Recent Development, Kirby v. Illinois

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PROSECUTION OF A WITNESS WHO HAS BEEN COMPELLED TO INCriminate himself, the promise has a hollow ring. Kastigar and Zicarelli have now legalized the unfortunate process by which a witness will be "whipsawed" between federal and state jurisdictions. The witness can be compelled to testify by the state and given only use/derivative use immunity. The practical effect will be that the state authorities can then prosecute the witness on investigatory leads obtained from the compelled testimony, subject to asserting the new evidence's independent source. The state can also turn the witness' testimony over to the federal authorities who will be able to use the compelled evidence to prosecute the witness, again subject to the independent source requirement. In this manner, the witness may be shuttled among various state prosecuting authorities using evidence unobtainable had the witness not been forced to testify. Alternatively, the witness can be offered up to the federal authorities for prosecution. The result is a perversion of the fifth amendment privilege against self-incrimination, while giving lazy prosecutors a new fishing license in the form of use/derivative use immunity statutes. The late Justice Black lamented this Pandora's Box, the top to which has now been opened by the Kastigar and Zicarelli decisions:

Indeed things have now reached the point . . . where a person can be whipsawed into incriminating himself under both state and federal law even though there is a privilege against self-incrimination in the Constitution of each . . . . I cannot agree that we must accept this intolerable state of affairs as a necessary part of our federal system of government.\textsuperscript{39}

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On February 22, 1968, Thomas Kirby was found by police officers to be in possession of travelers checks and a social security card bearing the name of Willie Shard. Unable to give a satisfactory explanation, Kirby was arrested. Upon arriving at the
police station, the arresting officers first learned that a Willie Shard had been robbed the preceding day. The police summoned Shard to the station for the purpose of identifying Kirby and his companion, Ralph Bean. This Shard did as petitioner and Bean sat alone at a table flanked by two uniformed police officers. Neither petitioner nor Bean had been advised of any right to the presence of counsel, and no attorney was present at the identification confrontation.

More than six weeks later, petitioner and Bean were indicted for robbery and subsequently convicted. Kirby’s conviction was affirmed by the Illinois appellate court, which held that People v. Palmer was dispositive of the issue of the applicability of United States v. Wade and Gilbert v. California to pre-indictment identification confrontations.

The rationale of the Supreme Court of Illinois in People v. Palmer was disarmingly simple. The court merely cited language in Wade and Gilbert which specified those lineups as post-indictment and then quoted Simmons v. United States where, in reference to the “lineup cases,” it was maintained that “the rationale of [Wade and Gilbert] was that an accused is entitled to counsel at any critical stage of the prosecution and that a post-indictment lineup is such a critical stage.” The United States Supreme Court granted petitioner’s writ of certiorari because “the issue of the applicability of Wade and Gilbert to pre-indictment confrontations had severely divided the courts.”

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2. Id. at 691 (Brennan, J., joined by Douglas & Marshall, J.J., dissenting).
3. Id. at 685.
5. 41 Ill. 2d 571, 244 N.E.2d 173 (1969).
9. Id. at 382-83.
10. 406 U.S. at 688 n.5. In fact all United States courts of appeals which had considered the issue had held Wade and Gilbert were applicable to post-arrest, pre-indictment identification confrontations. Wilson v. Gaffney, 454 F.2d 142 (10th Cir. 1972); Government of Virgin Islands v. Calwood, 440 F.2d 1206 (3d Cir. 1971); United States v. Greene, 439 F.2d 193 (D.C. Cir. 1970); Cooper v. Picard, 428 F.2d 1351 (1st Cir. 1970); United States v. Phillips, 427 F.2d 1035 (9th Cir. 1970); United States v. Ayres, 426 F.2d 524 (2d Cir. 1970); United States v. Broadhead, 413 F.2d 1351 (7th Cir. 1969);
On June 12, 1967, the United States Supreme Court, Mr. Justice Brennan speaking for the majority, decided *United States v. Wade* based on the following reasoning: (1) Pre-trial lineups are critical stages of the prosecution because they can and frequently do settle the accused's fate and render the trial a mere formality.\(^1\) (2) The sixth amendment right to counsel is applicable to all "critical stages of the proceedings," and the accused has the right to counsel "whenever necessary to assure a meaningful 'defense.'"\(^12\) (3) Identification evidence is peculiarly untrustworthy due to (a) "the dangers inherent in eyewitness identification" and (b) "the suggestibility inherent in the context of the pre-trial identification."\(^13\) (4) "[A]s is the case with secret interrogations, there is serious difficulty in depicting what transpires at lineups and other forms of identification confrontations."\(^14\) (5) The presence of counsel can work to avoid the prejudice that inheres in pre-trial identification confrontations and thus protect both the accused's right to a fair trial and the right to have effective assistance of

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Rivers v. United States, 400 F.2d 935 (5th Cir. 1968).


The Supreme Court of Indiana held in *Martin v. State*, supra, that a suspect's right to counsel attaches at a post-arrest line-up where the investigation has focused on the accused. This rule is still valid in Indiana although it will probably be re-evaluated in light of *Kirby*.

In contrast, the plurality could Marshall only five lower court opinions to support its view. State v. Fields, 104 Ariz. 486, 455 P.2d 964 (1969); Perkins v. State, 228 So.2d 382 (Fla. 1969); People v. Palmer, 41 Ill. 2d 571, 244 N.E.2d 173 (1969); State v. Walters, 457 S.W.2d 817 (Mo. 1970); Buchanan v. Commonwealth, 210 Va. 664, 173 S.E.2d 792 (1970). However, *Buchanan v. Commonwealth*, supra, is not very strong support for the plurality's position, considering the following statement: "[I]t appears that there is no fixed time between crime and indictment when there accurs the right to counsel at a witness-suspect confrontation." 173 S.E.2d at 794.

11. 388 U.S. at 224.
12. *Id.* at 224-25.
13. *Id.* at 235.
14. *Id.* at 230.
counsel at that trial.\(^{15}\) (6) The deficiency in knowledge concerning what actually transpires at the identification confrontation deprives the accused of his right to meaningfully cross-examine the witnesses against him.\(^{16}\) The Supreme Court held specifically that in Wade the post-indiction lineup was a critical stage of the prosecution because of the inherent dangers of prejudice and that the presence of counsel was required at such lineups in order to avoid such prejudice and deprivation of the accused's right to a meaningful confrontation at trial.\(^ {17}\)

In the case of Gilbert v. California the accused's lineup also had chanced to occur after his indictment. The Supreme Court took the opportunity presented by Gilbert both to apply the Wade rule to the states via the fourteenth amendment as well as to invoke a per se exclusionary rule concerning evidence of pre-trial lineups conducted in the absence of counsel. In Stovall v. Denno the petitioner's pre-trial identification confrontation did occur prior to his indictment. The Court did not believe this fact important, however, and affirmed Stovall's conviction solely on the grounds that Wade and Gilbert were to be applied only prospectively. Therefore, the United States Supreme Court appeared to have decided the issue conclusively, and the right to counsel at all pre-trial confrontations appeared securely fixed in American jurisprudence. At least that was the consensus of American jurists and legal scholars.\(^ {18}\)

In Kirby, Mr. Justice Stewart, writing for the Court in an opinion joined by the Chief Justice, Mr. Justice Blackmun, and Mr. Justice Rehnquist,\(^ {19}\) characterized the holdings of Wade and Gilbert

\(^{15}\) Id. at 236.

\(^{16}\) Id. at 231-32. In Kirby the plurality did not discuss the sixth amendment confrontation issue.

\(^{17}\) In Wade Mr. Justice Brennan stated the holding of the Court as follows:

"Since it appears that there is a grave potential for prejudice, intentional or not, in the pre-trial lineup, which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial, there can be little doubt that for Wade the post-indiction lineup was a critical stage of the prosecution at which he was "as much entitled to such aid [of counsel] as at the trial itself."


\(^{19}\) Mr. Justice Powell concurred in the result in a separate opinion: "As I would not extend the Wade-Gilbert per se exclusionary rule, I concur
as limited to post-indictment lineups.\textsuperscript{20} According to the Kirby plurality, this limited holding was in accordance with the rationale of Wade-Gilbert which the Court ascertained by reference to dicta found in Simmons \textit{v. United States.}\textsuperscript{21}

By distinguishing the Wade-Gilbert rationale and holding as pertinent only to the right to counsel at post-indictment lineups, the Court enabled itself to decide Kirby on the basis of whether or not the Wade-Gilbert rule should be extended to govern pre-indictment lineups. The Court decided that Wade-Gilbert should not be so extended by reviewing the holdings of the sixth amendment right to counsel precedents which have never extended that right to a pre-indictment situation.\textsuperscript{22} In order to make its conclusions in the result reached by the Court." 406 U.S. at 691.

20. The Court accomplished this by referring to \textit{Gilbert v. California} as follows:

\begin{quote}
[A] post-indictment pre-trial lineup at which the accused is exhibited to identifying witnesses is a critical stage of the prosecution; that police conduct of such a lineup without notice to and in the absence of his counsel denies the accused his Sixth [and fourteenth] amendment right to counsel.
\end{quote}


The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law . . . . He requires the guiding hand of counsel at every stage of the proceedings against him.

287 U.S. at 68-69 (emphasis added).

This language was cited with approval by the Court in Johnson \textit{v. Zerbst}, 304 U.S. at 463; Spano \textit{v. New York}, 360 U.S. 315, 325 (Douglas, J., concurring); and Massiah \textit{v. United States}, 377 U.S. at 204-05. Perhaps the most cogent criticism of discovering constitutional principles by reference solely to holdings is contained in Gideon \textit{v. Wainwright}:

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.

372 U.S. at 343.

Interestingly, the Kirby plurality also chose to ignore United States \textit{v. Marlon}, 404 U.S. 397 (1971), which, in consideration of another sixth amend-
compatible with these precedents, it was necessary for the Court to
distinguish Escobedo v. Illinois\(^{23}\) and Miranda v. Arizona\(^{24}\) as in-
applicable to the case at bar.

Escobedo was differentiated by reference to Johnson v. New
Jersey,\(^{25}\) which the plurality read as not only limiting Escobedo
to its facts, but which also declared that "... the 'prime purpose'
of Escobedo was not to vindicate the constitutional right to counsel
as such, but, like Miranda, 'to guarantee full effectuation of the
privilege against self-incrimination. ...'"\(^{26}\) The Supreme Court
found Miranda inapplicable to Kirby because Miranda was based
upon the fifth amendment while Kirby was a sixth amendment
case.\(^{27}\) According to Mr. Justice Stewart, application of a fifth
amendment case to a sixth amendment question would be to aban-
don "all semblance of principled constitutional adjudication."
\(^{28}\)

The plurality in Kirby also was faced with the dissent's as-
sertion that an indictment is a mere formalism in the pre-trial pro-
cedure.\(^{29}\) In an attempt to refute this allegation, Mr. Justice
Stewart stated that the indictment marks the point in time when
the Government commits itself to prosecute and, therefore, it is
the beginning of the adversary system of criminal justice.\(^{30}\) It was
upon this reasoning that the Court concluded that it was merely re-
fusing "to impart into a routine police investigation an absolute
constitutional guarantee."\(^{31}\)

The limited grant of certiorari in Kirby\(^{32}\) precluded the Court
from considering accidental confrontations,\(^3\) confrontations occurring before custody,\(^4\) and on-the-scene encounters between the witness and the suspect shortly after the occurrence of the crime.\(^5\) The Court, perhaps unwisely, limited itself to consideration of the Wade-Gilbert rule's applicability to a post-arrest, pre-indictment identification confrontation bearing none of the countervailing policy considerations that had originally been alluded to in Wade.\(^6\) The Court chose to leave Wade intact although refusing to apply it to an essentially similar situation where the issuance of an indictment was the only distinguishing factor. By viewing Kirby in this manner, the plurality's characterization of the holding and rationale of Wade and Gilbert becomes crucially important. If that characterization cannot withstand scrutiny, then the entire foundation of Kirby becomes illusory.

There are three fundamental considerations that must be analyzed in order to discover the true rationale and holding of Wade and Gilbert. First, the rationale and factual foundation of the Wade case must be considered. Wade was grounded in the fact that there is an inherent potential for prejudice and unintentional suggestion in pre-trial identification procedures, making those proceedings a critical stage of the criminal prosecution. At such a critical stage, the Court recognized the right of the accused to have counsel present. If this probability of inherent prejudice and suggestion in identification procedures is the true rationale of Wade, then it would appear that the mere issuance of an indictment is irrelevant. The Kirby plurality made no attempt to dispute the factual foundation of Wade, as well it could not since it was purporting to leave that decision intact.

Secondly, it becomes clear that the holdings of Wade and Gilbert were not so clearly limited to post-indictment lineups as the decision of Mr. Justice Stewart in Kirby would have us believe. In Wade, Mr. Justice Brennan, writing for the majority, stated that the constitutional principle enunciated in a long line of Supreme

\(^{33}\) See United States v. Pollack, 427 F.2d 1169 (5th Cir. 1970); State v. Bibbs, 461 S.W.2d 755 (Mo. 1970).


\(^{36}\) 388 U.S. at 237.
Court cases beginning with *Powell v. Alabama* makes it the duty of the Court to determine whether the absence of counsel at any pre-trial confrontation is constitutionally permissible. Mr. Justice Stewart foresaw the question presented in *Kirby*, and in *Wade* concurred in the dissenting position of Mr. Justice White that the *Wade-Gilbert* rule was applicable to pre-indictment identification confrontations. If compatibility of rationale and decision is to be the guide, then it appears that the characterization of *Wade* as applicable to all pre-trial identifications would be the better interpretation. There remains, however, the question of why the *Wade* and *Gilbert* decisions used the post-indictment language if in fact they were not intended to be so limited. This question has been the subject of scholarly and judicial discussion with the general consensus being that the term “post-indictment” in the *Wade* decision was merely descriptive of the particular factual situation presented and was not intended to be a limitation on the actual decision. Since this explanation has reason to commend it and can alone reconcile the *Wade* rationale and decision, it would appear that *Wade* was intended to be applicable to all pre-trial identification confrontations, regardless of whether occurring before or after indictment. In light of this analysis, the *Kirby* characterization of *Wade* was, at best, erroneous, or, at worst, sophistry to achieve a desired result.

Finally, a review of Supreme Court decisions after *Wade* and *Gilbert* can only buttress this conclusion. In *Stovall v. Denno*, where the identification confrontation occurred prior to the is-

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37. 287 U.S. 45 (1932).

In sum, the 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 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 the defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice.

38. Mr. Justice Stewart, who wrote the Court opinion’s in *Kirby*, concurred in a dissent in *Wade* written by Mr. Justice White in which it was stated:

   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.

388 U.S. at 251.
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suance of the indictment, the Court stated that it was considering the identical issue presented in Wade and Gilbert. No member of the Court saw any significance in the pre-indictment nature of Stovall's identification confrontation. If Wade and Gilbert were in fact limited to post-indictment identification confrontations, then the Supreme Court clearly violated long-established constitutional precepts by rendering an advisory opinion in Stovall. Furthermore, in neither Foster v. California nor Coleman v. Alabama, both cases of pre-indictment confrontations, did any member of the Court find the pre-indictment nature of the identification confrontation significant, and it was not mentioned in either opinion.

Although the defective characterization of Wade and Gilbert renders the foundation of the Kirby decision illusory, the plurality had to surmount even greater intellectual difficulties in order to justify its post-indictment limitation. Unless the Court could distinguish Escobedo and Miranda so as to make those decisions inapplicable to the sixth amendment right asserted by Kirby, the weight of precedent would require an "extension" of Wade and Gilbert to pre-indictment identification confrontations. Intellectually, it is impossible to so distinguish Escobedo and Miranda and leave Wade and Gilbert intact since the latter decisions explicitly relied on Escobedo and Miranda.

The Kirby plurality did not attempt to overcome this problem but rather considered the applicability of Escobedo and Miranda as if it were a matter of first impression for the Court. The plurality's statement that Escobedo and Miranda were inapplicable because their purpose was the protection of the accused's privilege against self-incrimination clearly ignored their relevance in Wade and that decision's statement that "nothing decided or said in the opinions in [Escobedo and Miranda] links the right to counsel only to protection of the fifth amendment rights." Similarly, the plurality's assertion that Johnson v. New Jersey limited Esco-

40. 406 U.S. at 702-03 n.12.
41. 388 U.S. at 294.
42. Stovall would hardly have been an appropriate vehicle to hold Wade and Gilbert only prospectively applicable if all three cases had not presented the same issue.
44. 399 U.S. 1 (1970).
45. 388 U.S. at 225, 226, 230, 238.
46. 388 U.S. at 226.
bedo to its facts, aside from its reliance on ambiguous language, is unconvincing given the fact that Wade and Gilbert, decided after Johnson, clearly found this decision applicable and not limited to its facts by Johnson. Without a complete re-evaluation of Wade and Gilbert and a forthright redefinition of those opinions, it is not possible to rationally distinguish Escobedo and Miranda so as to make them inapplicable in Kirby.

The plurality in Kirby clearly expressed a radical departure from the views held in Wade and Gilbert concerning the rights of the accused. By freeing the police from absolute constitutional obligations, the Kirby plurality effectively overruled Wade and Gilbert. As Mr. Justice Sullivan of the Supreme Court of California stated: "[T]he establishment of the date of formal accusation as the time wherein the right to counsel at lineup attaches could only lead to a situation wherein substantially all lineups would be conducted prior to indictment or information."

That Wade and Gilbert have had a beneficial impact on the administration of criminal justice was not disputed in Kirby. Instead, the plurality used Kirby to express a preference for the limitation of the rights of the accused to the formal stage of the prosecution. In so doing the plurality has made an observation concerning the American system of judicial administration that brings to mind Mr. Justice Goldberg's statement in Escobedo:

No system worth preserving should have to fear that if

47. "Apart from its broad implications, the precise holding of Escobedo was that statements elicited by the police during an interrogation may not be used against the accused at a criminal trial." 384 U.S. at 733-34.
The parallel between Wade, Escobedo, and Miranda is unmistakable. All three are concerned with the subtleties of psychologically oriented interrogations. Finally, each of them was an attempt to counter the secrecy and police dominated atmosphere of their respective pre-trial proceeding. In Escobedo the test used to mark the beginning of a "critical stage" at which counsel was required was "focus on a particular suspect." The Escobedo Court clearly rejected the contention that the start of this critical stage depended on the obtaining of an indictment. In Miranda the test of "custodial interrogation" did not require indictment. The critical stage in Wade is the line-up, just as "focus on a particular suspect" and "custodial interrogation" is in Escobedo and Miranda. By analogy, this critical stage should not be dependent on whether an indictment has been procured.
Id. at 321.
50. 29 U. PITT. L. REV. 65, 82 (1967).
an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.\textsuperscript{51}

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\textsuperscript{51} 378 U.S. at 490.
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