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SIXTH AMENDMENT—PRETRIAL IDENTIFICATION AND THE RIGHT TO COUNSEL

Moore v. Illinois, 434 U.S. 220 (1977).

In *Moore v. Illinois*,¹ 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.² 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.³

The sixth amendment to the United States Constitution entitles the accused to the assistance of counsel in all criminal prosecutions.⁴ 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."⁵ 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.⁶ It is therefore appropriate that the counsel guarantee has been extended to critical stages of prosecution which precede trial.⁷

¹ 434 U.S. 220 (1977).

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."

⁵ *United States v. Ash*, 413 U.S. 300, 309 (1973).

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

In *United States v. Wade*,⁸ 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.⁹ Realizing that a witness is unlikely to change an announced identification, the Court emphasized the necessity of preventing the im-

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.

United States v. Wade, 388 U.S. 218, 224 (1967) (footnote omitted).

Pretrial confrontations deemed "critical" stages of the proceedings include arraignment, *Hamilton v. Alabama*, 368 U.S. 52 (1961), post-indictment lineup, *United States v. Wade*, 388 U.S. 52 (1967), and preliminary hearing, *Coleman v. Alabama*, 399 U.S. 1 (1970).

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.

proper suggestions that often lead to mistaken identifications.¹⁰ Moreover, recognizing that a pre-trial confrontation for purposes of identification¹¹ may in effect be the trial that determines the fate of the accused,¹² 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.¹³

In *Gilbert v. California*,¹⁴ 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

¹⁰ 388 U.S. at 229.

¹¹ "The pre-trial confrontation for purpose of identification may take the form of a lineup . . . or presentation of the suspect alone to the witness. . . . It is obvious that risks of suggestion attend either form of confrontation and increase the dangers inhering in eyewitness identification." *Id.*

¹² The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation, with the State aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no effective appeal from the judgment there rendered by the witness—"that's the man."

Id. at 235-36.

¹³ *Id.* at 239-40.

¹⁴ 388 U.S. 263 (1967). In this case, defendant Gilbert was indicted for armed robbery and murder, and a lineup was conducted in the absence of Gilbert's appointed counsel. The lineup was held in an auditorium so that over 100 persons could view the lineup participants, who were instructed to walk, speak and don certain clothing. At trial, the eyewitnesses to the crime in question identified Gilbert as the robber-murderer. Testimony regarding their pretrial identifications was elicited by defense counsel on cross-examination. On direct examination by the prosecution, the manager of the building where Gilbert lived and eight witnesses to other robberies attributed to Gilbert identified Gilbert in court and testified to their pretrial identifications.

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.¹⁵ 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."¹⁶ 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."¹⁷ 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.¹⁸

In *Kirby v. Illinois*,¹⁹ 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."²⁰ 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*-

¹⁵ *Id.* at 272-73.

¹⁶ *Id.* at 273-74.

¹⁷ *Id.* at 273.

¹⁸ *Id.* at 274. According to *Chapman v. California*, 386 U.S. 18 (1967), the harmlessness of a constitutional error must be established beyond a reasonable doubt. If there is no "reasonable possibility that the evidence complained of might have contributed to the conviction," the error will be deemed harmless. *Fahey v. Connecticut*, 375 U.S. 85, 86-87 (1963).

¹⁹ 406 U.S. 682 (1972). In this case, the police stopped defendant Kirby on the street and found him to be carrying someone else's social security card and traveler's checks. Kirby was arrested and brought to the police station. When police records revealed the items in question to have been recently stolen, the police brought the robbery victim to the police station and the victim identified Kirby as the robber. At trial, the victim again identified Kirby as the robber and directly testified as to his prior identification.

²⁰ *Id.* at 689.

Gilbert principles to exclude any of the victim's identification testimony.²¹

In *Moore v. Illinois*,²² the Supreme Court once again concerned itself with the propriety of a pre-trial corporeal identification. Defendant Moore was implicated in the sexual assault of a young woman²³ by the victim's identification of Moore's photograph²⁴ and by the presence at the scene of the crime of a letter written by Moore's girlfriend.²⁵ 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.²⁶

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.²⁷ The

State's Attorney then asked the victim if she saw her assailant in the courtroom, whereupon the victim pointed to Moore.²⁸ Moore was neither represented by counsel at this hearing nor offered an appointment of counsel by the court.²⁹

After the grand jury returned a four-count indictment against Moore,³⁰ 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.³¹

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.³² 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 corporeal identification procedure."³³ 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.³⁴

²¹ *Id.* at 690.

²² 434 U.S. 220 (1977).

²³ 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. *Id.* at 221-22.

²⁴ According to the United States Supreme Court, the victim chose two or three photographs, one of which pictured Moore. 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). 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*.

²⁵ 434 U.S. at 222.

²⁶ 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).

²⁷ 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.

²⁸ *Id.* at 222-23.

²⁹ Moore's preliminary hearing was held in 1967. Since 1970, individuals accused of crime in Illinois have been entitled to the assistance of counsel at preliminary hearings. *People v. Adams*, 46 Ill. 2d 200, 263 N.E.2d 490 (1970), *aff'd sub nom. Adams v. Illinois*, 405 U.S. 278 (1972).

³⁰ Moore was indicted for rape, deviate sexual assault, burglary and robbery. 434 U.S. at 223.

³¹ *Id.*

³² *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.

³³ 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.

³⁴ 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,³⁵ 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.³⁶ The district court declined to decide the question of whether Moore had been entitled to the assistance of counsel at the pre-indictment identification.³⁷ 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.³⁸

The United States Court of Appeals for the Seventh Circuit affirmed the district court's denial of Moore's habeas corpus petition.³⁹ 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.⁴⁰ 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.⁴¹

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*.⁴² As a consequence, the Court began its opinion in *Moore* by reiterating its holdings in those earlier cases.⁴³ 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.⁴⁴ The Court noted that *Wade and Gilbert* had deemed the pretrial *post-indictment* identification to be a critical prosecutive 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."⁴⁵ 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,⁴⁶ 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.⁴⁷ 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.⁴⁸ 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.⁴⁹ Noting the role of counsel in preventing

circumstances were that the victim had tentatively identified the defendant from photographs but stated that she could not be certain unless she saw him again. The victim signed a criminal complaint naming the defendant, then identified the defendant as her assailant, after the defendant had been called before the bench for a preliminary hearing. *Id.* at 85, 281 N.E.2d at 298. It is interesting to note that the United States Supreme Court considered these circumstances to be highly suggestive. See note 49 and accompanying text *infra*.

³⁵ 409 U.S. 979 (1972).

³⁶ *United States ex rel. Moore v. Illinois*, No. 73-C-2222 (N.D. Ill. June 3, 1975). Moore contended that the pretrial identification procedure was highly suggestive and resulted in violations of his due process and sixth amendment rights. Moore also contended that he was denied due process and the effective assistance of counsel when he was denied copies of the transcripts of pretrial hearings which contained testimony by the victim. *Id.*, slip op. at 2. The Supreme Court addressed only Moore's *Gilbert* argument, leaving the lower courts free to reconsider the other issues raised by Moore. 434 U.S. at 232 & n.7.

³⁷ *United States ex rel. Moore v. Illinois*, No. 75-1697 (7th Cir. April 27, 1976).

³⁸ *Id.* See note 53 *supra*.

³⁹ *United States ex rel. Moore v. Illinois*, No. 75-1697 (7th Cir. April 27, 1976).

⁴⁰ *Id.*, slip op. at 9.

⁴¹ *Id.*, slip op. at 8. See note 24 *supra*.

⁴² 434 U.S. at 221.

⁴³ For a discussion of the holdings of *Wade, Gilbert and Kirby*, see notes 8-22 and accompanying text *supra*.

⁴⁴ "Petitioner was entitled to have an attorney present at his preliminary hearing, because it was a critical stage of prosecution, at which Moore was confronted by the only adversarial eyewitness." Brief for Petitioner at 13.

⁴⁵ 406 U.S. at 689 (emphasis added).

⁴⁶ 434 U.S. at 228 (citing Brief for Respondent at 8 & n.1; Transcript of Oral Argument at 32, 34).

⁴⁷ 434 U.S. at 228-29.

⁴⁸ *Id.* at 228.

⁴⁹ As the Court noted:

It is difficult to imagine a more suggestive manner in which to present a suspect to a witness for their critical first confrontation than was employed in this case. The victim, who had seen her assailant for only 10 to 15 seconds, was asked to make her identification after she was told that she was going

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

to view a suspect, after she was told his name and heard it called as he was led before the bench, and after she heard the prosecutor recite the evidence believed to implicate the petitioner.

Id. at 229-30 (footnote omitted).

⁵⁰ 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.

⁵¹ 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.

⁵² *Id.* at 231.

⁵³ The federal district court found the victim's identification of Moore to have derived from her observation of him at the scene of the crime. United States *ex rel.* Moore v. Illinois, No. 73-C-2222, slip op. at 12 (N.D. Ill. June 3, 1975). The state supreme court found the victim's identification of Moore to have derived from a proper photographic identification. 51 Ill. 2d at 85-86, 281 N.E.2d at 298. The trial court admitted the victim's identification on the ground that the prosecution had shown an independent basis for the identification, 434 U.S. at 223, but it is not clear what the court considered that basis to be.

⁵⁴ 434 U.S. at 231.

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" identi-

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." 406 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.⁶⁰ At the same time, the Court had, under *Gilbert*, held that testimony concerning improper pretrial identifications must be excluded *regardless* of the source of the identification.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 *at trial* or *before trial*—with the designation “in-court” employed to distinguish clearly *identifications made at trial* from *testimony at trial concerning pretrial identifications*. In *Moore*, the lower courts did not distinguish between the two types of identification testimony presented by the victim at

⁶⁰ 388 U.S. at 239–40.

⁶¹ 388 U.S. at 273. *See also* 434 U.S. at 227 and 388 U.S. at 220.

trial and thus admitted her *entire* testimony under the *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 *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 *Moore* Court did not extend or alter earlier Supreme Court holdings concerning pretrial corporeal identifications. Rather, the Court simply clarified its positions that, under *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 *Gilbert*, prosecution testimony concerning improper pretrial identifications is inadmissible regardless of the basis of the identification.