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Constitutional Law - Right to Counsel - Extention of the Critical Stage to Pre-Indictment Identifications - People v. Fowler, 82 Cal. Rptr. 363, 461 P.2d 643 (1969)

DePaul College of Law

CASE NOTES

CONSTITUTIONAL LAW—RIGHT TO COUNSEL—EXTENSION OF THE CRITICAL STAGE TO PRE-INDICTMENT IDENTIFICATIONS

Following the robbery of a motel by three men, two witnesses positively stated that defendant Fowler was one of the robbers. Their statements were made during a photographic identification, a pre-indictment lineup identification, and an in-court identification. Fowler moved to suppress the evidence of the line-up identification on the authority of the *Wade-Gilbert* rules[1] because he was not represented by counsel at the lineup, and he did not intelligently waive his right to counsel. His motion was denied in the Superior Court of California. On appeal to the California Supreme Court, the case was reversed on the ground that defendant Fowler's sixth amendment right to counsel was violated. *People v. Fowler*, 82 Cal. Rptr. 363, 461 P.2d 643 (1969).

This decision has followed two and one-half years of lower court decisions which are split into two distinct trends in their application of the *Wade-Gilbert* rules. One line of cases has consistently interpreted the "post-indictment" language in the *Wade* and *Gilbert* decisions to be the limits the United States Supreme Court had intended to place upon the right to counsel. *Fowler*, however, is an extension of the other trend of lower court cases which have held that *Wade* and *Gilbert* did not intend to limit the right to counsel to "post-indictment" situations. Based upon this interpretation, the California Supreme Court extended the right to

1. In United States v. Wade, 388 U.S. 218 (1967), the United States Supreme Court held (5-4) that a federal judgment convicting defendant Wade of bank robbery should be vacated because he had been required to appear in a post-indictment lineup without the presence of his counsel or a valid waiver thereof—which lineup was therefore conducted in violation of defendant's sixth amendment rights. People v. Fowler, 82 Cal. Rptr. 363, 368, 461 P.2d 643, 648 (1969). In Gilbert v. California, 388 U.S. 263 (1967), the High Court held (6-3) that a state court judgment convicting defendant Gilbert of murder and armed robbery should be vacated because of the admission during the prosecution's case in chief of *evidence of a post-indictment lineup* in which defendant had been required to appear without the presence of his counsel or a valid waiver thereof—such admission being per se erroneous—and that the judgment should be reversed unless it was determined upon remand that the error was harmless.

counsel to the pre-indictment lineup.[2]

Because a broad application of the reasoning of the *Fowler* court would require the presence of counsel at every pre-trial identification, both before and after indictment, it is the purpose of this note to examine those factors which collectively determine whether a particular confrontation requires the presence of counsel, thus defining what is this "critical stage" to which the sixth amendment right attaches. Attention will also be given to those factors which remove any basis for regarding a stage as critical.

The right to counsel at identification proceedings is a recent development in the history of its interpretation. The origin of the doctrine of the right to counsel in the United States is the sixth amendment of the Constitution which guarantees that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[3] Indicating that this right is not limited to the trial itself, the United States Supreme Court held in *Powell v. Alabama*[4] in 1932, that it does not matter whether the defendant is intelligent or feebleminded, educated or illiterate, or whether he is a layman in the science of law; he "lacks both the skill and knowledge adequately to prepare a defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step of the proceedings against him."[5] The Court stated that the right to counsel attaches at any critical period of the proceedings against the defendant[6] and has applied this right to cases that have originated in state courts,[7] to pre-trial judicial proceedings,[8] to appellate review,[9] to police

2. People v. Fowler, *supra* note 1, at 368, 461 P.2d 643, 648 (1969). *See* Note, *Criminal Law: Self-Incrimination: Right to Counsel*, 51 MARQ. L. REV. 191, 194 (1968), a discussion which extends the *Wade-Gilbert* rules to pre-indictment lineups. *See* 9 WM. & MARY L. REV. 538, 533 (1967), which limits the right to counsel to post-indictment lineups. *See also* 32 ALBANY L. REV. 198, 205 (1967), for a discussion of problems created by requiring counsel at lineups and the need for alternatives.

3. U.S. CONST. amend. VI.

4. Powell v. Alabama, 287 U.S. 45 (1932).

5. *Id.* at 64.

6. *Id.* at 59. "[D]uring perhaps the most critical period of the proceedings against the defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself."

7. In Powell, *supra* note 4, at 65, the Court held 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, feeblemindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law." Affirming this position in Grossjean v.

interrogations,[10] to juvenile proceedings,[11] and to pre-trial identification proceedings.[12]

American Press Co., 297 U.S. 233, 243-44 (1936), in which the Court said: "We conclude that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution." *See also* Johnson v. Zerbst, 304 U.S. 458 (1938); Avery v. Alabama, 308 U.S. 444 (1940); Smith v. O'Grady, 312 U.S. 329 (1941). *Contra,* Betts v. Brady, 316 U.S. 455 (1942) wherein the Court held that "The Sixth Amendment of the national constitution applies only to trials in federal courts. The due process clause of the Fourteenth Amendment does not incorporate as such, the specific guarantees found in the Sixth Amendment." It was not until 1963 that the Court, in Gideon v. Wainwright, 372 U.S. 335 (1963), solved the problem of a defendant's federal constitutional right to counsel in a state court by specifically overruling *Betts* and reaffirming *Powell.* The factual situation of *Gideon* also extended the right to counsel to a state, non-capital felony case whereas in *Powell* the right to counsel was applied in a capital case.

8. In extending the right to counsel to pre-trial judicial proceedings the Court held in Hamilton v. Alabama, 368 U.S. 52, 54 (1961), that an arraignment is a critical stage to which the right to counsel attaches because "What happens there may affect the whole trial. Available defenses may be as irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes." Affirming the right to counsel at a "preliminary hearing" which was as much a critical stage in Maryland as an arraignment in Alabama, the Court in White v. Maryland, 373 U.S. 59, 60 (1963), stated that "only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently."

9. The right to counsel must extend to indigents on appeal according to the Court in Douglas v. California, 372 U.S. 353, 357 (1963): "[W]here the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." The Court further extended the right to counsel on appeal in Anders v. California, 386 U.S. 738 (1967), by requiring counsel first to submit a brief to the court referring to anything in the record that might arguably support the appeal, before being allowed to withdraw from the representation of an indigent on appeal. For right to counsel on appeal in federal courts, *see* Johnson v. United States, 352 U.S. 565 (1957) and Ellis v. United States, 356 U.S. 674 (1958).

10. Whether the police interrogation takes place after indictment as in Massiah v. United States, 377 U.S. 201 (1964), or before indictment, as in Escobedo v. Illinois, 378 U.S. 478 (1964), the accused is entitled to the presence of counsel. Two years later the Court held that not only is the accused entitled to counsel at police interrogations, but he must be informed of his right to counsel and that if he has no lawyer, one will be appointed for him unless he knowingly and intelligently waives that right. Miranda v. Arizona, 384 U.S. 436, 470-71 n.21 (1966), the Court explained that "No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings. [T]he accused who does not know his rights and therefore does not make a request [for counsel] may be the person who most needs counsel."

11. *In re* Gault, 387 U.S. 1 (1967).

12. United States v. Wade, *supra* note 1; Gilbert v. California, *supra* note 1; People v. Fowler, *supra* note 2.

Recognizing the potential for prejudice at identification proceedings and the inability of the accused to reconstruct such prejudice through cross-examination at trial,[13] the sixth amendment right to counsel was applied to the lineup identifications of the *Wade* and *Gilbert*[14] cases in 1967. The Court emphasized that identification proceedings include both intentional[15] and unintentional[16] instances of prejudicial practices by the police. Whether the prejudice is intentional or not, the presence of counsel may often prevent it.[17] A lawyer will be able to detect unfairness in witness-suspect confrontations, and reconstruct this unfairness at the trial through cross-examination of the witness.[18] For these reasons the Court ruled

13. "There is a grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial; . . . [the] presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial." United States v. Wade, *supra* note 1, at 233.

14. United States v. Wade, *supra* note 1; Gilbert v. California, *supra* note 1.

15. "State reports . . . reveal numerous instances of suggestive procedures, for example, that all in the lineup but the suspect were known to the identifying witness, that other participants in a lineup were grossly dissimilar in appearance to the suspect, that only the suspect was required to wear distinctive clothing which the culprit allegedly wore, that the witness is told by the police that they have caught the culprit after which the defendant is brought before the witness alone or is viewed in jail, that the suspect is pointed out before or during a lineup, and that the participants in the lineup are asked to try on an article of clothing which fits only the suspect." United States v. Wade, *supra* note 1, at 233.

16. The Court quotes Williams and Hammelman, *Identification Parades, Part I*, 1963 CRIM. L. REV. 479: "[T]he fact that the police themselves have, in a given case, little or no doubt that the man put up for identification has committed the offense, . . . involves a danger that this pursuasion may communicate itself even in a doubtful case to the witness in some way." This element of prejudiced communication is considered by the Court to be inherent in eyewitness identifications quite apart from any intentional suggestive influence by the police. United States v. Wade, *supra* note 1, at 235. Particular suggestions are set forth as a means of preserving fairness at lineups in Note, *Due Process at the Lineup*, 28 LA. L. REV. 259 (1968).

17. United States v. Wade, *supra* note 1, at 233.

18. "The [defendant] can seldom reconstruct the manner and mode of lineup identification for a judge and jury at trial. . . . The impediments to an objective observation are increased when the victim is the witness. . . . 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. . . . In short, the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification." United States v. Wade, *supra* note 1, at 230-32.

See also Pointer v. Texas, 380 U.S. 400 (1965), in which the complaining witness had testified at a preliminary hearing for a robbery charge. The accused did not have counsel. The witness' testimony was introduced at the trial. The conviction was reversed by the Court on the ground that these facts denied the defendant

that "both Wade and his counsel should have been notified of the impending lineup, and counsel's presence should have been a requisite to conducting the lineup, absent an 'intelligent waiver.' "[19]

"Since counsel's presence at the lineup would equip him to attack not only the lineup identification but the courtroom identification as well,"[20] the *Wade* Court held that the in-court identification may be admissible only if the prosecution can show that it had an origin independent of the tainted pre-trial identification.[21] In *Gilbert v. California*,[22] where the facts were substantially the same as in *Wade*, the Court protected the right to counsel in state courts by ruling that there would be a *per se* exclusionary rule applied to evidence of such tainted pre-trial identification.[23] Also, any in-court identification based upon such tainted pre-trial identification will be excluded, unless the prosecution can show that the in-court identification had an origin independent of the tainted pre-trial identification, "or whether, in any event, the introduction of the evidence was harmless error."[24]

Although the Court said that "[t]he principle of *Powell v. Alabama* and succeeding cases requires that we scrutinize *any* pre-trial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial,"[25] the facts of *Wade* and *Gilbert* were such that the Court actually applied the right to counsel to post-indictment lineup identifications. It then became the work of the lower federal and state courts to determine whether or not to apply the *Wade-Gilbert* rules to pre-indictment identification proceed-

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the right of cross-examination, a right applicable to state courts under the fourteenth amendment.

19. United States v. Wade, *supra* note 1, at 237.

20. United States v. Wade, *supra* note 1, at 241.

21. "A rule limited solely to the exclusion of testimony concerning identification at the lineup itself, without regard to admissibility of the courtroom identification, would render the right to counsel an empty one. The lineup is most often used, as in the present case, to crystallize the witnesses' identification of the defendant for future reference. . . . The State may then rest upon the witnesses' unequivocal courtroom identification, and not mention the pretrial identification as part of the State's case at trial. Counsel is then in the predicament in which Wade's counsel found himself—realizing that possible unfairness at the lineup may be the sole means of attack upon the unequivocal courtroom identification, and having to probe in the dark in an attempt to discover and reveal unfairness, while bolstering the government witness' courtroom identification by bringing out and dwelling upon his prior identification." United States v. Wade, *supra* note 1, at 240-41.

22. Gilbert v. California, 388 U.S. 263 (1967).

23. *Id.* at 273.

24. *Id.* at 242.

25. United States v. Wade, *supra* note 1, at 227.

ings. Reasoning as the Court did in *Gideon*,[26] that often the holding of the Court will be limited to the particular facts of the case at bar, while the conclusions themselves may be more broadly applicable, some lower courts extended the right to counsel to identifications occurring near the scene of the crime,[27] at the stationhouse,[28] in a courtroom without a judicial officer present,[29] during a show-up,[30] and in photographs,[31] as well as during many lineup proceedings.[32]

It is in stark contrast to these decisions that another line of decisions has refused to extend the *Wade-Gilbert* rules to identifications occurring near

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26. "While the Court at the close of its *Powell* opinion did by its language, as this Court frequently does, limit its holding to the particular facts and circumstances of that case, its conclusions about the fundamental nature of the right to counsel are unmistakable." Gideon v. Wainwright, *supra* note 7, at 343.

27. It is the reason given by the *Rivers* court for extending the *Wade-Gilbert* rules to an identification near the scene of the crime that expresses the most comprehensive application of these rules. The *Rivers* court stated that *Wade* applies "to any lineup, to any other techniques employed to produce an identification, and *a fortiori* to a face-to-face encounter between the witness and the suspect alone, regardless of when the identification occurs in time or place." Rivers v. United States, 400 F.2d 935, 939 (5th Cir. 1968).

28. United States v. Clark, 289 F. Supp. 610 (E.D. Pa. 1968); and United States v. Wilson, 283 F. Supp. 914 (D.D.C. 1968). In the stationhouse identification of *Clark* the court held that the trial court is only to inquire whether the confrontation occurred at a critical state, and "if so, regardless of the demonstrated fairness of the confrontation, if defense counsel was not present . . . the fruit of that confrontation must be barred at trial." United States v. Clark, *supra* at 626. This identification was held the same day as the crime and the immediacy indicates an element of fairness. However, counsel still was not present to prepare meaningfully for cross-examination at trial.

29. In Palmer v. State, 5 Md. App. 691, 695, 249 A.2d 482, 486 (1969), the court cited Stovall v. Denno, 388 U.S. 293 (1967), as justification for attaching the right to counsel to a courtroom identification that clearly was not a judicial hearing because no judicial officer was present. "[In] *Stovall* the Court said that *Wade* and *Gilbert* [apply to] . . . *all* future cases which involve confrontations for identification purposes conducted in the absence of counsel. It did not limit their effect to post-indictment lineups." The *Palmer* court also cited *Wade* directly in requiring that any pre-trial identification of the accused must be scrutinized to see if the right to counsel must attach, and concluded that the preparation of meaningful cross-examination cannot be absolutely limited to post-indictment confrontations.

30. State v. Wright, 247 N.C. 84, 161 S.E.2d 581 (1968).

31. In Thompson v. State, 451 P.2d 704 (Nev. 1969), the court extended the *Wade-Gilbert* rules to identifications through photographs and said that the fact that *Wade* involved a post-indictment lineup is not determinative. The right to counsel attaches when the prosecutorial process shifts from the investigatory to the accusatory stages and focuses on the accused.

32. United States v. Broadhead, 413 F.2d 1351 (7th Cir. 1969); Hampton v. State, 462 P.2d 760 (Nev. 1969); Boone v. State, 456 P.2d 418 (Nev. 1969); Parker v. State, 230 So.2d 247 (1970); State v. DeLuca, 448 S.W.2d 869 (Tex. Crim. App. 1970); Martin v. State, 449 S.W.2d 257 (Tex. Crim. App. 1970).

the scene of the crime,[33] at the stationhouse,[34] at preliminary hearings,[35] in a hospital room,[36] during routine police investigatory procedures,[37] and during pre-indictment photographic procedures.[38] The most common reason given for not extending the *Wade-Gilbert* rules to pre-indictment identifications is the specific language of *Wade* and *Gilbert*, which applies this right to counsel only to post-indictment lineup situations.[39] Another justification for so holding is that "it is not probable that [the defendant] would have been any better represented by counsel at this confrontation occurring in the middle of the night."[40] Some courts have interpreted identification through photographs as preparatory steps which are capable of sufficient reconstruction at trial so that they are not critical stages, and, thus, the *Wade-Gilbert* rules do not apply.[41] Other courts have refused to apply the rules to routine police investigatory activity because they view these rules as a barrier to the necessary procedures which the police must pursue in their duty of prompt apprehension of a criminal and their duty to give equally prompt freedom to an innocent suspect.[42]

Finally, some courts have been reluctant to extend the right to counsel to pre-indictment identifications because they are apparently in doubt as

33. Commonwealth v. Bumpus, 354 Mass. 494, 238 N.E.2d 343 (1968); Russell v. United States, 408 F.2d 1280 (D.C. Cir. 1969); People v. Cesarz, 44 Ill. 2d 180, 255 N.E.2d 1 (1969); People v. Green, 42 Ill. 2d 555, 254 N.E.2d 663 (1969).

34. State v. Gatling, 275 N.C. 625, 169 S.E.2d 60 (1969).

35. Tyler v. State, 5 Md. App. 265, 246 A.2d 634 (1968); Laury v. State, 260 A.2d 907 (Del. 1969). The court stated in State v. Boens, 8 Ariz. App. 110, 112, 443 P.2d 925, 927 (1968), that "we must assume that the Court selects its language with care" and therefore, although there is some language in *Wade, Gilbert* and *Stovall* that "may arguably apply to all pretrial identifications . . . we do not believe that it was the intent of the Supreme Court to categorize on-the-scene identifications, such as this one, as being a critical stage in the 'prosecution' of the accused."

36. People v. Almengor, 268 A.C.A. 664, 74 Cal. Rptr. 213 (1969).

37. People v. Palmer, 41 Ill. 2d 571, 244 N.E.2d 173 (1969); State v. Aldridge, 204 Kan. 599, 464 P.2d 8 (1970); State v. Bertha, 4 N.C. App. 422, 167 S.E.2d 33 (1969).

38. McGee v. United States, 402 F.2d 434 (10th Cir. 1968); United States v. Conway, 415 F.2d 158 (3rd Cir. 1969).

39. People v. Palmer, 41 Ill. 2d 571, 573, 244 N.E.2d 173, 175 (1969).

40. State v. Boens, *supra* note 35, at 112, 443 P.2d at 928.

41. United States v. Conway, 415 F.2d 158 (3rd Cir. 1969): "We hold that *Wade* and *Gilbert* do not apply in these circumstances, since these pre-indictment photographic identifications were not a 'critical stage' of the prosecutions where the presence of counsel could meaningfully have preserved defendant's right to a fair trial. . . . There was no form of confrontation here, nor, indeed, was any communication from defendants compelled or their presence even required." *See also* United States v. McKenzie, 414 F.2d 808 (3rd Cir. 1969).

42. Commanwealth v. Bumpus, *supra* note 33.

to the correct *Wade-Gilbert* application.[43] Since the United States Supreme Court has not yet decided a case in which the facts involve a pre-indictment identification, the *Fowler* case,[44] decided by the Supreme Court of California, is a significant step toward defining the limits of the *Wade* and *Gilbert* rules.

The facts of the *Fowler* case are distinguishable from *Wade* and *Gilbert* in that Fowler appeared in a lineup *before* indictment. In deciding that the right to counsel attached to this lineup identification, the California Supreme Court indicated that there was nothing said in *Wade* which required that the right to counsel be limited to factual situations identical with *Wade*. In fact, the *Fowler* court assumed that if "proceedings formally binding a defendant over for trial" were required, the Supreme Court would have referred to post-information as well as post-indictment lineups.[45] The California court also refers to the fact that other courts have decided "that there [is] no distinction between the *Wade* taint and the taint of a 'Rule 5' violation."[46] Rule 5 of the Federal Rules of Criminal Procedure requires that police bring an arrested person before a magistrate without delay, and the accused must be told of his right to counsel.[47] Because nearly all Rule 5 violations occur before indictment, the *Fowler* court reasoned that the common effect of Rule 5 violations in federal courts, and *Wade-Gilbert* violations in state courts, is that *Wade-Gilbert* applies also to the pre-accusation stage. A lineup which occurs prior to indictment may result in the same far-reaching consequences for the defendant, as a lineup which occurs after indictment. Either may determine the outcome of the trial.[48]

The second reason advanced by *Fowler* for not limiting *Wade* to post-indictment lineups, is the very language of *Wade*. After citing *Escobedo* and *Miranda*, both of which extended the right to counsel to pre-indictment police interrogation proceedings, the *Wade* Court stated that the principle of those cases:

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43. In United States v. O'Connor, 282 F. Supp. 963, 964 (D.D.C. 1968), the court stated that the "extent of this right [to counsel at pretrial confrontations] in particular circumstances has yet to be authoritatively determined."

44. People v. Fowler, *supra* note 1, at 363, 461 P.2d at 643. *See* Note, *Lawyers and Lineups*, 77 YALE L.J. 390 (1967), which suggests the Supreme Court will need to lay down specific rules for lineups.

45. *Supra* note 44 at 368, 461 P.2d at 648.

46. United States v. Broadhead, *supra* note 32, at 1359; Adams v. United States, 399 F.2d 574 (D.C. Cir. 1968); *but see* Williams v. United States, 419 F.2d 740 (D.C. Cir. 1969).

47. 18 U.S.C.A. Rule 5.

48. People v. Fowler, *supra* note 1, at 349, 461 P.2d at 649.

[R]equires that we scrutinize *any pretrial confrontation* of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice.[49]

Thus, the *Fowler* court suggests that the principles governing lineups are broadly applicable to all pre-trial confrontations. However, this is not a suggestion that rules governing lineups are applicable to *all* pre-trial confrontations.[50]

As the third reason for extending the *Wade-Gilbert* rules to a pre-indictment lineup situation, the *Fowler* court cites the dissenting opinion in *Wade*.[51] The *Fowler* court expressed justification for relying on the dissent because of the fact that the *Wade* majority took notice of other dissenting arguments and made no mention of this one. If the majority had felt that this was inconsistent with their opinion, the *Fowler* court assumed that they would have expressly said so.[52] In addition, *Stovall*[53] is cited as another reason for not limiting the *Wade* rule to post-indictment lineups. In *Stovall*, decided the same day as *Wade* and *Gilbert*, and involving a preaccusation showup, the Court declared: "we hold that *Wade* and *Gilbert* affect only those cases and all future cases which involve confrontations for identification purposes conducted in the absence of counsel after this date. The rulings of *Wade* and *Gilbert* are, therefore, inapplicable in the present case."[54] The implication is that the *Wade-Gilbert* rules would have been applied to the hospital room confrontation in *Stovall* had they been given retroactive application, or if the confrontation had taken place after the date of the *Wade* and *Gilbert* decisions.[55]

The fifth reason advanced for extending *Wade* is the fact that pre-indictment lineups could possibly be employed to the exclusion of post-in-

49. United States v. Wade, *supra* note 1, at 227 (emphasis added).

50. People v. Fowler, *supra* note 1, at 369, n.13, 461 P.2d at 649, n.13.

51. In Mr. Justice White's dissent in United States v. Wade, *supra* note 1, at 251, it is stated that "The rule applies to any lineup, to any other techniques employed to produce an identification and *a fortiori* to a face-to-face encounter between the witness and the suspect alone, regardless of when the identification occurs, in time or place, and whether before or after indictment or information." This is the same reason that was given in Rivers v. United States, *supra* note 27.

52. People v. Fowler, *supra* note 1, at 370, 461 P.2d at 650.

53. Stovall v. Denno, *supra* note 29.

54. *Supra* note 29, at 296.

55. People v. Fowler, *supra* note 1.

dictment lineups, so as to circumvent the *Wade-Gilbert* requirement. The *Fowler* court said: "We cannot reasonably suppose that the high court, recognizing that the same dangers of abuse and misidentification exist in all lineups, would announce a rule so susceptible of emasculation by avoidance."[56] By adding this cogent reason to its references to *Wade* and *Stovall*, the *Fowler* court concluded that the *Wade-Gilbert* rules are "wholly applicable to the formal preaccusation lineup" of defendant Fowler. However, the court did not specifically decide whether the rules would be applicable to pre-trial confrontations occurring out of the context of a formal lineup.[57]

Although the *Wade* and *Fowler* cases have held that their respective lineups were critical stages to which the right to counsel attaches, both of these cases indicate that the designation of an identification proceeding as a critical stage is not limited merely to lineups.[58] Indeed, the language of *Wade* indicates that the right to counsel applies to all critical stages of the prosecution[59] and requires that any pre-trial confrontation be scrutinized to determine whether or not it is in fact a critical stage.[60] By this language, the Supreme Court has indicated that the right to counsel attaches to every critical stage; therefore, it is necessary to determine what factors necessarily make a stage critical, and what factors remove the basis for regarding a stage as critical.

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56. People v. Fowler, *supra* note 1.

57. People v. Fowler, *supra* note 1. *But see* the dissenting language in *Wade*, *supra* note 1. Also, the same Court in *Stovall* stated that confrontations are often unfair, both because of the manner in which they are frequently conducted and because of the inability of the participant to reconstruct what occurred at trial. Since "[t]he presence of counsel will significantly promote fairness at the confrontation and a full hearing at trial on the issue of identification, . . . [w]e have, therefore concluded that the confrontation is a 'critical stage', and that counsel is required at all confrontations." Stovall v. Denno, *supra* note 29, at 298.

58. "[W]e consider that the review of authorities and . . . language contained in . . . the *Wade* opinion manifests an intention to state principles governing *any* confrontation by one suspected of crime with the witnesses against him at trial." People v. Fowler, *supra* note 1, at 369, 461 P.2d at 649. "The rule applies to any lineup, to any other techniques employed to produce an identification and *a fortiori* to a face-to-face encounter between the witness and the suspect alone." *Id.*

59. "[T]oday's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to all 'critical stages' of the proceedings. The plain wording of this guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful defense." United States v. Wade, *supra* note 1, at 224.

60. United States v. Wade, *supra* note 1, at 227.

The *Wade* Court, in allowing for certain circumstances by which a stage would not be considered critical, ruled that "preparatory steps, such as systemized or scientific analyzing of the accused's fingerprints, blood sample, clothing, hair, and the like," are not to be considered critical because the techniques of science and technology are sufficiently available for the accused to have meaningful confrontation of these procedures at the trial through the ordinary processes of cross-examination.[61] *Wade* also held that "legislative or other regulations . . . which eliminate the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial may remove the basis for regarding a stage as 'critical.' "[62] Although these are only two examples of the kinds of identification procedures which may be conducted in such a way as to remove the basis for regarding the stage as critical, the common requirement of the ability adequately to reconstruct such for cross-examination at trial may be available for stages of prosecution other than identification.

In determining what factors make a stage critical, it is helpful to examine the language of some of the cases which have applied the right to counsel in particular factual situations. The stage between arraignment and trial was considered critical in *Powell* because it was then that "consultation, thoroughgoing investigation and preparation were vitally important."[63] The Court decided that the defendants were as much entitled to counsel at that stage as at the trial, itself. In another decision, an arraignment in Alabama was determined to be a "critical stage" because "what happens there may affect the whole trial. Available defenses may be irretrievably lost, if not then and there asserted."[64]

61. "[T]hey are not critical stages since there is minimal risk that counsel's absence at such stages might derogate from his right to a fair trial." United States v. Wade, *supra* note 1, at 227.

62. United States v. Wade, *supra* note 1, at 247. *But see* People v. Fowler, *supra* note 1 at 373-74, 461 P.2d at 653-654. The court held that the regulations governing the lineup in *Fowler* were not sufficient to remove the basis for regarding the identification as a critical stage, because they did not provide a means for the question of whether regulations will ever remove the need for having a lawyer defendant to effectively reconstruct the lineup at trial. *Fowler* also raises the question of whether regulations will ever remove the need for having a lawyer present at a lineup identification. Counsel, if not present at the lineup "would have no idea as to which facets of the pre-trial confrontation might contain elements of unfairness." The defendant, with "his natural apprehension at the time of the confrontation, his unpracticed eye in such matters, and in some instances his complete inability to achieve accurate perception because of the use of such devices as one-way mirrors and bright footlights, cannot be expected to detect unfair procedures and report them to counsel for reconstruction at trial." Discussed further at note 18 *supra*.

63. *Supra* note 4, at 57.

64. Hamilton v. Alabama, *supra* note 8, at 54.

"[T]he preliminary hearing under Maryland law was determined to be as critical a stage as an arraignment under Alabama law," because the petitioner entered a plea when he had no counsel. "[W]e do not stop to determine whether prejudice resulted: 'Only the presence of counsel could have enabled the accused to know all the defenses available to him and to plead intelligently.' "[65] The right to counsel was held to apply to an interrogation by the police in a completely extra-judicial proceeding because "anything less . . . might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him."[66]

It was against this background of cases that the Court in *Wade* interpreted the sixth amendment right to mean that "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."[67] Therefore the test to be applied to any pre-trial confrontation to determine whether or not it constitutes a critical stage is to "analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontations and the ability of counsel to help avoid that prejudice."[68]

At each stage of the prosecution, the question which must be asked is whether or not a lawyer is necessary in order for the defendant to be afforded adequately the safeguards of our adversary system of criminal justice. This test is not dependent on when the stage of prosecution occurs.[69] Neither does it depend on whether the proceeding is conducted

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65. White v. Maryland, *supra* note 8, at 60.

66. Massiah v. United States, *supra* note 10, at 204.

67. United States v. Wade, *supra* note 1, at 227.

68. United States v. Wade, supra note 1, at 227. This test was applied by the Supreme Court in Coleman v. Alabama, 399 U.S. 1 (1970), where it was decided that preliminary hearings are a critical stage in Alabama, even though a preliminary hearing is not a required step in an Alabama prosecution. In applying the test, the Court found that: (1) Cross-examination by a lawyer at the preliminary hearing may result in the magistrate not binding the accused over for trial; (2) Cross-examination at the hearing may enable the lawyer to impeach the witness at trial as well as providing a method to admit favorable testimony for the defendant which may otherwise be lost; (3) The presence of counsel aids preparation of a proper defense; and (4) Counsel would be able to present arguments on such matters as an early psychiatric examination, bail, etc. at the preliminary hearing. "The inability of the indigent accused on his own to realize these advantages of a lawyer's assistance compels the conclusion that the Alabama preliminary hearing is a 'critical stage' of the State's criminal process at which the accused is as much entitled to such aid (of counsel) . . . as at the trial itself." *Id.* at 9-10.

69. "It would exalt form over substance to make the right to counsel . . . depend on whether . . . the authorities had secured a formal indictment. . . . We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused . . . our adversary system begins to operate, and . . . the ac-

by the police or by a judicial officer.[70] If a lawyer would be necessary, then the stage is considered to be critical, and the sixth amendment right automatically attaches.

It is obvious in the *Powell*, *Hamilton*, *White*, *Gideon*, *Massiah*, *Escobedo*, *Miranda*, *Wade*, *Gilbert*, *Stovall*, and *Coleman* opinions that the Supreme Court has responded to what they must interpret to be a critical need of a criminal defendant—his need to be represented by counsel at numerous pre-trial stages of prosecution. At the same time, however, the Court has also held that this right to counsel may be waived by the defendant.[71]

In addition to waiver, the *Wade-Gilbert* rules[72] will have no effect if the government can establish an independent source for the courtroom identification, or if the court can determine that the admission of the tainted evidence is harmless error. Contrary to Justice White's dissent that the establishment of an independent source is "admittedly a heavy burden for the State and probably an impossible one,"[73] many courts have found that the courtroom identification did have a source independent of the lineup which was already determined to have been tainted because of lack of counsel.[74] These courts have found an independent source even though doubt has been raised as to the possibility of an in-court identification ever being capable of complete independence of a particular prior identification.

> This Court cannot accept complainant's testimony that he was a "mental picture" of the defendants and that the precinct identification did not color his present recollection of his identification at the preliminary hearing. It is the opinion of this Court that any identification subsequent to the precinct identification is tainted.[75]

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cused must be permitted to consult with his lawyer." Escobedo v. Illinois, *supra* note 10, at 486-492 (1964).

70. Escobedo v. Illinois, *supra* note 10, involved a police interrogation. Coleman v. Alabama, *supra* note 68, involved a preliminary hearing.

71. Miranda v. Arizona, *supra* note 10, at 476; United States v. Wade, *supra* note 1, at 237; People v. Fowler, *supra* note 1, at 372, 461 P.2d at 651.

72. *Supra* note 1.

73. United States v. Wade, *supra* note 1. For discussions of the establishment of an independent source of identification, *see*, *Counsel at Lineups*, 36 U. CHI. L. REV. 830, 833 n.14 (1969); *Panel Discussion: The Role of the Defense Lawyer at a Line-up in the Light of the Wade, Gilbert, and Stovall Decisions*, 4 CRIM. L. BULL. 273 (1968); Note, *United States v. Wade—Right to Counsel at Pretrial Lineup*, 63 NW. U.L. REV. 251, 256 n.26 (1968).

74. Boone v. State, 456 P.2d 418 (Nev. 1969); Hamlet v. State, 455 P.2d 915 (Nev. 1969); McCray v. State, 460 P.2d 160 (Nev. 1969); Hampton v. State, 462 P.2d 760 (Nev. 1969); Martin v. State, 449 S.W.2d 257 (Tex. Crim. App. 1970); State v. DeLuca, 448 S.W.2d 860 (Tex. Crim. App. 1970); Parker v. State, 45 Ala. App. 335, 230 So. 2d 247 (1970).

75. United States v. Wilson, 283 F. Supp. 914, 916 (D.D.C. 1968). *But see*

Some courts have decided that on remand a hearing should be held out of the presence of the jury to determine whether or not the government can establish an independent source for the identifications.[76]

In addition to avoiding a *Wade-Gilbert* violation by finding an independent source, other courts have found that the introduction of the identification evidence was harmless error,[77] and others have held that there has been an intelligent waiver.[78] A waiver of the right to counsel can be intelligently given only if the suspect is notified that he is entitled to counsel and that counsel will be appointed if he is an indigent.[79] It has been pointed out that courts indulge every reasonable presumption against waiver of fundamental constitutional rights and that they "do not presume acquiescence in the loss of fundamental rights."[80] The question has been raised: Does the accused ever have the capacity to understand the legal consequences of his action, and thus, intelligently waive his right to counsel, without the presence of counsel?[81] Can the accused ever have adequate independent knowledge of when he does and does not need counsel?

Although the Supreme Court in the *Wade* and *Gilbert* decisions emphasized the need for attaching the right to counsel to critical stages, and did not express an intention that these rules should be purposely avoided by the determination of harmless error, independent source and effective

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United States v. Clark, *supra* note 28, in which the court allowed the in-court identification because the following factors in determining an independent source were satisfied: (1) prior opportunity to observe the alleged criminal act; (2) no existence of any discrepancy between any pre-lineup description and the defendant's actual description; (3) no identification prior to lineup of another person; (4) identification by picture of the defendant prior to lineup; (5) no failure to identify defendant on a prior occasion; and (6) lapse of time between alleged act and lineup identification.

76. Palmer v. State, *supra* note 29, Rivers v. United States, *supra* note 27; State v. Wright, 274 N.C. 84, 161 S.E.2d 581 (1968).

77. In Thompson v. State, *supra* note 31, at 707, the court said: "As a practical matter, clear and convincing proof that an in-court identification is independent of the illegal pre-trial lineup will often be sufficient to support a finding that admission of evidence of the illegal pre-trial lineup is harmless error." In People v. Fowler, *supra* note 1, at 370, the court found that since the sole issue of the trial was identification and there was no other evidence connecting defendant with the crime other than the identification evidence, that the defendant presented an alibi supported by witnesses, that it was not clear that the identification did not contribute to the verdict. "[W]e are not able to declare a belief that it was harmless beyond a reasonable doubt."

78. State v. Williams, 448 S.W.2d 865 (Tex. Crim. App. 1970); Jones v. State, 450 P.2d 139 (Nev. 1969).

79. People v. Fowler, *supra* note 1, at 373-74, 461 P.2d at 653-54.

80. Johnson v. Zerbst, 304 U.S. 458 (1938). *See*, Comment, *Waiver of Rights in Police Interrogations: Miranda in the Lower Courts*, 36 U. CHI. L. REV. 413 (1969).

81. Browne v. State, 24 Wis. 2d 941, 511, 129 N.W.2d 175, 184 (1964).

waiver, the lower courts have, in fact, consistently avoided the effects of the *Wade-Gilbert* rules by the use of these avoidance mechanisms. These courts have proved through their decisions that the possibilities for avoidance have tended to render the *Wade-Gilbert* rules totally ineffective. Since the decision in *Wade* shows a belief on the part of the Supreme Court for the necessity of maintaining the right to counsel at any critical stage, the only way to insure that right will be to eliminate these mechanisms of avoidance. At this point in the application of the *Wade-Gilbert* rules it is significant to recall the words of the Supreme Court in *Escobedo*:

> There is necessarily a direct relationship between the importance of a stage to the police in their quest for a confession and the criticalness of that stage to the accused in his need for legal advice. Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer.[82]

TORTS—NEGLIGENT MISREPRESENTATION—DOWNFALL OF PRIVITY

On March 30, 1966, appellant purchased a pair of shoes at a retail store. While wearing the shoes on the day of purchase she stepped on to the vinyl floor of her kitchen and sustained severe injuries after slipping and falling. Appellant subsequently brought suit against the retailer, the importer, and respondent Hearst Corporation; the complaint averred conspiracy, warranty, and negligent misrepresentation. Appellant alleged that respondent Hearst publishes Good Housekeeping magazine, in which products are advertised as conforming to the "Good Housekeeping's Consumer's Guaranty Seal."[1] Regarding the seal, Good Housekeeping stated: "[W]e satisfy ourselves that products advertised in Good Housekeeping are good ones and that the advertising claims made for them in our magazine are truthful."[2] The Seal itself promised: "If the product or performance is defective, Good Housekeeping guarantees replacement or refund to consumer."[3] Appellant further alleged that the shoes she purchased had received the aforementioned Good Housekeeping endorsement, that the Good Housekeeping Seal was affixed both to the shoes and to the shoes' container with respondent Hearst's consent, and that she relied upon respondent's representation and seal in purchasing the shoes. The trial court sustained a general demurrer by respondent and entered its judgment of dismissal. The court of appeals affirmed the dismissal as to the causes of action dealing with conspiracy and warranty, and re-

82. Escobedo v. Illinois, *supra* note 10, at 488.

1. Hanberry v. Hearst Corp., 81 Cal. Rptr. 519, 521 (1969).
2. *Id.* at 521.
3. *Id.*