Sixth Amendment--Pretrial Identification and the Right to Counsel

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Recommended Citation
Sixth Amendment--Pretrial Identification and the Right to Counsel, 69 J. Crim. L. & Criminology 538 (1978)
SIXTH AMENDMENT—PRETRIAL IDENTIFICATION AND THE RIGHT TO COUNSEL


In Moore v. Illinois, the United States Supreme Court clarified its position as to when the sixth amendment entitles the accused to the assistance of counsel at a pretrial corporeal identification and as to when testimony concerning the pretrial identification of an uncounseled accused is admissible at trial. The Court, in an opinion by Justice Powell, held that the sixth amendment's counsel guarantee attaches upon the initiation of the adversary criminal proceedings, even if, as in Moore, the pretrial corporeal identification occurs at a preliminary hearing, prior to the accused's indictment. The Court also held that prosecution testimony concerning a pretrial identification improperly conducted in the absence of counsel is inadmissible at trial even if an independent source for the pretrial identification can be established.

The sixth amendment to the United States Constitution entitles the accused to the assistance of counsel in all criminal prosecutions. Historically, the counsel guarantee was intended to assure the assistance of counsel at trial, inasmuch as the accused there became "confronted with both the intricacies of the law and the advocacy of the public prosecutor." However, as a result of changes in patterns of investigation and procedure, today's accused confronts both expert adversaries and the judicial system well before his trial begins. It is therefore appropriate that the counsel guarantee has been extended to critical stages of prosecution which precede trial.

In United States v. Wade, the Supreme Court held that a pretrial post-indictment identification lineup is a critical stage of prosecution at which the accused is entitled to the assistance of counsel. In Wade, the Court determined that the presence of counsel is necessary both to prevent suggestiveness in the conduct of the lineup and to permit reconstruction of the event for effective cross-examination at trial—in short, to assure a meaningful defense. Realizing that a witness is unlikely to change an announced identification, the Court emphasized the necessity of preventing the imposition of counsel at a pretrial corporeal identification and the right to counsel at a pretrial corporeal identification and the right to counsel.

2 Id. at 228-29.
3 Id. at 231-32.
4 U.S. Const. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."
6 Id. at 310.
7 As the Supreme Court has noted:

When the Bill of Rights was adopted, there were no organized police forces as we know them today. The accused confronted the prosecutor and the witnesses against him, and the evidence was marshalled, largely at the trial itself. In contrast, today'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 "critical" stages of the proceedings.


8 388 U.S. 218 (1967). In this case, defendant Wade was indicted for the robbery of a federally insured bank. A lineup for identification purposes was then conducted in the absence of Wade's appointed counsel. Each participant in the lineup wore strips of tape on his face and spoke words attributed to the robber. The witnesses identified Wade as the robber and, at trial, testified that Wade was the robber. Testimony regarding the pretrial identifications was elicited by defense counsel on cross-examination.

9 Id. at 224-25, 236. It is this dual purpose of the counsel guarantee that precludes the application of the "totality of circumstances" test suggested by Justice Rehnquist in Moore. 434 U.S. at 233 (Rehnquist, J., concurring). If the counsel guarantee were intended only to prevent suggestiveness and thus ensure the reliability of pretrial identifications, perhaps the "totality" test employed to determine due process violations would be appropriate to determine whether the presence of counsel was necessary in a given situation. However, it is because of the harmful impact of a pretrial denial of counsel upon the trial itself that counsel is guaranteed to the defendant at "critical" pretrial stages and that any testimony exploiting the denial must be strictly excluded by the trial court. Whether the right to counsel attaches and whether exploitive testimony is admissible cannot be determined on a case by case basis according to the "totality of circumstances" of each case.

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proper suggestions that often lead to mistaken identifications. Moreover, recognizing that a pretrial confrontation for purposes of identification may in effect be the trial that determines the fate of the accused, the Court extended the right of counsel to protect the accused from prejudice at this critical stage in the prosecution.

Since the conduct of a pretrial post-indictment lineup in the absence of defense counsel was held to have violated the accused's sixth amendment right to counsel, there arose, in Wade, a corollary question regarding the admissibility of identifications made at trial by witnesses who had attended constitutionally impermissible pretrial lineups. These in-court identifications, the Court held, must be excluded at trial unless the prosecution can establish that the identifications are based on observations of the accused other than those made at the lineup. In Gilbert v. California, a companion case to Wade, the Supreme Court reiterated its Wade holding that the conduct of a pretrial post-indictment lineup in the absence of defense counsel is unconstitutional and that the admission of in-court identifications, without first determining that they are untainted by an illegal lineup, is constitutional error. In addition, the Gilbert Court addressed the issue of the admissibility of direct testimony by prosecution witnesses concerning improper pretrial identifications. On this point, the Court held that testimony derived from improper pretrial identifications is exploitive of illegal lineups and must therefore be excluded, even if an independent source for the pretrial identifications can be asserted. The per se exclusion of such testimony, the Court reasoned, is necessary so as not to enhance in-court identifications and thereby "seriously aggravate whatever derogation exists of the accused's right to a fair trial." Furthermore, the Court believed that "[o]nly a per se exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of counsel at the critical lineup." The Court found the admission of testimony concerning improper pretrial identifications to be constitutional error in Gilbert, but left to the courts below the determination of whether the error was harmless.

In Kirby v. Illinois, the Supreme Court addressed the question of an accused's entitlement to the assistance of counsel at a pretrial pre-indictment identification. The Court held that a person's constitutional right to counsel attaches only "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." Since no prosecution had commenced against Kirby prior to his being identified by the victim, the Court found no right to the assistance of counsel at the confrontation. Inasmuch as the pretrial identification was not improper, the Court declined to apply the Wade-
In Moore v. Illinois, the Supreme Court once again concerned itself with the propriety of a pretrial corporeal identification. Defendant Moore was implicated in the sexual assault of a young woman by the victim's identification of Moore's photograph and by the presence at the scene of the crime of a letter written by Moore's girlfriend. Upon this evidence, the police arrested Moore and held him pending a preliminary hearing to determine whether he should be bound over to the grand jury.

As the victim was escorted to the preliminary hearing, a policeman told her that she was going to view a suspect whom she should identify if she could. The policeman also had the victim sign a complaint which named Moore as her assailant. At the hearing, the victim was in the courtroom when Moore's name was called and he was led to the bench. After the judge informed Moore that he was charged with rape and deviate sexual assault, and after the judge called the victim to the bench, the State's Attorney enumerated the items of physical evidence linking Moore to the crimes.

The State's Attorney then asked the victim if she saw her assailant in the courtroom, whereupon the victim pointed to Moore. Moore was neither represented by counsel at this hearing nor offered an appointment of counsel by the court.

After the grand jury returned a four-count indictment against Moore, an attorney was appointed to defend him. Citing Wade, Moore's counsel moved to suppress the victim's identification of Moore, alleging that it had been elicited through an unnecessarily suggestive pretrial procedure at which Moore had been without counsel. After an evidentiary hearing, the court denied the motion to suppress the victim's identification, on grounds that the prosecution had shown an independent basis for the identification.

At trial, the victim testified on direct examination by the prosecution that she had identified Moore at the preliminary hearing, and she once again identified Moore as her assailant. The jury found Moore guilty as charged. On appeal, the Illinois Supreme Court rejected Moore's argument that the victim's identification testimony should have been excluded as the product of a "suggestive pretrial procedure." The court believed that the fact that the victim had been permitted to see Moore at the preliminary hearing had merely confirmed her identification from a proper photographic display and had not tainted her identification.

In Illinois, all prosecutions of felonies must be by indictment unless properly waived. The court found no error in permitting the victim to see the defendant at the preliminary hearing under the circumstances.

The victim was sexually assaulted in her apartment at mid-day. The victim saw her assailant's face for ten to fifteen seconds before he covered it with a bandana. Although she did not know his name, the victim thought her assailant was the same man who had made offensive remarks to her in a bar the night before.

21 Id. at 690.
23 The victim was sexually assaulted in her apartment at mid-day.
24 According to the United States Supreme Court, the victim tentatively identified Moore from his photograph but stated that she could not be certain unless she saw him again. People v. Moore, 51 Ill. 2d 79, 85, 281 N.E.2d 294, 298 (1972).
25 434 U.S. at 222. According to the Illinois Supreme Court, the victim tentatively identified Moore from his photograph but stated that she could not be certain unless she saw him again. People v. Moore, 51 Ill. 2d 79, 85, 281 N.E.2d 294, 298 (1972).
26 Both the Illinois Supreme Court and the United States Court of Appeals for the Seventh Circuit considered the photographic identification to form the basis of the victim's subsequent corporeal identifications of Moore. See notes 41 & 53 infra.
27 434 U.S. at 222.
28 In Illinois, all prosecutions of felonies must be by indictment unless properly waived. Ill. Ann. Stat. ch. 38, § 111-2(a) (Smith-Hurd 1970). A preliminary hearing may be held to determine if there is probable cause to believe that the defendant has committed an offense and should therefore be held to answer to the grand jury. Ill. Ann. Stat. ch. 38, § 109-3(a) (Smith-Hurd 1970).
29 The State's Attorney stated that a guitar and a flute taken from the victim's apartment at the time of the assault were found in Moore's apartment. He also stated that clothes like those worn by the assailant were found in Moore's apartment. However, since further investigation revealed that the instruments found at Moore's apartment were not those taken from the victim's apartment, the instruments were not introduced into evidence at trial, nor was any clothing. 434 U.S. at 230 n.4.
30 Id. at 222–23.
32 Moore was indicted for rape, deviate sexual assault, burglary and robbery. 434 U.S. at 223.
33 Id.
34 Id. at 223–24. In addition to the victim's identification, the prosecution presented the letter found in the victim's apartment as evidence linking Moore to the crimes. The defense presented an alibi for the time of the assault and a theory that the victim had brought the letter from the bar to her apartment the night before the attack. The jury rejected both the defense theory and alibi.
35 51 Ill. 2d at 84, 281 N.E.2d at 297. The court found no reversible error in any of the nine claims asserted by Moore.
36 The court found no error in permitting the victim to see the defendant at the preliminary hearing under the circumstances. Id. at 85–86, 281 N.E.2d at 298. The relevant
After the United States Supreme Court denied certiorari, Moore sought a writ of habeas corpus from the United States District Court for the Northern District of Illinois, alleging violation of his sixth amendment rights. The district court declined to decide the question of whether Moore had been entitled to the assistance of counsel at the pre-indictment identification. Rather, the court held that, even if the counsel guarantee and attendant exclusionary rules were applicable in Moore's case, the victim's identification testimony was admissible because it had been based on adequate observation of Moore at the time of the assault.

The United States Court of Appeals for the Seventh Circuit affirmed the district court's denial of Moore's habeas corpus petition. The court held that Moore's right to counsel had not been violated at the pretrial pre-indictment corporeal identification because *Kirby* had limited that right to post-indictment situations. The court also held that the *Wade-Gilbert* exclusionary rule was inapplicable in Moore's situation because the victim's pretrial identification had been of independent origin.

The United States Supreme Court finally granted certiorari because of a conflict between the holdings of the lower courts in *Moore* and the Court's holdings in *Wade, Gilbert and Kirby*. As a consequence, the Court began its opinion in *Moore* by reiterating its holdings in those earlier cases.

The Court then addressed Moore's claim of entitlement, under *Wade, Gilbert and Kirby*, to the assistance of counsel at a pretrial pre-indictment corporeal identification. The Court noted that *Wade* and *Gilbert* had deemed the pretrial post-indictment identification to be a critical prosecutorial stage at which the accused is entitled to the assistance of counsel.

In addition, the Court noted that the question of whether the accused is so entitled at pretrial pre-indictment identifications had been answered by the Court in *Kirby* when it held that an accused's right to counsel attaches "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." Since the Court had, in *Kirby*, specifically enumerated the preliminary hearing as marking the initiation of adversary judicial criminal proceedings, and since the State of Illinois had conceded that the preliminary hearing marked the initiation of adversary judicial criminal proceedings against Moore, the Court felt compelled, in *Moore*, to hold that Moore's right to counsel had already attached prior to his identification by the victim at the preliminary hearing. In so holding, the Court rejected as erroneous the Seventh Circuit's view that *Kirby* entitled the accused to counsel only at post-indictment identifications. The Court also rejected the Seventh Circuit's implication that conduct of Moore's identification at a judicial proceeding rather than at a lineup somehow precluded his right to counsel, for the Court found the "judicial" presentation to have been highly suggestive nonetheless.

Noting the role of counsel in preventing
suggestiveness in the conduct of a pretrial identification, the Court rejected the Seventh Circuit’s assertion that counsel would be of little use at a pretrial identification such as Moore’s.50

The Court next addressed Moore’s claim that prosecution’s testimony concerning the pretrial identification should have been excluded by the trial court.51 The Court held, as in Gilbert, that such testimony was the direct result of an illegal identification procedure and had to be excluded regardless of the prosecution’s establishment of an independent source for the pretrial identification.52 Thus, the courts below, which had held that the victim’s testimony concerning the pretrial identification was admissible because of an independent source for her identification,53 were found to have been in error. In view of the violation of Moore’s right to counsel at the pretrial identification and in view of the prosecution’s exploitation at trial of evidence directly derived from that violation, the Supreme Court reversed the judgment of the Seventh Circuit.54 The cause was remanded for a determination of whether the constitutional error of admitting the tainted evidence had been harmless error.55

In Moore, the Supreme Court clarified some confusion which had arisen concerning its earlier holdings in Wade, Gilbert and Kirby. The courts below had apparently been confused about language in earlier Supreme Court opinions regarding attachment of the right to counsel—confusion which had resulted in their misconstruing the substance of the holdings of those cases. Undoubtedly, one such misunderstanding arose because of Justice Stewart’s framing of the counsel issue, in Kirby, in terms of an extension of the benefits enjoyed by the accused in post-indictment situations to pre-indictment situations as well.56 In Kirby, the Court had reviewed a lower court holding that the Wade-Gilbert principles were inapplicable to pre-indictment situations.57 The Supreme Court there affirmed the lower court’s disposition of the case,58 but did not do so on the ground that Wade-Gilbert principles were inapplicable to pre-indictment identifications. Rather, the Supreme Court distinguished the permissible pretrial identifications of Kirby from the impermissible ones of Wade and Gilbert, because the defendant in Kirby had been identified before the initiation of any adversary judicial criminal proceedings against him.59 Inasmuch as defendant Moore, in the instant case, had been identified at a preliminary hearing which occurred before indictment but after the initiation of adversary judicial criminal proceedings, the Court held that Moore had been entitled to the assistance of counsel under Kirby. In so doing, the Court clarified and reaffirmed the point at which the right to counsel attaches.

The lower courts’ misapplication of the holdings of Wade and Gilbert may also have arisen from the lower courts’ misunderstanding of another term within those earlier Supreme Court opinions. In Wade, the Court had held that “in-court” identifi-

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50 Id. at 229–30 (footnote omitted).
51 The Court enumerated several ways in which counsel can attempt to prevent suggestiveness in a pretrial identification such as Moore’s. Counsel could request arrangement of lineup, request to exclude the victim from the courtroom while charges and evidence are recited, request seating of the accused with the audience when identification is attempted or cross-examine the victim before her identification hardens. However, the Court expressed no opinion as to whether the judge presiding at the preliminary hearing must grant any of the above requests. Id. at 230 & n.5.
52 The Court did not pass on Moore’s claims that the victim’s in-court identification was tainted by the prior uncounseled identification or that the in-court identification should have been excluded under the due process clause as the unreliable product of a suggestive procedure. Id. at 232 n.7.
53 Id. at 231.
54 The federal district court found the victim’s identification of Moore to have derived from her observation hardens. However, the Court did not pass on Moore’s claims that the victim’s in-court identification was tainted by the prior uncounseled identification or that the in-court identification should have been excluded under the due process clause as the unreliable product of a suggestive procedure. Id. at 232 n.7.
55 Id. See note 18 supra for a discussion of the standard by which to determine harmless error.
56 “In the present case we are asked to extend the Wade-Gilbert per se 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.” 405 U.S. at 684 (emphasis in original).
57 In People v. Kirby, 121 Ill. App. 2d 323, 257 N.E.2d 589 (1970), the Appellate Court of Illinois relied on a state supreme court case, People v. Palmer, 41 Ill. 2d 571, 244 N.E.2d 173 (1969), to hold that the Wade-Gilbert principles apply only to post-indictment confrontations.
58 406 U.S. at 691.
59 Id. at 689–90.
cations of the accused need not be excluded when the prosecution is able to establish that the identification is not based on observation of the accused at an improper lineup.\textsuperscript{60} At the same time, the Court had, under \textit{Gilbert}, held that testimony concerning improper pretrial identifications must be excluded \textit{regardless} of the source of the identification.\textsuperscript{61} The test of which exclusionary rule was to apply in a given situation depended upon whether the testimony in question concerned an identification made \textit{at trial} or \textit{before} trial—with the designation "in-court" employed to distinguish clearly identifications made \textit{at trial} from testimony at trial concerning \textit{pretrial} identifications. In \textit{Moore}, the lower courts did not distinguish between the two types of identification testimony presented by the victim at trial and thus admitted her \textit{entire} testimony under the \textit{Wade} exception despite the fact that the victim's testimony concerning the improper pretrial identification should clearly have been excluded under the strict rule of \textit{Gilbert}. While pointing out the lower courts' error in this regard, the Supreme Court reiterated the distinction between the types of identification testimony and their attendant exclusionary rules.

In sum, the \textit{Moore} Court did not extend or alter earlier Supreme Court holdings concerning pretrial corporeal identifications. Rather, the Court simply clarified its positions that, under \textit{Kirby}, the accused is entitled to the assistance of counsel at pretrial corporeal identifications conducted after the initiation of adversary judicial proceedings and that, under \textit{Gilbert}, prosecution testimony concerning improper pretrial identifications is inadmissible regardless of the basis of the identification.

\textsuperscript{60} 388 U.S. at 239-40.
\textsuperscript{61} 388 U.S. at 273. \textit{See also} 434 U.S. at 227 and 388 U.S. at 220.