Criminal Law - The Lineup's Lament - Kirby v. Illinois

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On February 21, 1968, Willie Shard reported to the Chicago police that the previous day two men had robbed him of a wallet containing, among other things, travelers checks and a social security card. On February 22, two police officers stopped the defendant and a companion on West Madison Street in Chicago for interrogation. Defendant was stopped because he resembled a man wanted by the police. When asked for identification, the defendant produced a wallet that contained three travelers checks and a social security card, all bearing the name of Willie Shard. Papers with Shard's name on them were also found on the defendant's companion. When asked to explain his possession of Shard's property, the defendant first said that the travelers checks were "play money", and then told the officers that he had won them in a craps game. The officers then arrested the two men and took them to a police station.¹

Only after arriving at the police station and checking the records there did the arresting officers learn of the Shard robbery. A police car was then dispatched to Shard's place of employment, where it picked up Shard and brought him to the police station. Immediately upon entering the room in the police station where the defendant and his companion were seated at a table, Shard positively identified them as the two men who had robbed him two days earlier. No lawyers were present in the room, and neither the petitioner nor his companion had asked for or been advised of any right to the presence of counsel. Six weeks later, the defendant was indicted for robbery. At the trial, after a pre-trial motion to suppress his testimony had been overruled, Shard testified as to his previous identification of the defendant and again identified him as the robber. The defendant was found guilty, and the conviction was upheld on appeal. While the lineup previously had been deemed a critical stage

¹ In People v. Bean, 121 Ill. App. 2d 332, 257 N.E.2d 562 (1970), the First District Court of Appeals held that Bean's conviction (Kirby's companion) was based on an identification which was the fruit of an unlawful arrest. It was unlawful because the search was based on his accompanying a man who resembled a person the police wanted and because he could not produce an identification. The appellate court reversed the conviction on the grounds that the identification was a "product of the unlawful seizure of his person and consequently all testimony relating thereto [was] improperly admitted into evidence against him." 121 Ill. App. 2d at 335, 257 N.E.2d at 564.
and the right to counsel was extended to those who had already been indicted, the United States Supreme Court held in this case that the right to counsel does not extend to lineups which occur prior to an indictment of the participants. *Kirby v. Illinois*, 406 U.S. 682 (1972).

With this decision the Court establishes an exact point in time for judging when the right to counsel becomes available prior to trial. When the process shifts from investigatory to a formal accusation, the right to counsel is considered necessary to protect the accused. Thus, the indictment is fixed as the critical stage whereupon counsel is required to protect the defendant's right to a fair trial. In so doing, however, the decision signifies a movement away from the spirit of the previous right to counsel cases by evidencing a greater concern for police efficiency than for the liberty of the individual. In order to discern that movement, this note will attempt to show that *Kirby v. Illinois* is but another indication of the fact that the whole area of right to counsel at lineups is perforated by incongruities; that due to this confusion the basic reason for having counsel at lineups, the protection of individual freedom, has been ignored to satisfy adherents of police efficiency.

The right to counsel has had a long and precarious history. Prior to 1963, its existence was couched within the margins of the due process clause of the Fourteenth Amendment. In broad and sweeping language, the Court of 1932, in *Powell v. Alabama*, held that the right to counsel at a trial was one of those certain "immutable principles of justice which

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3. 406 U.S. 682 (1972) [hereinafter cited as *Kirby*].
4. It was an elementary principle that the first ten amendments constituted limitations only on the federal government and not on the states: *see* Ohio ex rel. Lloyd v. Dollison, 194 U.S. 445 (1904); Brown v. New Jersey, 175 U.S. 172 (1899); Twitchell v. The Commonwealth, 74 U.S. (7 Wall.) 321 (1868); Withers v. Buckley, 61 U.S. (20 How.) 84 (1857); Barron v. Baltimore, 32 U.S. (7 Pet.) 242 (1833). There were, however, some exceptions; *see* first amendment cases: *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931); *Stromberg v. California*, 283 U.S. 359 (1931); *Gitlow v. New York*, 268 U.S. 652 (1925); and *Chicago, B.&Q.R.R. Co. of Chicago*, 166 U.S. 226 (1897) holding that the fifth amendment right to just compensation was within due process of the law. It should be noted that there was an undercurrent expressed by some of the Justices that the Bill of Rights necessarily applied to the states; *see* Gideon v. Wainwright, 372 U.S. 335, 345-47 (1963) [hereinafter cited as *Gideon*] which cites a review of ten Justices sympathetic to this view; *In re Groban*, 352 U.S. 330, 337 (1957) (Black dissenting); Bute v. Illinois, 333 U.S. 640, 678 (1948) (Douglas dissenting); Foster v. Illinois, 352 U.S. 134, 139 (1947) (Black dissenting); Betts v. Brady, 316 U.S. 455, 474 (1942) (Black dissenting); Hurtado v. California, 110 U.S. 516, 547-58 (1884) (Harlan dissenting). Arising out of the fear of abusive state practices, the Court resorted to the use of the Fourteenth Amendment to oversee state activities.
5. 287 U.S. 45 (1932) [hereinafter cited as *Powell*].
inhire in the very idea of free government”\textsuperscript{6} and it was one of the “fundamental principles of liberty and justice”\textsuperscript{7} guaranteed by the due process clause of the fourteenth amendment. The Court characterized the importance of the lawyer’s role by saying that:

Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he [may] have a perfect one. He requires the guiding hand of counsel at every step in the proceeding against him.\textsuperscript{8}

Though \textit{Powell} dealt with a capital case, the author of the opinion, in a later discussion, described the \textit{Powell} rule in broad terms without regard to a capital-non-capital distinction.\textsuperscript{9}

At first the Court was comfortable with this standard and had no trouble extending it to other trial-related issues.\textsuperscript{10} Then ten years after \textit{Powell}, the Court, in a non-capital case \textit{Betts v. Brady},\textsuperscript{11} distinguished it from \textit{Powell} on the grounds that \textit{Powell} was a capital case and \textit{Betts} was not. It was then held that the Court should decide on a case by case basis by “an appraisal of the totality of facts in a given case.”\textsuperscript{12} Though the Court recognized that previous decisions lent color to the argument that the right to counsel ought to apply to non-capital cases,\textsuperscript{13} it was afraid of falling into the “habit of formulating the guarantee into a set of hard and fast rules. . . .”\textsuperscript{14}

Decisions subsequent to \textit{Betts} have borne out the fact that this distinction caused great debate\textsuperscript{15} and discrepancy in decision-making.\textsuperscript{16} Finally,
in 1963, Betts was explicitly overruled by Gideon in an effort by the Court to make this right more certain. By incorporating the sixth amendment into the fourteenth, the Court in Gideon embedded the right in an air of relative certainty and ended the confusion caused by the Betts ruling. Once Gideon established a definitive right to counsel at the trial, the ensuing decisions began to establish those critical points where the right arose.

Affirming a pre-Gideon case, Hamilton v. Alabama (where the right was extended to an arraignment), the Court in White v. Maryland held that a hearing in which the defendant was forced to enter a plea was tantamount to an arraignment and that the defendant was entitled to have counsel present. Extending the right even further, the Court, in Mas-siah v. United States, held that allowing into evidence incriminating statements elicited in a secret interrogation after indictment and in the absence of counsel "contravenes the basic dictates of fairness in the conduct of criminal causes and [violates] fundamental rights of persons charged with [a] crime." Noting the constitutional principle established in Powell, the Court said that the assistance of counsel, "during perhaps the most critical period of the proceeding ... from the time of their arraignment until the beginning of their trial" was of vital importance.

The final major area of concern to face the Court in its efforts to fix the critical point was the time period preceding any formal state action

334 U.S. 728 (1948); Bute v. Illinois, 333 U.S. 640 (1948); Gayes v. New York, 332 U.S. 145 (1947); Foster v. Illinois, 332 U.S. 134 (1947). Some of the earlier non-capital cases, however, used the factual situation to distinguish them so as to hold a denial of due process; see Uveges v. Pennsylvania, 335 U.S. 437 (1948); Townsend v. Burke, 334 U.S. 736 (1948); Wade v. Mayo, 334 U.S. 672 (1948). As late as 1961, however, the Court, still dissatisfied with the distinction, held for the petitioner in two non-capital cases; Carnley v. Cochran, 369 U.S. 506 (1961) and Chewning v. Cunningham, 368 U.S. 443 (1962).

17. 372 U.S. at 339: facts were ostensibly the same as in Betts.
20. Under Maryland law, this procedure was called a preliminary hearing.
21. 373 U.S. at 60: in reversing the court of appeals' judgment, the Court quoted Hamilton v. Alabama, 368 U.S. at 55: "Only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently." For a discussion of the right to counsel prior to trial during this period see W. BeaneY, Right to Counsel Before Arraignment, 45 Minn. L. Rev. 771 (1961) and Note, Criminal Procedure—Right to Counsel Prior to Trial, 44 Ky. L.J. 103 (1955).
23. Id. at 205.
24. Id.
prior to trial. Having previously considered such cases under the paternal guidance of *Betts*, the Warren Court was now able to take a fresh look at those cases without the weight of *Betts* and decide anew. In overruling any case inconsistent with its holding, the Court found the critical point to be when the police investigation was no longer a general inquiry but focused on a particular suspect in police custody. Thus, in *Escobedo*, the Court ruled that to make the right to counsel a function of whether an indictment had been secured would "exalt form over substance." The Court felt that to rule otherwise would make "the trial no more than an appeal from the interrogation." In combining the fifth and sixth amendment rights, the Court in *Escobedo* held that the adversary system began when the process focused on the accused, and at that point counsel became a necessary ingredient in a fair system of criminal justice.

Going further than *Escobedo* in seeking to "dispel the compelling atmosphere of the interrogation," the Court, two years later in *Miranda*, set down clear-cut guidelines for the protection of those held for custodial interrogation. The purpose of forcing law enforcement officials to administer these warnings, especially the right to counsel, was to protect the privilege to remain silent. The rights arose when the suspect was "taken into custody or otherwise deprived of his freedom of action in any significant way." The practical effect of *Escobedo* and *Miranda* was that counsel was deemed an essential participant, unless waived, when the investigation focused on the individual, irrespective of whether any formal action had been initiated. Both decisions were primarily couched in terms of protecting the individual from state procedures that threatened his lib-

25. See *Crooker v. California*, 357 U.S. 433 (1958) holding that refusal of counsel was not a denial of due process during the interrogation under the facts; *Cicenia v. Lagay*, 357 U.S. 504 (1958) counsel is only "one pertinent element in determining from all the circumstances whether a conviction was attended by fundamental unfairness." 357 U.S. at 509. The Court held that denial of counsel, under the facts, did not prejudice the defendant.

26. *Escobedo v. Illinois*, 378 U.S. 478 (1964) [hereinafter cited as *Escobedo*]: here the suspect requested and was denied counsel who was present in the police station and the police did not warn him of his right to remain silent.

27. *Id.* at 486.

28. *Id.* at 487. See *In re Groban*, 352 U.S. 330, 340 (1957), a pre-*Gideon* decision where defendant, unlike *Escobedo*, did not request counsel.

29. *Id.* at 492.


31. *Id.* at 467-73: right to remain silent; that anything said can be used against the individual in court; right to consult with a lawyer during the interrogation; if he is indigent, a lawyer will be appointed to represent him.

32. *Id.* at 444.
The extension of counsel to custodial interrogation was not an arbitrary maneuver. It plainly rested on the word custody as an objectively significant time to allow the individual assistance in understanding his relationship with the state. In recognizing the need for the accused to be on equal footing, the Court went even further. At the expense of a per se exclusionary rule, the Court in *Miranda* forced agents of the state to act as impartial liaisons by giving the accused specific warnings, some of which would ordinarily be given by counsel. This step connoted a reverence for individual liberty. By trying to put one in custody on equal footing with the state by providing counsel, the Court is acting in the best interests of a state whose primary concern is protecting individual liberty. If viewed in this light, these decisions must be read broadly, in accordance with their spirit, to accomplish that end.

Keeping this background of cases in mind, the Supreme Court was able to take a fresh look at the need for counsel at line-ups. This uncertain journey began on June 12, 1967, with *United States v. Wade*, *Gilbert v. California*, and *Stovall v. Denno*. Having accepted those cases on the basis of the right to counsel issue, the Court resorted to the critical stage doctrine. A stage was, and still is, critical if at that point the denial of counsel would deprive the defendant of his right to a fair trial. Clearly, this doctrine is applicable where there are objective criteria for determining whether the accused's rights have been derogated. Such criteria in the case of lineups, however, are not so easy to find.

33. See *Orozco v. Texas*, 394 U.S. 324 (1969), extending *Miranda* outside the police station (to a bedroom), and *Mathis v. United States*, 391 U.S. 1 (1968), extending *Miranda* to a tax investigation.

34. The strong language put forth in *Gideon* is but one indication of the Court's desire to protect the individual: "Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries." 372 U.S. at 344.

35. At the heart of this uncertainty is the fact that there is no firm evidence that lineups are actually trustworthy and accurate. There is very little empirical data because this procedure has been solely within police domain and has been deemed, for such a long time, as obviously the best form of proof.


37. 388 U.S. 263 (1967) [hereinafter cited as Gilbert].

38. 388 U.S. 293 (1967) [hereinafter cited as Stovall].

In the first case, Wade, an in-court identification based on a lineup without counsel resulted in a conviction. The Court held that though the right to counsel did not apply to protect any fifth amendment right,\(^{40}\) it did apply to the lineup so as not to deprive the defendant of the "right to a fair trial at which the witnesses against him might be meaningfully cross-examined."\(^{41}\) After reviewing the interrogation cases, the Court pointed out that:

nothing decided or said in the opinions in the cited cases [Escobedo and Miranda] links the right to counsel only to protection of the Fifth Amendment rights. Rather those decisions "no more than reflect a constitutional 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 derogate from the accused's right to a fair trial.\(^{42}\)

The Court, by implication, suggested that though the right to counsel did not protect the fifth amendment right, it might, as proposed above, be considered within a broad view of Escobedo. This avenue, however, was not pursued any further.

The Court then moved on to decide whether lack of counsel denied the accused a right to a fair trial. By citing many instances of erroneous eyewitness identifications and suggestive police practices, the Court emphatically based its decision that counsel was necessary on the fact that the lineup was a procedure inherently wrought with prejudicial dangers due to the nature of the lineup itself.\(^{43}\) Counsel's presence was consid-

\(^{40}\) 388 U.S. at 221-23. The Court held that the fifth amendment right covered only testimony and not mere physical presence or a verbal utterance for voice identification (as was also true here). Justices Black and Douglas dissented and Justices Warren and Fortas felt that the utterance was in violation of Wade's fifth amendment right. See Schmerber v. California, 384 U.S. 757 (1966); Holt v. United States, 218 U.S. 245 (1910).

\(^{41}\) 388 U.S. at 224.

\(^{42}\) Id. at 226.

\(^{43}\) Id. at 228-39: "We do not assume that these risks are the result of police procedures intentionally designed to prejudice an accused. Rather we assume they derive from the dangers inherent in eyewitness identification and the suggestibility inherent in the context of the pretrial identification." Id. at 235. In Wade, one witness, the bank cashier, stated that he had seen Wade standing in the hallway near an FBI agent and that later five or six persons appeared in the hallway. The bank vice president admitted that he had seen Wade standing in the custody of the FBI and that that person resembled the person subsequently identified as the robber. See E. Borchard, Convicting the Innocent (1961); E. Cahn, The Moral Decision 258 (1955); Frank and Frank, Not Guilty 61 (1957); F. Frankfurter, The Case of Sacco and Vanzetti (1927); H. Gross, Criminal Investigation 47-54 (Jackson ed. 1962); R. Ringel, Identification and Police Lineups (1966); Rolph, Personal Identity: P. Wall, Eye-witness Identification in Criminal Cases (1965); Wentworth and Wilden, Personal
ered important so that he could reconstruct the lineup in his efforts to meaningfully cross-examine the witnesses, but the role of counsel at the lineup was discussed in very vague terms without enumerating what could or could not be done. From within that cloud of uncertainty, the Court then added that it left open the possibility for legislatures to eliminate the abuses and thereby remove the basis for regarding this stage as critical.

In setting down its rule, the Court felt that the in-court identification based on the illegal lineup was to be excluded unless the prosecution could show that the in-court identification was based on an independent


44. 388 U.S. at 230-32.

45. Id. at 237-38: the Court felt it could not refuse to recognize the right to counsel for fear that counsel would obstruct justice. Counsel's presence may in fact be beneficial so as to prevent the infiltration of the taint of an illegal lineup. But there are some perplexing questions as to the appropriate role of counsel which complicates matters even more. As McCormick points out: "Is he to be merely an observer, whose presence is required so that he will have the information necessary effectively to point out to the trial jury any factors in the lineup that should be considered in weighing the probative value of the witnesses' trial testimony? If so, it is arguable that counsel is ill-equipped to perform this function. In the event that the facts at the lineup are put in issue, he would then be required to testify himself, an awkward position for an attorney who is also presenting the case. In the event that he observes conditions which might adversely affect the witnesses' trial testimony, does he have any authority to have them corrected? If he observes them but fails to bring them to the attention of the police until after the witnesses' testimony has been "tainted," has he waived any of his client's rights? 4 McCormick on Evidence 2d ed., at 409 (1972).


46. Id. at 239. Since three of the Justices who felt the critical stage should be extended to a lineup felt that the fifth amendment had been violated, it is reasonable to assume that they might not feel that a legislature's solution would remove it from its critical stage status. Mr. Justice Black, who took issue with the critical stage idea but felt that counsel should be extended, also would fit in with the three other Justices (Douglas, Warren and Fortas).

It should also be noted that subsequent to Wade, the City of Chicago Police Department adopted no rule which would correct the feared abuses.
This qualified exclusionary rule was adopted because attacking a procedure upon which the unequivocal courtroom identification was based was an insurmountable burden for a counsel not present at the lineup. Wade was remanded so that the lower court could determine whether the in-court identification was of an independent source or if it was a harmless error.

The second case in the lineup trilogy, Gilbert, dealt with a post-indictment lineup where counsel was absent, and the defendant was placed on a stage in order to be viewed by one hundred people for a multitude of offenses. The Court here focused on two distinct types of testimony. By applying Wade, the Court first held that any testimony of an identification of the defendant in court stemming from an illegal lineup (one without counsel) should be excluded as long as there was no showing that the in-court identification was of an independent source. Secondly, the Court held that any testimony of an out-of-court lineup identification where counsel was absent was to be per se excluded. The basis for the per se exclusionary rule was founded on the belief that testimony of an out-of-court illegal identification would “enhance the impact of his in-court identification on the jury and seriously aggravate whatever derogation exists of the accused's right to a fair trial.” Gilbert was then remanded so that the California Supreme Court could decide whether there was sufficient basis to render the errors harmless.

The final lineup case, Stovall, was, in actuality, a showup situation. On August 25, 1961, Stovall was arrested on suspicion of the attempted murder of one Ms. Behrendt and the murder of her husband. One day after the arrest, without having been able to obtain counsel, defendant was brought, handcuffed to one of the five accompanying policemen, to the hospital and was identified by Ms. Behrendt. Mr. Justice Brennan held that the Wade-Gilbert rule was not to be applied retroactively. He based his decision on the fact that it was a new standard “not fore-

47. Id. at 240.
49. Id. at 273-74.
50. Id. at 274.
51. 388 U.S. at 297. After setting forth the criteria for determining whether it should be applied retroactively, the Court notes that Gideon, Hamilton v. Alabama, 368 U.S. 52 (1961) and Douglas v. California, 372 U.S. 353 (1963) were deemed to apply retroactively.

One should note that by not applying Wade retroactively, the Court is impliedly consenting that, unlike the arraignment or trial, one can not be sure that the lack of counsel will actually derogate an accused’s right to a fair trial.
shadowed... until Wade was decided by the Court of Appeals... and that if it was not applied retroactively, it "would seriously disrupt the administration of our criminal laws." In an effort to dispense properly with those cases not within the scope of the Wade-Gilbert rule, the Court addressed itself to the issue of whether the showup violated due process. Thus a second standard was established for those lineups that took place prior to June 12, 1967. The basic tenets of the due process evaluation consisted of whether:

the confrontation conducted in this case was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law... [A] claimed violation of due process of law in the conduct of confrontation depends on the totality of the circumstances surrounding it.

The record indicated that the immediate hospital confrontation was imperative. The Court held that such an emergency (imminent death of the victim) rendered the identification necessary and thus sufficient, under the circumstances, to fall outside the ambit of the due process test. However, the Court mentioned that the "practice of showing suspects singly to persons for the purposes of identification, and not as part of a lineup, has been widely condemned." Upon a plain reading of "unnecessarily suggestive," one could interpret "unnecessarily" as modifying "suggestive." "Unnecessarily" would then pertain to the degree of wilfulness in allowing the procedure to be "suggestive." It would seem to imply that there are certain steps that could be taken to make the procedure less "suggestive" and that a failure to do so would render the procedure "unnecessarily suggestive." Such an import, however, was not provided.

Instead the Court has distinguished between the two terms completely. By doing so, the Court has forsaken the basic reasoning of Wade—that lineups, and especially showups, are inherently suggestive. The showup in Stovall satisfied the due process test solely because it was necessary in light of the fear of imminent death of the victim. The issue of suggestiveness was not modified by necessity but instead superceded by it. Thus, for those cases prior to June 12, 1967, the decision as to whether a showup was necessary, regardless of the belief that they are inherently

52. Id. at 299.
53. Id. at 300. Mr. Justice Brennan felt that the possibility of fairness without counsel was much greater than in the circumstances where retroactivity was allowed.
54. Id. at 301-02. See also 39 A.L.R.3d 791 (1971).
55. Id. at 302.
56. 388 U.S. at 228-35.
untrustworthy, falls back on the reliability of the identification based on the surrounding circumstances of the showup. It would seem that the more external factors present, the more reliable an inherently suggestive procedure becomes.

That might very well be; however, it is not a logical extension of the reasoning of Wade. The Court throws itself back into the confusing issue that Wade was apparently trying to avoid: reliability. Once again, a segment in the development of the right to counsel has become as uncertain as it did the day Betts was decided.

In order to discriminate intelligently and further clarify the basic underlying issues, certain key factors of the lineup trilogy should be set forth and discussed as later treatment of these issues may significantly effect the future of the right to counsel.

If the trilogy is read broadly, one could conclude that if no counsel is present at a lineup or showup, the conviction must be reversed unless it can be shown that the in-court identification was of a sufficient independent source or was a harmless error. And, for those cases prior to

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57. Following Stovall’s lead, these subsequent cases also held that the showup was necessary though suggestive and thus not a denial of due process. In so deciding they used a balancing approach when holding that the showup was reliable. See United States v. Poe, 462 F.2d 195 (5th Cir. 1972); United States v. Hines, 455 F.2d 1317 (D.C. Cir. 1972); Loper v. Beto, 454 F.2d 499 (5th Cir. 1971); United States v. Perry, 449 F.2d 1026 (D.C. Cir. 1971); United States v. Wilson, 449 F.2d 1005 (D.C. Cir. 1971); United States v. Miller, 449 F.2d 974 (D.C. Cir. 1971); United States ex. rel. Penachio v. Kropp, 448 F.2d 110 (6th Cir. 1971); United States v. Washington, 447 F.2d 308 (D.C. Cir. 1970); United States v. Callahan, 439 F.2d 852 (2d Cir. 1971) (police arranging a “coincidental” showup where witness happened to pick out the defendant was not suggestive and did not violate due process); United States v. Hallman, 439 F.2d 603 (D.C. Cir. 1971) (a lineup case), at 604: “The interest of justice includes approval of police techniques even though they involve possibility of prejudice to the suspect, where the overall balance lies in the furtherance of fair pre-trial identifications . . . .”; United States v. Harris, 437 F.2d 686 (D.C. Cir. 1970); United States v. Cunningham, 436 F.2d 907 (D.C. Cir. 1970); United States v. Green, 436 F.2d 290 (D.C. Cir. 1970); United States v. Follette, 435 F.2d 1380 (2d Cir. 1970); United States v. Wilson, 435 F.2d 403 (D.C. Cir. 1970); and see Russell v. United States, 408 F.2d 1280 (D.C. Cir.), cert. denied, 395 U.S. 928 (1969) which held that an “immediate on-the-scene confrontation at five o’clock in the morning when there would necessarily be a long delay in summoning appellant’s counsel, or a substitute counsel, to observe a formal lineup [would not violate defendant’s right]. Such a delay may not only cause the detention of an innocent suspect; it may also diminish the reliability of any identification obtained, thus defeating a principle purpose of the counsel requirement. . . . We conclude, with some hesitation, that Wade does not require exclusion of McCann’s identification.” 408 F.2d at 1283-84. See also SOBEL, Assailing the Impermissible Suggestion: Evolving Limitations on the Abuse of Pre-trial Criminal Identification Methods, 38 BROOKLYN L. REV. 261 (1971) and 1969 L. & SOC. ORDER 104.
June 12, 1967, the due process test would be applied to determine whether the totality of circumstances amount to a denial of due process to the accused. Due to the divergent views in this area, some crucial distinctions could narrow the above interpretation.

The most obvious factual distinction can be made with regard to the actual time the right to counsel becomes critical. In those cases where the right to counsel was based on the sixth amendment guarantee and was deemed fundamental, the lineup took place after formal state action (an indictment). It was of no consequence to Stovall that it took place before or after an indictment as its holding was to apply only to those cases prior to the Wade date. Therefore, whether the sixth amendment right to counsel was deemed a fundamental right to one not yet formally charged remained technically open.

With regard to inherent suggestiveness, it should also be noted that a showup was considered at least as contemptible as a lineup. In fact, the decision to treat all three cases under the same rules gives weight to the proposition that the Court did not mean to distinguish between a lineup or a showup in any way that could imply that either procedure was acceptable. One should keep in mind, however, that it is possible to distinguish between a lineup and a showup in these cases. Such a differentiation could have the effect of allowing a showup, applying the due process test, outside the Wade-Gilbert rule, and thus allow the police to hold showups in order to avoid any counsel requirement.

A most significant aspect of these cases, however, is the discrepancy between the policy and actual rule of Wade. Wade's reasoning gets its life-breath from the fact that the Court does not want to remain in the precarious position of having to define reliability. In a close reading of Wade, what waxes most important is that it attacks the very nature of the lineup. The Wade rule, however, remains within the bounds of the critical stage doctrine and thus does not truly reflect the Court's main objective. A literal interpretation of Wade's reasoning would demand that the procedure be abolished. Not wanting to go that far, the Court applies a rule which may not be relevant.

The rule, that counsel should be present so that the defendant's right to a fair trial would not be derogated, may not be satisfactory when dealing with lineups and showups. It is argued that counsel's mere presence (since he can not play an active role) compels the lineup to be fair. However, his presence might also cause the prejudicial activity to be

58. 388 U.S. at 234 and 388 U.S. at 302.
simply less overt (like prior counseling of the witnesses). Thus, the demise of the function of the critical stage doctrine might not secure justice as counsel would be rendered helpless in an effort to meaningfully cross-examine the witnesses anyway. Allowing the presence of counsel would not get at the inherent suggestiveness and dangers intrinsic to eyewitness identifications at lineups.

One result of this faulty nexus was depicted in *Stovall* where the Court, in distinguishing between "unnecessarily" and "suggestive," applied a due process standard to a showup case when, if the *Wade policy* had even been persuasive, the result would have been exactly opposite. In fact a showup, as discussed in *Wade*, like the one in *Stovall*, where the suspect was presented to the witness handcuffed to a policeman, clearly conveyed the suggestion that the one presented was believed to be guilty by the police. By not setting down any guidelines, the Court recognizes the gap between the critical stage doctrine and its policy by explicitly leaving open the opportunity for legislatures to remove the critical stage status by formulating rules to govern the lineup. It is altogether possible that the Court has made a hasty intrusion into police station procedure. What is clear, however, is that these cases indicate nothing certain.

One year after *Stovall*, the Court applied the totality of circumstances test to two situations which occurred prior to the *Wade* date. In *Simmons v. United States*, the Court justified the use of a pre-arrest photographic

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59. 388 U.S. at 234. "And the vice of suggestion created by the identification in *Stovall*, . . . was the presentation to the witness of the suspect alone handcuffed to police officers. It is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police."

60. Stovall was handcuffed to a policeman, surrounded by four other officers and was the only Black person in the room. Ms. Behrendt had, a day earlier, undergone major surgery as a result of eleven stab wounds and had watched the murder of her husband. The petitioner was identified only after he spoke a few words. Showups, like this one, are the "most grossly suggestive identification procedures now or ever used by the police." . . . Whatever may be said of lineups, showing a suspect singly to a victim is pregnant with prejudice. The message is clear: the police suspect this man. That carries a powerful suggestive thought. Even in a lineup the ability to identify the criminal is severely limited by normal fallibilities of memory and perception. When the subject is shown singly, havoc is more likely to be played with the best-intended recollections." *Biggers v. Tennessee*, 390 U.S. 404, 407 (1968) (Douglas dissenting).

61. 388 U.S. at 239.

62. 390 U.S. 377 (1967). *See generally* Comment, *Photographic Identification: The Hidden Persuader*, 56 Iowa L. Rev. 408 (1970). *But see* United States v. Ash, 461 F.2d 92 (D.C. Cir.), cert. granted, 407 U.S. 909 (1972) (where the defendant was in custody, after arrest, and no lineup was held, but photographs were used—held that it violated his right to counsel at a critical stage of the prosecution). *See also* 39 A.L.R.3d 1000 (1971).
identification where more than one possible suspect was in the picture. The holding was based on the exigencies of the situation. Since the procedure was held not to be suggestive, it was approved. In Biggers v. Tennessee, a pre-indictment showup was conducted and the petitioner was chosen solely by the fact that his voice was similar to the one the victim had heard. The showup was without notice to counsel and could easily have been replaced with a lineup. In affirming the conviction, the Court clearly contravened the spirit of Wade.

Though applied in different circumstances, two standards have simultaneously evolved: (1) whether the in-court identification based on the illegal lineup was of an independent source, and (2) regardless of counsel’s presence, whether the procedures violated due process. Since distinction between Wade and Stovall is possible, it is not unreasonable to assume that the second standard might not be abolished in certain factual situations (like showups) occurring after June 12, 1967. This could produce the anomaly of counsel not being considered necessary, though a procedure may be deemed so prejudicial as to warrant a reversal. Though the result would be the same under Wade, it clearly belies Wade’s reasoning and puts a foot in the door for further decisions like Biggers v. Tennessee.

Since the lineup in Foster v. California was prior to the Wade date, the Court held that where the defendant was put in a lineup wearing a jacket similar to the one worn by the robber, and with two men much shorter than he, the procedure was violative of due process. The victim could not positively identify him in the lineup, nor in a showup hours later. However, in another lineup a week later, the victim positively identified Foster. In Coleman v. Alabama, while the lineup, prior to Wade, was held not to be impermissibly suggestive so as to violate due process, the Court extended the critical stage doctrine to preliminary hear-

63. 390 U.S. 404 (1967).
64. Possibly on the facts: one being a lineup and the other a showup in emergency circumstances, since subsequent cases do not view the actual procedure itself as significant as did Wade. Cf. Biggers v. Tennessee, 390 U.S. 404 (1967). See also 338 U.S. at 228-35.
65. Such a case might arise out of a showup which is extremely suggestive. It should be noted that in requesting that Wade be overruled, the respondent in Kirby felt that the Stovall due process test was an adequate solution. Brief for Respondent at 42. Kirby v. Illinois, 406 U.S. 682 (1972).
68. Id. at 442-43.
ings.\(^69\) Thus, the Court, as in *Foster*, applied *Stovall* outside its facts to a lineup. Within the same issue of allowing counsel to one whose liberty is curtailed, the Court undermines the spirit of *Escobedo* and *Wade* by not requiring counsel at a lineup, while citing *Wade* as authority for allowing counsel at the probable cause hearing.

One result of the lineup cases was that some courts began to distinguish the right to counsel at post-indictment lineups from the right at pre-indictment lineups.\(^70\) Based on Illinois' distinction between pre- and post-indictment lineups,\(^71\) Kirby was granted certiorari to decide the narrow question of whether the Court should "extend the *Wade-Gilbert per se\(^{69}\) 399 U.S. 1 (1970). It should be noted that in *Adams v. Illinois*, 405 U.S. 278 (1972), *Coleman v. Alabama*, 399 U.S. 1 (1970) was held not to be retroactive based on the criteria set forth in *Stovall* for retroactivity.


71. *People v. Palmer*, 41 Ill.2d 571, 244 N.E.2d 173 (1969). In the 1971 rules of the Illinois Supreme Court, discovery rule 413 makes no distinction between a post or pre-indictment lineup. Rule 413 states: (a) The person of the accused. Notwithstanding the initiation of judicial proceedings, and subject to constitutional limitations, a judicial officer may require the accused, among other things, to (i) appear in a line-up; . . . (b) Whenever the personal appearance of the accused is required for the foregoing purposes, reasonable notice of the time and place of such appearance shall be given by the State to the accused and his counsel, who shall have the right to be present. . . . Ill. Sup. Ct. Rule 413(a)(b).
exclusionary rule to identification testimony based upon a police station showup that took place before the defendant had been indicted or otherwise formally charged with any criminal offense.” 72

While not addressing Wade’s policy, the plurality based its decision on the fact that the petitioner was entitled to counsel only “at or after the time that adversary judicial proceedings have been initiated against him.” 73 Mr. Justice Stewart reached this conclusion by distinguishing Miranda on the grounds that it applied solely to protect the right against self-incrimination which had no application as per Schmerber v. California74 and Wade. 75 The opinion also distinguished Escobedo on the grounds that its prime purpose was to protect the right to silence and that it was strictly limited to its facts. 76

Once that argument was dispensed with, the Court reached its holding by looking at the whole line of right to counsel cases from Powell to Coleman v. Alabama. 77 The Court then concluded that the reason why the right to counsel should attach once the adversary proceeding was initiated was because only at that time did the “adverse positions of government and defendant . . . [become] solidified.” 78 While declining to go beyond Wade to impose the per se exclusionary rule on pre-indictment lineups, the Court felt that such a lineup could still be reviewed within the due process test as applied in Stovall and Foster. 79

By drawing a line between post- and pre-indictment lineups, the Court exalts form over substance in two ways. First, the Court specifically up-

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72. 406 U.S. at 684. Justices Stewart, Burger, Rehnquist and Blackmun rendered the Court’s opinion, Mr. Justice Powell concurred in the result and Justices Brennan, Douglas, Marshall and White dissented.

73. 406 U.S. at 688. As Mr. Justice Brennan aptly pointed out in his dissent: “The plurality today ‘decline[s] to depart from [the] rationale of Wade and Gilbert. . . .’ The plurality discovers that ‘rationale’ not by consulting those decisions themselves, which would seem to be the appropriate course. . . .” Id. at 700.


75. 406 U.S. at 687-88.

76. Id. at 689. Mr. Justice Stewart cited pages 733-34 in Johnson v. New Jersey, 384 U.S. 719 (1966) as standing for the proposition that Escobedo was limited strictly to its facts. Upon reading those pages one will find a discussion of Escobedo’s retroactivity but no explicit prospective limitation to its facts.

It should be noted that consistent with a suggested avenue put forth in this note, the petitioner argued that Escobedo can not be distinguished because the confrontation was held “in the investigatory stage rather than at the accusatory stage. . . .” Brief for Petitioner at 12. Kirby v. Illinois, 406 U.S. 682 (1972).


78. 406 U.S. at 689.

79. Id. at 690-91.
holds *Wade* on the basis of its policy considerations. That policy goes to the very being of the procedure itself, not merely to how it will affect the right to a fair trial or to at what time such a procedure occurs. It is based on the innate unreliability of eyewitness identifications and suggestive police practices. That a trial may later be influenced is but a result of this process. It is, however, the practices themselves that lie at the pith of the *Wade* decision. Though the *Wade* critical stage rule concentrates on the result of the lineup, it is certainly inspired by the desire to move into the police station to protect the individual. By impliedly distinguishing *Wade*, the Court demonstrates that it no longer accepts *Wade*'s policy as a given. Thus, the homage paid to *Wade* is hasty and superficial.

Secondly, "[t]he plurality apparently considers an arrest, which for present purposes we must assume to be based upon probable cause, to be nothing more than part of 'a routine police investigation' . . . and thus not 'the starting point of our whole system of adversary criminal justice;' . . . [a]n arrest, according to the plurality, does not face the accused 'with prosecutorial forces of organized society,' nor immerse him 'in the intricacies of substantive and procedural criminal law.'" To say that when a man has been arrested the police have not focused on him beyond a mere routine police investigation is repugnant to the spirit of *Escobedo* and *Miranda*. To distinguish *Escobedo* and its disciples is to ignore their fundamental reality.

Putting aside the important issue of what effect the presence of counsel has at a lineup, the critical stage doctrine, as applied to lineups, is too

80. *Id.* at 696-97.
81. *Id.* at 698.
82. "An arrest evidences the belief of the police that the perpetrator of a crime has been caught. A post-arrest confrontation for identification is not 'a mere preparatory step in the gathering of the prosecution's evidence.' *Wade* supra, at 227. A primary and frequently sole purpose of the confrontation for identification at that stage is to accumulate proof to buttress the conclusion of the police that they have the offender in hand." 406 U.S. at 699.

"The right to counsel prior to an identification confrontation is no less important to the preservation of justice than is the right to counsel prior to interrogation." Brief for Petitioner at 13. *Kirby v. Illinois*, 406 U.S. 682 (1972).

83. In discussing *Miranda*, Mr. Justice Douglas said that: "[w]e were not then concerned with whether an 'arrest' or an 'indictment' was necessary for a person to be an 'accused' and thus entitled to Sixth Amendment protections. We looked instead to the nature of the event and its effect on the rights involved." *United States v. Marion*, 404 U.S. 307, 333 (1971) (Douglas, concurring in the result).

"Of course nothing decided or said in the opinions in the cited cases [*Escobedo* and *Miranda*] links the right to counsel only to protection of Fifth Amendment Rights." 388 U.S. at 226.
subjective due to the uncertainty of whether a lineup actually impinges on the right to a fair trial. It is clear from the movement of the Court that though there is evidence of abuses, post-\textit{Wade} courts are not convinced that the lineup itself is as faulty a procedure as proclaimed by \textit{Wade}. If one is to assume that counsel is a necessary ingredient, it would have been more suitable to focus on custody, as in \textit{Escobedo}, as a more objectively significant time to grant the right.\footnote{84} By not applying the critical stage doctrine to pre-indictment lineups, the decision exhibits this very fundamental problem.\footnote{85} In these terms, it is easy to see how the \textit{Kirby} plurality could feel at ease when not only circumventing \textit{Wade}'s reasoning, but also avoiding its rule.\footnote{86} The Court in \textit{Kirby} salutes \textit{Wade} like a retiring general and then makes it fade away.

From a broad perspective, \textit{Wade} was a decision by the Court to move into the police station to curtail certain abusive police practices which threatened individual liberty. At the very least, it was a maneuver to in-

\footnote{84. It could be argued that the right to counsel is not necessarily limited to the sixth amendment. Incorporation does not have to exclude the possibility that due process could require counsel upon state deprivation of liberty, which, for all intents and purposes, could be once the person is taken into custody. It appears to this writer that insuring counsel is the minimum requirement for putting the defendant on an equal footing with his adversary.}

\footnote{85. It should also be noted that the ABA approved standards for criminal justice recommends that, "Counsel should be provided to the accused as soon as feasible after he is taken into custody, when he appears before a committing magistrate, or when he is formally charged, whichever occurs earliest." \textit{ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Providing Defense Services} § 5.1 (approved draft, 1968) (emphasis added).}

\footnote{86. It should be noted that the Respondent and the State of California in an amicus curiae brief in \textit{Kirby} both recommended that \textit{Wade} be overruled. Brief for Respondent at 23-43; Brief of Amicus Curiae in Support of Respondent at 7-15 (Attorney General of California).}

\footnote{As Mr. Justice Brennan points out "the initiation of adversary judicial criminal proceedings... is completely irrelevant to whether counsel is necessary at a pretrial confrontation for identification in order to safeguard the accused's constitutional right to confrontation and the effective assistance of counsel at his trial." 406 U.S. at 697.}
duce an awareness of police abuses. The post-\textit{Wade} courts\textsuperscript{87} have reinsulated police lineup procedures which occur subsequent to an arrest. The wide use of independent sources\textsuperscript{88} evidences the fact that the lineup is not nearly as important, in the eyes of the Court, as those later, more formal stages. In some cases, brief observation at the time of the offense (followed by a lineup without counsel months later) was sufficient to sustain an independent source identification even though the lineup identification was excluded.\textsuperscript{89} This is but another indication of the dilution of the \textit{Wade} principle.

There are at least two possible consequences which could accrue from these cases. The first is that the whole criminal process may ultimately

\textsuperscript{87} Instead of moving towards abolition or at least regulation of police lineups, post-Wade courts have evidenced the opposite desire (e.g., wide use of independent sources and lack of any positive procedural suggestions). Legislatures have also gone the opposite way. Congress, on June 19, 1968, passed § 3501 of the Omnibus Crime Control and Safe Streets Act which attempted to explicitly overrule \textit{Wade} and \textit{Gilbert}: "The testimony of a witness that he saw the accused commit or participate in the commission of a crime for which the accused is being tried shall be admissible in evidence in a criminal prosecution in any trial court ordained and established under Article III of the Constitution of the United States." 18 U.S.C. § 3502 (Supp. 1968).


For a discussion on the split of authority concerning the admissibility of prior extrajudicial identifications, as independent evidence of identity, both by the witness and third parties present prior to identification, see 71 A.L.R.2d 449 (1971), and 5 A.L.R.2d Later Case Service 1225-28 (1971). These above mentioned cases attest to the fact that they, contrary to the belief of Justice White in \textit{Wade}, did not impose a "heavy burden on the State and probably an impossible one [and that for] all intents and purposes, courtroom identifications are barred if pretrial identifications have occurred without counsel being present." 388 U.S. at 251 (Justice White dissenting in part and concurring in part).

\textsuperscript{89} \textit{See}, e.g., People \textit{v. Brown}, 6 Ill. App. 3d 500, 285 N.E.2d 515 (1972) (victim saw accused eight minutes during the alleged offense; then at an illegal lineup seven months later. \textit{Held}, that eight minute identification was a sufficient independent source).
be retarded since it would be in the best interest of the defendant's adversary to delay in the procurement of an indictment so that a lineup could be held without having to obtain counsel for the accused. The most likely result, however, may be that the police will stop conducting lineups in favor of arranging prompt showups in an effort to fall within the ambit of *Stovall*\(^90\) and now *Kirby*.

Though no definitive answers are presented, what is clear is that the critical stage doctrine has reached the end of its line, and form has jammed the system of procedural safeguards so necessary for the protection of individual liberty. When the most essential procedural safeguard is dependent on whether an indictment has been returned one must ask for whom the balance between the individual and the state is tipped.\(^91\)

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90. Russell v. United States, 408 F.2d 1280 (D.C. Cir. 1969) and see 388 U.S. at 228-35.

91. While commenting on recent Supreme Court criminal decisions, the Journal of the American Bar Association described *Kirby* as "perhaps the least defensible, from a technical point of view, of the Court's criminal law holdings during the term." 58 A.B.A.J. 1092 (1972).