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Identification: United States v. Ash, 93 S. Ct. 2568 (1973)

and *United States v. Biswell*[43] as decisions where the Court had permitted warrantless searches because they were reasonable under the circumstances.

Important to Mr. Justice White's belief that the search for aliens was reasonable under the circumstances were: the judgment of Congress on immigration; decisions of the fifth, ninth and tenth circuits;[44] and actual alien smuggling practices.[45] The dissent found compelling the argument that declaring random searches unconstitutional would be invalidating § 287(a) of the Immigration and Naturalization Act in the face of the contrary opinion of Congress.[46] In passing § 287(a), Congress obviously found its provisions reasonable under the fourth amendment. The majority, however, saw their actions not as an invalidation of the statute, but rather as a construction of the statute in a manner consistent with the fourth amendment. It felt that no Act of Congress can authorize a violation of the Constitution.

In urging approval for searches for smuggled aliens without probable cause, Mr. Justice White followed the reasoning of the ninth and tenth circuits. Both circuits have held that probable cause is not required for roving immigration searches within 100 miles of the border, but is required for roving searches for contraband in automobiles within the same area.[47] Thus, searches for contraband alone may be conducted without probable cause only at the border or its functional equivalent, while searches for smuggled aliens can be conducted without probable cause anywhere within 100 miles of the border. Neither Mr. Justice White nor the courts involved offered any justification for the difference between searches for aliens and searches for contraband.[48]

By requiring probable cause or consent for roving searches of automobiles for aliens by the Immigration and Naturalization Service, the Supreme Court extended fourth amendment rights to an area previously not covered. However, in light of the policy considerations involved, it seems unlikely that the Court will also extend the probable cause requirement to searches at the border or its functional equivalent.

[43] 406 U.S. 311 (1972).

[44] § 287(a) of the Immigration and Naturalization Act, 8 U.S.C. § 1357(a) was declared constitutional in United States v. McDaniel, 463 F.2d 129 (5th Cir. 1972); *accord*, United States v. McCormick, 468 F.2d 68 (10th Cir. 1972); Mienke v. United States, 452 F.2d 1076 (9th Cir. 1971).

[45] Mr. Justice White noted that aliens had recently adopted the practice of sitting up behind the back seat of automobiles with their feet and legs doubled up under the rear seat cushions. 93 S. Ct. at 2546 (White, J., dissenting). Further, aliens sometimes illegally enter the country on foot and meet prearranged transportation. *Id.* at 2552.

[46] Congress permitted warrantless searches of vehicles for aliens within a reasonable distance from the border in the Act of August 7, 1946, 60 Stat. 865. Further, in the Immigration and Naturalization Act of 1952, 66 Stat. 63, it also permitted the entry of private lands, excluding dwellings, within 25 miles of the border for the purpose of discovering aliens who had illegally entered the country.

[47] *See* United States v. Anderson, 468 F.2d 1280 (10th Cir. 1972); United States v. McDaniel, 463 F.2d 129 (5th Cir. 1971); Fumigalli v. United States, 429 F.2d 1011 (9th Cir. 1970). In all three cases, the court held that probable cause for a search for contraband may arise during an alien search. In *Anderson* there was probable cause when the officers noticed the odor of marijuana and saw an expended marijuana cigarette in an ashtray when they stopped the defendant for an alien search. The court found probable cause in *McDaniel* when the Border Patrol agent felt and smelled marijuana when he opened a burlap bag covered with newspapers during a search for aliens. Probable cause existed in *Fumigalli* when the Border Patrol agent saw a brick of marijuana protruding from a duffel bag in the trunk when he stopped the defendant for an alien search.

[48] *See* United States v. Almeida-Sanchez, 452 F.2d 459, 461–68 (9th Cir. 1971) (dissenting opinion) for a further discussion of this question.

IDENTIFICATION

United States v. Ash, 93 S. Ct. 2568 (1973).

In *United States v. Ash*,[1] the United States Supreme Court decided that the sixth amendment guarantee of the right to the assistance of counsel[2] should not be extended to a defendant during a post-indictment photographic identification where the defendant is not present. The majority opinion, per Mr. Justice Blackmun, affirmed the conviction of Charles J. Ash, Jr., holding that an identification made on the basis of a photographic display in the absence of the defendant was not a "critical stage"

[1] 93 S. Ct. 2568 (1973).

[2] U.S. CONST. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

of the prosecution to which the right to counsel might attach.

On August 26, 1965, two men held up a bank in Washington, D.C. The robbery lasted for three or four minutes. Acting on information supplied by a government informer, an FBI agent showed five black-and-white mug shots to four witnesses. Ash's picture was one of these five; the others approximately resembled the descriptions given by eyewitnesses. All of the witnesses made uncertain identifications of Ash.[3] Ash was arrested and indicted. The day before the trial commenced, the prosecutor conducted another photographic display, this time with color photographs.[4] Three of the four witnesses, who had previously made uncertain identifications, selected Ash's picture.

Respondent Ash's counsel was not present at this identification. The respondent claimed that this pretrial identification constituted a "critical stage" of the prosecution, and contended that the absence of his attorney violated his sixth amendment right to counsel.[5]

In a five-to-four decision, the court of appeals held that Ash's sixth amendment right to counsel had been violated.[6] The court cited *United States v. Wade*,[7] *Gilbert v. California*[8] and *Stovall v. Denno*[9] for the proposition that the pretrial photographic identification was a critical stage of the prosecution and that Ash needed the assistance of counsel if he was to be guaranteed a fair trial.[10] The Supreme Court granted certiorari.[11]

The five man majority[12] first looked at the historical rationale for the sixth amendment guarantee of the right to counsel. They found that the earliest justification for this guarantee was the need for aid in combatting the new institution of a public prosecutor. According to the Court, the core of this guarantee, the assurance of assistance at trial, was later expanded to other areas, deemed necessary to make this assistance at trial meaningful. The Court then examined the cases which have expanded this guarantee[13] and resolved that the common factor was a trial-like confrontation at which the defendant was faced with a legally skilled prosecutor and had no resources to combat this adversary alone.

[3] The presence of counsel at a pre-indictment identification is not required under the sixth amendment. Kirby v. Illinois, 406 U.S. 682 (1972). Ash based his claim solely on the second, post-indictment identification.

[4] There is some controversy as to how fairly this photo display was conducted. The Supreme Court does not discuss this, but the majority in the court of appeals noted that only the defendants' pictures were full length and only their pictures were taken next to height meters with police numbers attached. United States v. Ash, 461 F.2d 92, 96 (2d Cir. 1972). *But see id.* at 126 (Wilkey, J., dissenting).

[5] Evidence of the pretrial identification was first introduced by the attorney for Ash's codefendant; there was no question of the prosecution's affirmative use of the identification.

[6] Ash v. United States, 461 F.2d 92 (2d Cir. 1972).

[7] 388 U.S. 218 (1967).

[8] 388 U.S. 263 (1967).

[9] 388 U.S. 293 (1967).

[10] 461 F.2d at 100.

[11] The Supreme Court cited a number of lower federal and state cases holding that *Wade* will not be extended to pretrial photo displays: United States *ex rel.* Reed v. Anderson, 461 F.2d 739 (3d Cir. *en banc* 1972); United States v. Long, 449 F.2d 288 (8th Cir.), *cert. denied*, 405 U.S. 974 (1972); United States v. Serio, 440 F.2d 827 (6th Cir. 1971); Allen v. Rhay, 431 F.2d 1160 (9th Cir. 1970); United States v. Ballard, 423 F.2d 127 (5th Cir. 1970); United States v. Collins, 416 F.2d 696 (4th Cir.), *cert. denied*, 396 U.S. 1025 (1970); United States v. Bennett, 409 F.2d 888 (2d Cir.), *cert. denied sub nom.*, Haywood v. United States, 396 U.S. 852 (1969); United States v. Robinson, 406 F.2d 64 (7th Cir.), *cert. denied*, 395 U.S. 926 (1969); McGee v. United States, 402 F.2d 434 (10th Cir.), *cert. denied*, 394 U.S. 908 (1969). When *Ash* was decided in the court of appeals, only the Third Circuit had extended *Wade* to photographic identifications. United States v. Zeiler, 427 F.2d 1305 (3d Cir. 1970). This case was overruled in part by *Anderson*, *supra*.

See also McGhee v. State, 264 So. 2d 560 (Ala. Crim. App. 1972); State v. Yehling, 108 Ariz. 322, 498 P.2d 145 (1972); People v. Lawrence, 4 Cal. 3d 273, 481 P.2d 212, 93 Cal. Rptr. 204, *cert. denied*, 407 U.S. 909 (1972); Reed v. State, 281 A.2d 142 (Del. 1971); People v. Holiday, 47 Ill. 2d 300, 265 N.E.2d 634 (1970); Baldwin v. State, 5 Md. App. 22, 245 A.2d 98 (1968) (dicta); Commonwealth v. Ross, 282 N.E.2d 70 (Mass. 1972), *vacated on other grounds and remanded*, 410 U.S. 901 (1973); Stevenson v. State, 244 So. 2d 30 (Miss. 1971); State v. Brookins, 468 S.W.2d 42 (Mo. 1971) (dicta); People v. Coles, 34 App. Div. 2d 1051, 312 N.Y.S.2d 621 (1970) (dicta); State v. Moss, 187 Neb. 391, 191 N.W.2d 543 (1971); Drewry v. Commonwealth, 213 Va. 186, 191 S.E.2d 178 (1972); State v. Nettles, 81 Wash. 2d 205, 500 P.2d 752 (1972); Kain v. State, 48 Wis. 2d 212, 179 N.W.2d 777 (1970).

See for state courts which have extended *Wade*, Cox v. State, 219 So. 2d 762 (Fla. App. 1969) (video tapes); People v. Anderson 389 Mich. 155, 205 N.W.2d 461 (1973); Thompson v. State, 85 Nev. 134, 451 P.2d 704, *cert. denied*, 396 U.S. 893 (1969); Commonwealth v. Whiting, 439 Pa. 205, 266 A.2d 738, *cert. denied*, 400 U.S. 919 (1970). See for a more complete list, 461 F.2d at 110–112, nn. 16–29.

[12] Chief Justice Burger and Justices Blackmun, Rehnquist, Powell and White joined in the majority. A concurring opinion was submitted by Justice Stewart. Justice Brennan wrote the dissenting opinion, joined by Justices Douglas and Marshall.

[13] Coleman v. Alabama, 399 U.S. 1 (1970) (preliminary hearing is a critical stage); United States v. Wade, 388 U. S. 218 (1967) (pretrial line-up is a critical stage); Massiah v. United States, 377 U.S. 201 (1964) (pretrial interview with defendant is a critical stage); White v. Maryland, 373 U.S. 59 (1963) (expanding *Hamilton*, *infra*, to encompass all arraignments, regardless of state law); Hamilton v. Alabama, 368 U.S. 52 (1961) (under Alabama law, arraignment must be a critical stage to which guarantee must attach); Powell

From this perspective the Court viewed the right to counsel as simply the right of the accused to have counsel acting as his assistant.[14] In *Hamilton v. Alabama*[15] and *White v. Maryland*,[16] counsel could act as an assistant at the arraignment stage, giving advice on all available defenses, so that the defendant could make an intelligent plea. In *Massiah v. United States*[17] defendant's right to counsel consisted of the right to be advised as to his fifth amendment privileges and to be protected from overreaching by the state during a surreptitious pretrial interview. In *Coleman v. Alabama*[18] the Court stated that it is counsel's legal skills in cross-examining, in probing for evidence and in presenting legal arguments which make his presence at the preliminary hearing necessary.[19]

In light of the historical rationale, the majority asserted that *Wade* requires the presence of counsel where counsel can assist in preserving the propriety of the line-up identification and aid in the reconstruction of the line-up at trial. The majority ruled that the right to counsel attaches only when the defendant needs aid in coping with legal problems and assistance in meeting his skilled adversaries.[20] The majority's test of criticalness was: Is the situation a trial-like, adversary confrontation at which counsel is necessary to assist the defendant in handling legal problems or in combatting the prosecutor?

The majority said the *Wade* opinion emphasized the need for counsel at "confrontations." Blackmun argued that neither the lack of scientific precision in identifications nor the need for legal assistance to facilitate reconstruction of the identification at the time of trail gave rise to the need for counsel in *Wade*. These were not tests to see if the assistance of counsel is a necessity. Rather, these were tests to see if confrontation at trial is an adequate substitute for the pretrial confrontation.[21] Photographic displays are not confrontations. The defendant is not even present. Photo displays are more similar to the interviews routinely conducted by the prosecutor in preparing his witnesses. To expand the guarantee out of the context of a confrontation would be far too drastic a step.[22]

In comparing Ash's situation to the general right to counsel case, the majority found that no guarantee need attach. Since the defendant was not present, there was no problem with his lack of knowledge of legal matters nor any fear of overpowering by a skilled adversary. There was no need to equalize any trial-like, adversary confrontation. The Court held that a photo display was only part of the prosecutor's trial preparation and that the defendant's counter-balance rested on the defense attorney's ability to interview the same witnesses. No extra consideration must be given to the defendant. The Court also pointed out that *Brady v. Maryland*[23] allowed the defense attorney to secure any favorable evidence in the hands of the prosecution.

In sum, the Court held that when the defendant is not present there is no confrontation, and when there is no confrontation there is no situation which will give rise to a need for counsel.

In a concurring opinion, Mr. Justice Stewart also ruled that the pretrial photographic identification was not a critical stage, but for a decidedly different reason.[24] His definition of criticalness emphasized what the lawyer can do at the critical stage to preserve the defendant's right to a fair trial. Quoting from both *Wade*[25] and *Schneckloth v. Bustamonte*,[26] Stewart said that when there is a possibility of unfair influence at the identification, there is a possibility that this will result in an unfair trial. The lawyer, then, is needed as a trained observer, to meaningfully confront the in-court identifications made by witnesses and to better reconstruct the procedure of the pretrial identification. It is this emphasis upon the trial itself and the lawyer's assistance at that time which makes Stewart's reading of *Wade* different from that of the majority.

v. Alabama, 287 U.S. 45 (1932) (right to counsel, to be meaningful, must attach during the period of preparation prior to the trial itself).

[14] 93 S. Ct. at 2575.

[15] 368 U.S. 52 (1961).

[16] 373 U.S. 59 (1963).

[17] 377 U.S. 201 (1964).

[18] 399 U.S. 1 (1970).

[19] These interpretations are those of the majority. In some of these cases, the interpretation is questionable, e.g., *Coleman*. See discussion of that case and note 38, *infra*.

[20] The Court calls this the "traditional" test. 93 S. Ct. at 2575.

[21] *Id.* at 2577.

[22] *Id.* at 2577.

[23] 373 U.S. 83 (1963).

[24] 93 S. Ct. at 2581, n. 1 (Stewart, J., concurring).

[25] In United States v. Wade, *supra*, the Court determined that a pretrial proceeding is a "critical stage" if "the presence of ... counsel is necessary to preserve the defendant's ... right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself."

Id. at 2580 (Stewart, J., concurring).

[26] "Pretrial proceedings are 'critical,' then, if the presence of counsel is essential 'to protect the fairness of the trial itself.' " *Id.*

However, Stewart goes on to say that a *photographic* identification is not a critical stage since counsel can not give better assistance at trial merely by being at the photo display. According to Stewart, the photographic line-up affords fewer possibilities of suggestion than the line-up identification and can be easily reconstructed at trial. If the lawyer suspects foul play, he can attack the identification through questioning of the witnesses prior to and at the trial. Stewart also saw little difference in a photo display and other prosecutorial, pretrial, interviewing techniques.

The dissenting opinion agreed with the interpretation of *Wade* given by Mr. Justice Stewart, but asserted that a post-indictment photographic identification is a critical stage of the criminal proceedings, to which the right to counsel attaches.

The dissenters reviewed *Wade* and attempted to clarify the definition of a critical stage. They saw the *Wade* argument as: (1) the defendant's inability to reconstruct at trial the pretrial lineup proceedings deprives the defendant of his opportunity to meaningfully attack the credibility of the witness' in-court identification; (2) as a conviction may rest on this in-court identification, which might be the fruit of a pretrial identification which the defendant is unable to subject to courtroom scrutiny, the defendant loses his right to cross-examine the witnesses, an essential part of his right to confront the witnesses against him; and (3) therefore the line-up is a critical stage to which the sixth amendment guarantee must attach, since the presence of counsel at the pretrial line-up is the only way to avert any prejudice and assure a meaningful confrontation at the trial.

The dissenters decided that a photographic identification falls within this framework. The possibility of suggestive influence, prejudicing in-court identifications, is inherent in all identifications,[27] and the mere presence of the pictures at trial does not guarantee the ability to reconstruct the procedures of the display. Since this chance of prejudice exists, and since the only way to attack the prejudice is to have first-hand knowledge of the identification procedures (something an absent defendant cannot possibly have), counsel is necessary at a post-indictment, pretrial, photographic identification to assure the defendant's right to a fair trial.

The dissent finally addressed the reasoning of the majority ruling. The dissenters said that the new definition of "critical stage" was only concerned with one facet of the right to counsel—what the lawyer can do for his client then and there. It ignored the other, equally important facet of the lawyer's assistance in protecting the defendant's right to a fair trial after the identification. The dissent reiterated that the new definition, with its emphasis on trial-like confrontations at which the lawyer can aid in answering legal questions and help in combatting the prosecutor, might, in some cases, deprive the defendant of legal assistance at the only time when such aid would help.[28]

The three opinions of *Ash* are the latest in a series of attempts to handle the issue of "the critical stage." It was recognized early that the guarantee must, in certain cases, attach before the trial itself. As each new situation arose, the Supreme Court examined the facts and made a decision as to the criticalness of that particular stage.[29] The issues in these cases can always be reduced to their major component: What is a critical stage? The dissent in *Ash* maintained that this question has two facets. A stage of the prosecution is critical if the lawyer can provide immediate assistance at a confrontation or if his presence is necessary to assure a meaningful "defence" at the trial itself. This double emphasis is supported by the previous cases. In *Hamilton* the Court listed the possible prejudices of an arraignment without counsel and concluded that the risks were serious since a poorly conducted arraignment might affect "the whole trial." [30] The *Hamilton* Court also recognized the importance of the lawyer's immediate assistance, concluding that counsel might have informed the defendant of all available defenses, thereby allowing the accused to plead intelligently.[31] This two-faceted approach to defining a critical stage is evident in *Coleman* as well. The Court listed the benefits of counsel at a preliminary hearing, two of which pertain to the immediate assistance a lawyer could render, two of which look towards the lawyer's work at the trial itself.[32]

[27] The possibility of suggestion in a photo display can arise from the photographs themselves (they might contain a picture of the 20 year old accused and four photos of middle-aged men), from the manner in which they are displayed (a special configuration could tend to draw one's attention to a particular picture), or from the demeanor of the prosecutor as he conducts the display (this could be anything from gestures and comments to coughs and smiles). See *id.* at 2585 (Brennan, J., dissenting).

[28] *Id.* at 2589 (Brennan, J., dissenting).

[29] *See* note 13 *supra.*

[30] 368 U.S. at 54.

[31] *Id.* at 55.

[32] Counsel is necessary at a preliminary hearing because (1) his skilled examination and cross-examination of witnesses may expose fatal weaknesses in the state's

The majority in *Ash* ignored this two-faceted definition of criticalness by emphasizing only what the lawyer can accomplish then and there. The majority was also at odds with the *Wade* decision. Despite the majority's stress upon the *Wade* Court's use of the word "confrontation,"[33] there is abundant evidence that the primary concern of the Supreme Court in *Wade* was the defendant's right to a fair trial. The Court framed the question in terms of Wade's "most basic right to a fair trial."[34] *Wade* emphasized the sixth amendment assurance of a meaningful "defence."[35] The *Wade* Court recognized that counsel could give legal assistance on the spot,[36] but they also included consideration of the trial:

> In sum, the principle of *Powell v. Alabama* and succeeding cases requires 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.[37]

Clearly, this shows the concern the *Wade* Court had for the trial itself. Yet the majority's historical analysis in *Ash* led them to the conclusion that the lawyer's assistance is limited to the immediate aid which he can give to his client.

The immediate effect of *Ash* will be to allow prosecutors to conduct pretrial photographic identifications without the defendant or his attorney present. Photo displays will, in effect, become part of the prosecutor's trial preparation.

However, *Ash* does not clear up the confusion which existed in this area prior to the decision.[38]

case which may lead the magistrate to refuse to bind over the defendant (immediate assistance), (2) his examination or cross-examination can be good for impeachment at trial or can preserve testimony of a witness who does not appear at trial (emphasis on trial itself), (3) he can more effectively discover the case against the defendant and prepare a proper defense (emphasis on trial itself), and (4) he can make an effective argument for the accused on matters such as bail or the necessity for an early psychiatric exam (immediate assistance). 399 U.S. at 9.

The majority, in discussing *Coleman*, have ignored the emphasis upon the defense attorney's preparation for the trial in favor of the immediate assistance counsel could provide. See 93 S. Ct. at 2575.

[33] 93 S. Ct. at 2576, n.9. *But see* discussion on this in the dissenting opinion, *id.* at 2589–90 (Brennan, J., dissenting).

[34] "[I]n this case it is urged that the assistance of counsel at the line-up was indispensable to protect Wade's most basic right to a fair trial at which the witnesses against him might be meaningfully cross-examined." 388 U.S. at 223–24.

[35] "The plain wording of this guarantee thus encompasses counsel's assistance whenever necessary to assure a 'defence.' " *Id.* at 225.

[36] The *Wade* majority quotes from *Hamilton:* " 'What happens there [at the arraignment] may affect the whole trial. Available defenses may be irretrievably lost, if not then and there asserted. . . .' " *Id.* at 225. "The presence of counsel at such confrontations, as at the trial itself, operates to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution."
Id. at 227.

[37] *Id.* at 227. *See also* the dissent's discussion, 93 S. Ct. at 2589–91 (Brennan, J., dissenting).

[38] This confusion is evidenced by the fact that the last three major cases on this issue (*Wade, Coleman* and *Kirby*) resulted in plurality decisions.

The mechanics of the *Wade* decision is an excellent example of the confusion which attends this area of the law. Seven opinions were filed. 388 U.S. 218 (1967). There was the official opinion of the Court delivered by Mr. Justice Brennan, the opinion of Mr. Justice Clark, concurring in result, the opinion of Mr. Justice Fortas, joined by Mr. Justice Douglas and Mr. Chief Justice Warren, dissenting in part and concurring in part, the separate opinions of Mr. Justice Douglas and Mr. Chief Justice Warren, dissenting in part and concurring in part, the opinion of Mr. Justice Black, dissenting in part and concurring in part and the opinion of Mr. Justice White, joined by Mr. Justice Harlan and Mr. Justice Stewart, also dissenting in part and concurring in part. The following is a chart designed to display which justices agreed on which issues. As can be seen, it appears to be happenstance that any part of the opinion of the Court had five justices concurring, thus making it law:

Part	Issue	Justices	
		Pro	Con
I	Line-up and speaking not a fifth amendment violation	Brennan Clark White Harlan Stewart	Warren Douglas Fortas Black
II	The sixth amendment guarantee is the presence of counsel to preserve right to a fair trial and a meaningful confrontation and "defence."	Brennan Warren Douglas Fortas Black Clark	White Harlan Stewart
III	Pretrial identification at line-up not the same as interviews, fingerprinting, etc., and are not part of prosecutor's pretrial preparation.	Brennan Warren Douglas Fortas Clark White Harlan Stewart Black	
IV	Pretrial identification at line-up is a situation in which presence of counsel is necessary as interpreted in Part II.	Brennan Warren Douglas Fortas Clark Black	White Harlan Stewart

From out of the confusion created by the past plurality decisions, the Court in *Ash* attempted to construct a narrow definition of criticalness based upon the right to counsel being extended only when an attorney could be of immediate assistance. Instead, by ignoring the obvious emphases of previous decisions concerning the trial-oriented assistance of counsel, the Court has added more fuel to a fire already burning out of control.

How will this narrow definition of criticalness work in the situations in which it has been claimed a lawyer is necessary? In post-indictment line-ups, it is not readily apparent what immediate assistance an attorney can provide. He cannot stop the line-up or see that it be conducted in a certain manner. He can give no legal advice, proffer no defenses, advance no arguments.[39] The defendant is not in need of legal advice and the lawyer is not in a position to provide on the spot assistance against the skills of the prosecutor. In fact, his only recognized function is as a trained observer. Would the *Ash* Court say that the post-indictment line-up is a critical stage because the lawyer is needed as an observer? If that is the case, then he is as much needed in a photo display case. The future of the right to counsel at post-indictment line-ups under the new *Ash* test of criticalness is cloudy and confused.[40]

The decision in *Ash* leads to even more confusion when approached from a narrower, procedural standpoint. Implicit in denying the sixth amendment claim as the *Ash* majority did, is the assumption that the remedy for foul play at a photographic identification is a due process attack as in *Simmons v. United States*.[41] If the defendant is not allowed counsel at the identification his only remedy against a tainted in-court identification is to attack the procedures used at the photo display. This safeguard is cited by the Court.[42] The harshness of the majority decision is partially assuaged by their belief that a photographic identification can be duplicated at trial.[43] A problem then arises when the photo display is conducted, but the photographs disappear before the trial commences. If the ability to duplicate the pretrial identification is gone, would not that be a violation of the defendant's right to due process, for how can his attorney meaningfully conduct his defense when the photographs, which may or may not form the basis for an in-court identification, are missing? In at least one state, Illinois, it has recently been decided that it is not absolutely necessary for the

Part	Issue	Justices	
		Pro	Con
V	Actual order. Presumption that an identification without counsel taints in-court identification unless prosecution can clearly and convincingly prove otherwise. Case remanded for hearing.	Brennan Warren Douglas Fortas Clark	White Harlan Stewart Black

Further confusion is added when one attempts to draw the distinction between photographic identifications and corporeal identifications. Stewart and the dissent fall on different sides of this issue. It is difficult to say exactly what distinction the majority finds, if any. In *Wade*, Mr. Justice White does not seem to make a distinction in his opinion: "The rule [of the majority in *Wade*] applies to any line-up, to any other techniques employed to produce an identification. . . ." *Id.* at 251 (White, J., concurring in part and dissenting in part). It is difficult to tell, in light of his concurrence in *Ash*, if he has changed his mind.

[39] *See generally* 93 S. Ct. at 2577 (majority's quote from United States v. Bennett, 409 F.2d 888 (1969)).

[40] This new criticalness definition makes the doubtful line drawn in Kirby v. Illinois, 406 U.S. 682 (1972), even more questionable. If what is necessary is a trial-like, adversary confrontation at which the defendant needs aid only his lawyer can give, that is all present at pre-indictment line-ups as much as it is at post-indictment line-ups. If the emphasis is an immediate aid of counsel in combatting adversaries, the pre-indictment or post-indictment distinction is not significant. Granted the prosecutor is usually not present at pre-indictment line-ups, thereby lessening the "confrontation" aspect. Does that then mean that if the prosecutor does not show up at post-indictment line-ups, counsel is no longer required? Or conversely, can the defendant claim a right to counsel if the prosecutor participates in a pre-indictment line-up? *See* 63 J. CRIM. L. & C. 478 (1972).

[41] 390 U.S. 377 (1967). After Stovall v. Denno, 388 U.S. 293 (1967), held that *Wade* was not to be applied retroactively, defendants were left with a due process attack if they wished to challenge a photographic display. If the defendant claims that a photo identification was misused or improperly conducted, the trial court must examine the situation in light of the totality of the circumstances, and "that conviction based on eyewitness identification at trial following a pretrail identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissively suggestive as to give rise to a very substantial likelihood of irreparable misidentification." 390 U.S. at 384.

[42] 93 S. Ct. at 2574.

[43] "Although we do not suggest that equality of access to photographs removes all potential for abuse [note omitted], it does remove any inequality in the adversary process itself and thereby fully satisfies the historical spirit of the Sixth Amendment guarantee." *Id.* at 2578. *A fortiori*, if the photographs are not available, the defendant would be denied equal access and the "historical spirit" would go unsatisfied. Can the defense attorney show "impermissible suggestion" without the photographs?