. The steps taken in the above manner will best balance the interest of the state and the constitutional rights of the suspect. First, the suspect would be insured of a fair identification that is not tainted by the pretrial activity of the police. It would also eliminate the necessity of mandatory presence of counsel thus easing the financial burden of the state. It would also cut down on expense in that it would be much cheaper to have a magistrate preside over a judicial identification than to later have to interrupt the trial to conduct a hearing on what happened in the police station several months prior to the trial. By the same token the trial judge would evaluate the testimony of the police and defense attorney and because of their prospective adversary roles it would be a good guess that such testimony would be conflicting. Thus, with the situation as it is now, the judge must attempt to use hindsight to determine what happened. However, if the aforesaid remedy would be applied such a hearing would be rare, in fact, almost non-existent absent a breach of the statute or rule. Adoption of such a procedure would also virtually eliminate appeals based on this issue which in the case of indigents, where the state now pays for both the prosecution and the defense, may become quite expensive. Along with all of the preceding, the adoption of such a procedure would extract the attorney from the delicate position which the *Wade, Gilbert* and *Stovall* holdings now leave him in, namely a situation where he might have to play an obstructing role in the police station to insure his client his right to a fair trial.

John W. Atwood '69

[77] This writer recommends a statute based upon criteria similar to that set out in the Appendix.

APPENDIX*

PROCEDURE FOR LINEUP IDENTIFICATIONS

The Supreme Court decisions in *United States* v. *Wade,* 388 U. S. 218 (1967), and *Gilbert* v. *California,* 388 U. S. 263 (1967), summarized in 4 *Defender Newsletter* 38-41 (July 1967), announce new constitutional standards for lineups. The Court recognized the legitimacy of the lineup and stated that the lineup did not violate the privilege against self-incrimination—"We have no doubt that compelling the accused merely to exhibit his person for observation by a prosecution witness prior to trial involves no compulsion of the accused to give evidence having testimonial significance." 388 U. S. 218, 222. Although both cases involved post-indictment lineups conducted in the absence of counsel, new procedures were necessary to assure that this critical pre-trial confrontation between the accused and the witnesses against him was conducted in a fair manner. The presence of counsel is necessary to protect the accused's interest, and now counsel for the accused is required unless intelligently and understandingly waived.

In Clark County (Las Vegas), Nevada, the district attorney and the public defender jointly adopted a step-by-step procedure which strives to achieve a balance between the rights of the individual and the rights of society. That agreement and check-list are set out below.

Joint Memorandum

FROM: Office of the District Attorney, Clark County, Nevada, and Office of the Public Defender, Clark County, Nevada

TO: All Law Enforcement Agencies, Clark County, Nevada

SUBJECT: *Line-up Identification Procedures*

The recent decisions of *United States* v. *Wade* and *Gilbert* v. *California* have necessitated a reappraisal of the procedures employed in witness' line-up identification of suspects accused of the commission of a crime.

A study of the procedures used and pertinent case law has been made by the District Attorney and the Public Defender of Clark County, Nevada. This has resulted in the directions for the conduct of line-up identification in the manner set out in the attachments. These procedures will afford suspects accused of crime the Constitutional safeguards provided in the Wade and Gilbert cases and at the same time will protect society from unnecessary appeals or loss of cases resulting from improper line-up identification procedures.

The office of the above District Attorney and the Public Defender are of the opinion that the institution of these procedures are in the interests of justice for the protection of the Constitutional rights of those accused of crime and to the substantial benefit of the public as a whole.

s/Richard H. Bryan	s/George E. Franklin
Richard H. Bryan	George E. Franklin, Jr.
Public Defender	District Attorney

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* The material appended here was taken from American Bar Center, *Defender Newsletter* 55-57 (Sept. 1967).

CHECK LIST FOR LINE-UP IDENTIFICATION

1. No line-up identification should be held without discussing the legal advisability of such line-up with the office of the District Attorney.

2. No line-up should be held without a member of the District Attorney's office being present.

3. No line-up should be held without a member of the Public Defender's office* being present.

4. Insofar as possible, all persons in line-up should be of the same general age, racial and physical characteristics (including dress).

5. Should any body movement, gesture, or verbal statement be necessary, this should also be done uniformly and any such movement, gesture, statement be done one time only by each person participating in the line-up and repeated only at the express request of the person attempting to make identification.

6. The customary line-up photograph should be taken, developed as soon as possible and a copy of such photograph made available immediately to the Public Defender's office.*

7. If more than one person is called to view a line-up, the persons should not be allowed, before the completion of all witnesses' attempted identification, to discuss among themselves any facet of their view of the line-up or the result of their conclusions regarding the same.

8. All witnesses who are to view the line-up should be prevented from seeing the suspect in custody and in particular in handcuffs, or in any manner that would indicate to the witness the identity of the suspect in question.

9. All efforts should be made to prevent a witness from viewing any photographs of the suspect prior to giving the line-up.

10. All conversation between the police officer and prospective witnesses should be restricted to only indispensible direction. In all cases nothing should be said to the witness to suggest suspect is standing in the particular line-up.

11. Should there be any more than one witness, only one witness at a time should be present in the room where the line-up is conducted.

12. There should be a minimum of persons present in the room where the line-up is conducted, and a suggested group would be the law enforcement officer conducting the line-up, a representative of the District Attorney's office, a representative of the Public Defender's* office and an investigator of that office if requested by the Public Defender.

13. The line-up report prepared by the law enforcement agency conducting the line-up should be prepared in sufficient number of copies to make a copy available, at the line-up, to the Public Defender.*

14. Each witness, as he appears in the room where the line-up is conducted, should be handed a form for use in the identification. Explanation for the use of the form is self-explanatory and a sample copy is attached hereto. This form should be signed by the witness, by a representative of the Public Defender's office*, and by the law enforcement officer conducting the line-up.

15. A copy of this Identification Form should be given to the Public Defender's office* at the completion of the viewing of the line-up by each individual witness.

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* This would apply to any privately retained attorney, should he be there in lieu of the Public Defender.

Witness' Line-up Identification Form

To Witness:

The positions of the persons in the line-up will be numbered left to right, beginning with one(1) on your left.

1. If you have previously seen one or more of the persons in the line-up, place an "X" in the appropriate square corresponding to the number of the person in the line-up.
2. Then, sign your name and fill in the date and time.
3. When completed, hand this sheet to the officer.

1	2	3	4	5	6	7
☐	☐	☐	☐	☐	☐	☐

_____
Signature of Witness

_____ _____
Signature of Law Enforcement Officer Date and Time

_____
Signature of Public Defender or
Attorney for Suspect