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Right to Counsel--Sixth Amendment: Misdemeanor Prosecutions: Argersinger v. Hamlin, 407 U.S. 25 (1972)

not departed from these views. It is my profound hope that the Court will not.

Justice Black, in one of his last opinions, described the Court as a "palladium of justice" and "citadel of liberty." I profoundly believe that the Supreme Court is such a court.

In the perspective of time, it will be the measure of the Burger Court, as it is of all courts, to act in the great tradition of the judge's creed stated by Lord Mansfield long ago:

> I will not do that which my conscience tells me is wrong to gain the huzzahs of thousands, or the daily praise of all the papers which come from the press. I will not avoid doing what I think is right, though it should draw on me the whole artillery of libels, all that falsehood and malice can invent, or the credulity of a deluded populace can swallow. ... Once for all let it be understood, that no endeavors of this kind will influence any man who at present sits here.

SIXTH AMENDMENT—RIGHT TO COUNSEL

Misdemeanor Prosecutions:

Argersinger v. Hamlin, 407 U. S. 25 (1972)

In *Argersinger v. Hamlin*[1] the United States Supreme Court squarely confronted an issue which has haunted federal and state courts since *Gideon v. Wainwright*[2] applied the sixth amendment right to counsel to the states through the fourteenth amendment due process clause: Is an indigent accused of committing a misdemeanor entitled to appointed counsel?

The defendant in *Argersinger* was convicted without counsel of carrying a concealed weapon, a misdemeanor punishable by up to six months imprisonment and a $1,000 fine, and was sentenced to 90 days in jail. He petitioned the Florida supreme court for a writ of habeas corpus, alleging that his sixth amendment right to counsel had been denied. The Florida court previously had held in *Fish v. State*[3] and in subsequent decisions[4] that only indigents accused of felonies were entitled to counsel as a matter of right. However, the Florida court agreed to take original jurisdiction in Argersinger's case in order to reexamine its previous decisions in light of a conflicting line of cases in the Court of Appeals for the Fifth Circuit,[5] and in light of the Supreme Court's holding in *Duncan v. Louisiana*.[6]

In *Duncan*, the Supreme Court applied the sixth amendment right to trial by jury to the states through the fourteenth amendment due process clause, "in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee."[7] The Court concluded, based on *Cheff v. Schnackenberg*,[8] that only "serious offenses" come within the purview of the sixth amendment right to trial by jury. Without actually defining "serious offenses," the Court held that the crime in *Duncan*, which carried a two year potential penalty, was sufficiently serious so as to require a jury trial. Excluded from the Court's holding were "petty offenses" as defined by 18 U.S.C.§1 (1948):

> Crimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses.[9]

In deciding *Argersinger* the Florida supreme court presumed that the United States Supreme Court would extend the same principles to the right to counsel as were applied in *Duncan* to the right to trial by jury. Noting that the sixth months standard was also adopted in *Brinson v. State*,[10] the Florida court concluded that the right to counsel "extends only to trials for non-petty offenses

[1] 407 U.S. 25 (1972).
[2] 372 U.S. 335 (1963).
[3] 159 So. 2d 866 (Fla. 1964).
[4] State *ex rel.* Taylor v. Warden, 193 So. 2d 606 (Fla. 1967); Watkins v. Morris, 179 So. 2d 348 (Fla. 1965).
[5] Bohr v. Purdy, 412 F.2d 321 (5th Cir. 1969); James v. Headley, 410 F.2d 325 (5th Cir. 1969); Boyer v. City of Orlando, 402 F.2d 966 (5th Cir. 1968); Goslin v. Thomas, 400 F.2d 594 (5th Cir. 1968); McDonald v. Moore, 353 F.2d 106 (5th Cir. 1965); Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965).
[6] 391 U.S. 145 (1968).
[7] *Id.* at 149.
[8] 384 U.S. 373 (1966).
[9] 391 U.S. at 159.
[10] 273 F. Supp. 840 (S.D. Fla. 1967).

punishable by more than six months imprisonment."[11] Since Argersinger's offense was only punishable by a maximum of six months, the writ was discharged.[12]

The United States Supreme Court granted certiorari and unanimously reversed the decision. Rejecting Florida's limitation on the right to counsel, the Court in *Argersinger* held that,

> absent a knowing waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.[13]

In arriving at this seemingly sweeping extension of the right to counsel,[14] the Court relied primarily on language in *Powell v. Alabama*,[15] *Gideon v. Wainwright*,[16] and the sixth amendment itself.[17] Although *Powell* was a capital case and *Gideon* involved a felony, in neither case was the decision explicitly limited to those factual circumstances.

The decision in *Powell*, which held that a state's denial of counsel to a defendant could violate due process in special circumstances, was predicated on the proposition that the assistance of counsel is essential to a fair trial:

> 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 lacks both the skill and knowledge adequately to prepare his defense even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. . . . If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.[18]

While *Powell* made no attempt to decide to what extent the sixth amendment might be applicable to the states, the Court in *Gideon* relied on that decision in determining that the sixth amendment right to counsel was a fundamental right fully applicable to the states through the fourteenth amendment due process clause. Although Mr. Justice Harlan, concurring in *Gideon*, disputed the notion that *Gideon* would require the application of the full scope of the federal right to the states,[19] the language of the majority opinion delineated a virtually unrestricted right to counsel:

> [R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, . . . cannot be assured of a fair trial unless counsel is appointed for him. This seems to us to be an obvious truth.[20]

While *Gideon* was never authoritatively interpreted to require the appointment of counsel in all criminal cases irrespective of the seriousness of the offense, Mr. Justice Douglas, writing for the majority in *Argersinger*, relied on the rationale of *Gideon* in extending the right to counsel to misdemeanor prosecutions. The purpose of counsel, as articulated in *Powell* and *Gideon*, and reiterated in *Argersinger*,[21] is to assure a fair trial and to preserve other important constitutional rights, like the right against self-incrimination, the right to confront witnesses, the right to object to improper evidence, and the right to a meaningful appeal.[22] Since all of these rights exist for petty as well as serious offenses, counsel is essential regardless of the offense charged.

Decisions made prior to *Gideon* involving the right to counsel in federal cases support this broad interpretation of the sixth amendment guarantee. In *Johnson v. Zerbst*,[23] the Supreme Court made no distinction between felonies and misdemeanors, or "serious" and "petty" offenses:

> The Sixth Amendment withholds from federal courts, *in all criminal proceedings*, the power and

[11] State *ex rel.* Argersinger v. Hamlin, 236 So. 2d 442, 443 (Fla. 1970).

[12] *Id.* at 444.

[13] 407 U.S. at 37.

[14] According to recent estimates, between four and five million misdemeanor cases are tried nationally per year, plus an additional 50 million traffic offenses. *Id.* at 34 & n.4. These statistics do not reflect the number of cases which will be affected by *Argersinger*, however. Of the estimated five million non-traffic misdemeanors, only some one and a quarter million involve indigents. Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685, 716 (1968).

[15] 287 U.S. 45 (1932).

[16] 372 U.S. 335 (1963).

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

[18] 287 U.S. at 68–69.

[19] 372 U.S. at 352.

[20] *Id.* at 344.

[21] 407 U.S. at 31.

[22] Other rights at stake include the right to a public trial, *In re* Oliver, 333 U.S. 257 (1948); the right to cross-examine witnesses, District of Columbia v. Clawans, 300 U.S. 617 (1937); the right against self-incrimination applied to the states to the full extent it is applied federally, Malloy v. Hogan, 378 U.S. 1 (1964); the right to be free from unreasonable searches and seizures, also applied fully to the states, Ker v. California, 374 U.S. 23 (1963) and Mapp v. Ohio, 367 U.S. 643 (1961); and the rights to a speedy trial and to be informed of the nature and cause of the accusation, none of which have been limited to "serious" offenses.

[23] 304 U.S. 458, 463 (1938) (emphasis added).

> authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel.

Johnson, however, involved an actual sentence of 4½ years so could not be said to have resolved the question of whether an indigent accused of a "petty" offense is entitled to appointed counsel in the federal courts.[24]

But, in *Evans v. Rives*,[25] a case involving a one year sentence, the Court of Appeals for the District of Columbia did consider the argument that counsel is required only where the offense is serious, and said:

> It is . . . suggested . . . that the constitutional guarantee of the right to the assistance of counsel in a criminal case does not apply except in the event of "serious offenses." No such differentiation is made in the wording of the guarantee itself, and we are cited to no authority, and know of none making this distinction.[26]

Although Mr. Justice Douglas had ample precedent to support his expansive interpretation of the right to counsel, prior to *Argersinger* a substantial number of state and federal courts arrived at a more limited view of the right to counsel, extending the right only to indigents accused of serious crimes. The distinction between serious and petty offenses for the purpose of applying the sixth amendment right to counsel comes from two main sources. The first in *Gideon* itself, which involved a felony and was interpreted in some cases as limiting the right to counsel to felony prosecutions.[27] Many state and federal courts, reluctant to strain already overtaxed judicial machinery, seized on Supreme Court language in *Mempa v. Rhay*[28] and *In re Gault*[29], which referred to the *Gideon* holding as establishing a right to counsel in felony cases, as a basis for denying counsel to accused misdemeanants.

Other courts recognizing that the right to counsel had never been expressly limited to felonies, nonetheless attempted to establish some cut-off point, based on the seriousness of the offense, for applying the right. The court in *Wooley v. Consolidated City of Jacksonville*[30] arrived at a compromise which used more than 90 days potential penalty as the point at which the right to counsel would attach. The Arizona supreme court in *State v. Anderson*[31] held that counsel must be provided for serious misdemeanors in light of *Patterson v. Warden*.[32] In *Patterson* the Supreme Court remanded a Maryland case for further consideration in light of *Gideon*, where the offense was a misdemeanor punishable by up to two years imprisonment. In *James v. Headley*[33] the court concluded that the sixth amendment required counsel in all criminal prosecutions, but suggested that there might be a class of cases in which the consequences of conviction were so slight that the appointment of counsel in those cases would be unnecessary. In each of these cases the desire to avoid the administrative problems of appointing counsel in all criminal prosecutions was the primary motivation for devising a more restrictive standard than previous right to counsel cases would warrant.

The second source of the "serious offense" test came from cases involving the sixth amendment right to trial by jury, most notably *Duncan v. Louisiana*[34] and *Baldwin v. New York*.[35] Taken to-

[24] The issue had since been resolved by the Supreme Court acting in its supervisory power over the federal courts. In 1966, Rule 44 of the Federal Rules of Criminal Procedure was amended to require the appointment of counsel in all criminal prosecutions, which includes petty offenses, tried in a federal court. However, this requirement is not of constitutional dimension.

[25] 126 F.2d 633 (D.C. Cir. 1942).

[26] *Id.* at 638. In holding that the defendant was entitled to counsel regardless of the seriousness of the offense, the court in *Evans* relied primarily on an expansive reading of *Johnson v. Zerbst*, 304 U.S. 458 (1938).

[27] *See, e.g.*, Wall v. Purdy, 321 F. Supp. 367 (S.D. Fla. 1971); Cableton v. Slate, 243 Ark. 351, 420 S.W.2d 534 (1967); Fish v. State, 159 So. 2d 866 (Fla. 1964); Rodriguez v. Rosenblatt, 58 N.J. 281, 277 A.2d 216 (1971); Hortencio v. Fillis, 25 Utah 2d 73, 475 P.2d 1011 (1970); Hendrix v. City of Seattle, 76 Wash. 2d 142, 456 P.2d 696 (1969). *See also* Junker, *supra* note 14, at 723 & n.199, for a listing of those jurisdictions which limited by statute the right to appointed counsel to felonies.

[28] 389 U.S. 128 (1967). In *Mempa*, Mr. Justice Marshall commented that "in Gideon v. Wainwright . . . this Court held . . . that there was an absolute right to appointment of counsel in felony cases." *Id.* at 134.

[29] 387 U.S. 1 (1967). Here the Court said: "He [the juvenile] would be entitled to clear advice that he could be represented by counsel and, at least if a felony were involved, the State would be required to provide counsel . . . ." *Id.* at 29. Later in the opinion the Court said: "If they [the juvenile's parents] were unable to employ counsel they were entitlted, in view of the seriousness of the charge and the potential commitment to appointed counsel unless they chose waiver." *Id.* at 42.

[30] 308 F. Supp. 1194 (M.D. Fla. 1970).

[31] 96 Ariz. 123, 392 P.2d 784 (1964).

[32] 372 U.S. 776 (1963).

[33] 410 F.2d 325 (5th Cir. 1969).

[34] 391 U.S. 145 (1968).

[35] 399 U.S. 66 (1970). While *Duncan* clearly excepted cases where the possible penalty was under six months from the jury trial requirement, *Baldwin* established that "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized." *Id.* at 69.

gether these two cases establish six months potential penalty as the cut-off line between serious and petty offenses for the purpose of applying the right to trial by jury. Since this right, like the right to counsel, is contained in the sixth amendment, the "serious offense" test promulgated by the jury trial cases has been applied to the right to counsel by analogy.[36]

The Supreme Court in *Argersinger*, however, concluded that the purposes and roots of the two rights were sufficiently distinct so as to require a different standard for each. In rejecting the "serious offense" test, Mr. Justice Douglas quoted with approval the reasoning of Judge Wisdom in *James v. Headley*:[37]

> Because a charge is petty enough to lie outside the jurytrial requirement does not mean that it is also petty enough to allow the suspension of the right to counsel. The petty offense concept has not been applied uniformly to all Sixth Amendment rights. . . .
>
> . . . .
>
> The jury, of course, is a treasured part of the American system of criminal justice but it occupies a less fundamental position than the right to counsel in a criminal case because it is not so interwoven with other rights. . . . Trials are held daily by a judge alone without derogation to the right against self-incrimination, the right to confront witnesses, . . . the right to compulsory process for obtaining witnesses. The same cannot be said of trials at which the defendant lacks an attorney's aid. And none of these rights turn upon the seriousness of the offense for which the defendant is tried.

Mr. Justice Douglas also noted that under the common law the two rights were applied differently. Trial by jury was limited to serious cases,[38] whereas the right to counsel was originally restricted to misdemeanor cases in England and later extended to felonies in the American colonies.[39]

The rule established by the Court in *Argersinger* extends the right to counsel to all criminal cases where the accused will be deprived of his liberty. It is a flat prohibition against the incarceration of an indigent where counsel was not retained:

> Under the rule we announce today, every judge will know when the trial of a misdemeanor starts, that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel.[40]

The rule does *not* require that counsel be appointed in all criminal prosecutions where there is any potential jail sentence; it merely prohibits a defendant from being imprisoned when he was denied the assistance of counsel during his trial. Thus, on appeal the crucial factor in determining whether a defendant's right to counsel was abridged will be whether the defendant was actually sentenced to jail rather than whether there was a potential jail sentence for the offense. The use of this "imprisonment in fact" [41] standard, as opposed to "potential penalty" analysis, creates a special problem for trial judges who must make the decision to appoint counsel prior to a determination of innocence or guilt, and prior to sentencing. Trial judges must either appoint counsel in all cases to avoid having to retry a defendant convicted and sentenced to jail without counsel, or forego the option of imposing jail sentence before fully considering the merits of a defendant's case or his prior record.

Although the *Argersinger* "imprisonment in fact" standard may be difficult to apply, it is logically related to the purpose of the right it is designed to protect. The "potential penalty" standard is appropriate where the existence of the right is dependent on the seriousness of the offense. "Potential penalty" measures "seriousness" because it reflects the degree to which society condemns the conduct involved in the offense. However, the sixth amendment right to counsel, according to the Court's holding in *Argersinger*, is not dependent on the seriousness of the offense, but is designed to prevent the actual deprivation of liberty where the defendant was denied due process of law—in this case, the right to counsel.

In addition, by formulating the rule in this manner, the Court has provided a limited option to those jurisdictions without the resources to appoint counsel in all cases where there is a potential jail sentence. This option to impose fines instead of imprisonment for unrepresented indigents could

[36] *See, e.g.*, United States *ex rel.* Singleton v. Woods, 440 F.2d 835 (7th Cir. 1971); State *ex rel.* Argersinger v. Hamlin, 236 So. 2d 442 (Fla. 1970); State v. McClam, 7 N.C. App. 477, 173 S.E.2d 53 (1970).

[37] 410 F.2d 325, 331–333 (5th Cir. 1969) (footnote omitted).

[38] *See* Frankfurter and Corcoran, *Petty Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917 (1926). *Cf.* Kaye, *Petty Offenders Have No Peers*, 26 U. CHI. L. REV. 245 (1959).

[39] 407 U.S. at 30.

[40] *Id.* at 40.

[41] The term "imprisonment in fact" has been used by commentators to describe the standard for applying the right to counsel now adopted by the Supreme Court in *Argersinger*. *See*, Junker, *supra*, note 14, and Kamisar and Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal Policy Observations*, 48 MINN. L. REV. 1 (1963).

take on increased significance if *Argersinger* were applied retroactively.[42] But, appointing counsel on a selective basis in cases where imprisonment is probable if the defendant is convicted requires an additional pre-trial proceeding which may prove time-consuming. In light of *Argersinger*, lower courts will be forced to develop standards for making a pre-trial determination to appoint counsel. Prior to trial, prosecutors will have to supply the judge with detailed information about the defendant's record and the offense with which he is charged so that the judge can make a reasoned decision whether imprisonment is a likely sentence.

The basis for making this decision is likely to be the most perplexing aspect of *Argersinger* for trial judges. In his opinion, Mr. Justice Douglas provided little guidance:

> We do not sit as an ombudsman to direct state courts how to manage their affairs but only to make clear the constitutional requirement. How crimes should be classified is largely a state matter. The fact that traffic offenses technically fall within the category of "criminal prosecutions" does not mean that many of them will be brought into the class where imprisonment actually occurs.[43]

The concurring opinions in *Argersinger* do not provide much additional insight into the problem. Mr. Justice Brennan suggests that law students could prove to be a fertile source of representation for misdemeanants.[44] The Chief Justice notes only that:

> The trial judge and prosecutor will have to engage in a predictive evaluation of each case to determine whether there is a significant likelihood that if the defendant is convicted, the trial judge will sentence him to a jail term.[45]

However, in making the decision to appoint counsel on this basis alone, judges may come perilously close to pre-judging the defendant, since the decision to appoint counsel will indicate that a prison sentence is contemplated. Mr. Justice Powell devotes most of his concurring opinion to a critique of the majority's standard. Justice Powell prefers a more flexible standard reminiscent of the "special circumstances" test of *Betts v. Brady*,[46] which would leave the appointment of counsel to the discretion of the trial judge "whenever the assistance of counsel is necessary to assure a fair trial." [47]

What happens if a defendant is convicted and sentenced to imprisonment after a trial in which he was not represented by counsel is a matter for speculation. Although the Solicitor General, in his brief in *Argersinger*, suggested that this problem could be handled by providing for a trial *de novo*, Mr. Justice Powell questioned the legality of such a procedure:

> [A] second trial held for no other reason than to afford the judge an opportunity to impose a harsher sentence might run afoul of the guarantee against being twice placed in jeopardy for the same offense.[48]

The controlling decision on this point is *North Carolina v. Pearce*,[49] in which the Supreme Court held that "neither the double jeopardy provision nor Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction." But the rationale for this case was that the original conviction was declared invalid at the defendant's behest, and thus the slate was wiped clean prior to a second trial. The same argument could not be made where the second trial was held at the state's instigation.

Finally, given the broad due process basis for the

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[42] *Gideon* was applied retroactively without comment in Pickelsimer v. Wainwright, 375 U.S. 2 (1963). However, in Stovall v. Denno, the Supreme Court noted:

> [T]he right to the assistance of counsel has been applied retroactively at stages of the prosecution where a denial of the right must almost invariably deny a fair trial, for example, at the trial itself . . . .

388 U.S. 293, 297 (1967). Also, where the Court is applying a flat requirement of the Constitution rather than a rule of implementation, it has frequently held that the right must have retroactive application. Dobbyn, *Prospective Limitation of Constitutional Decisions in Criminal Cases*, 30 Mo. L. REV. 301, 309 (1971). One state court has already given *Argersinger* retroactive effect, but with no comment as to whether the defendent must be retried, or could merely be resentenced and fined. People v. Morrissey, No. 44073 (Ill. S. Ct., Oct. 2, 1972).

[43] 407 U.S. at 38 (footnote omitted).

[44] *Id.* at 40.

[45] *Id.* at 42.

[46] 316 U.S. 455 (1942). In *Betts*, the Court held that:

> The due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment, although a denial by a State of rights or privileges specifically embodied in that and other of the first eight amendments may, in certain circumstances, or in connection with other elements, operate, in a given case, to deprive a litigant of due process of law in violation of the Fourteenth.

Id. at 461–462. The Supreme Court in *Gideon* explicitly overruled *Betts* and concluded that the right to counsel was of such a fundamental character that it was incorporated in the fourteenth amendment. In doing so, the Court substituted the flat requirement that counsel be appointed in all criminal prosecutions for the case by case approach utilized in *Betts*.

[47] 407 U.S. at 47.

[48] *Id.* at 54.

[49] 395 U.S. 711, 723 (1969).

Argersinger decision, the question arises whether *any* trial can be conducted in the absence of defense counsel. As Mr. Justice Powell notes in his concurring opinion:

> The Fifth and Fourteenth Amendments guarantee that property as well as life and liberty may not be taken from a person without affording him due process of law. The majority opinion suggests no constitutional basis for distinguishing between deprivations of liberty and property.[50]

Since the majority in *Argersinger* holds that counsel is a fundamental element of due process as defined by the fourteenth amendment, Mr. Justice Powell sees no constitutional basis for allowing a defendant to be deprived of his property as well as his liberty without the benefit of counsel.

Mr. Justice Powell also predicts that the application of the *Argersinger* standard may result in a denial of equal protection since an indigent accused of a misdemeanor may receive counsel in one court while an indigent accused of the same offense in another court of the same jurisdiction may not.[51] If, as the majority in *Argersinger* contends, the services of defense counsel are essential to a fair trial, the decision to appoint counsel for some defendants and not for others could be viewed as arbitrary and discriminatory.[52] In addition, the decision not to appoint counsel for a defendant under *Argersinger* has the consequence of limiting the defendant's possible punishment to a fine, whereas the defendant who receives counsel is subject to the full range of statutory sanctions provided for his offense. This results in another kind of discrimination against the defendant who has counsel.

In holding that no one convicted of a misdemeanor can be sentenced to jail without the assistance of counsel at trial, the Court in *Argersinger* has allowed trial judges to appoint counsel on a selective basis where there is a possibility of imprisonment. But the practical and legal problems which trial judges will encounter in making the determination of whether or not to appoint counsel may result in the adoption of what Mr. Justice Powell calls a "broad prophylactic rule" [53] necessitating the appointment of counsel for every defendant accused of a misdemeanor.

[50] 407 U.S. at 51.
[51] *Id.* at 54.
[52] *Id.*
[53] *Id.* at 52.

Preindictment Lineups:

Kirby v. Illinois, 406 U. S. 682 (1972)

After finding that a critical stage of the proceedings for the purposes of the sixth amendment occurs only after *de jure* criminal proceedings have commenced, the Supreme Court in *Kirby v. Illinois*[1] held that the right to counsel at lineups attaches only in post-indictment situations. In a short plurality opinion written by Justice Stewart[2] the Court affirmed petitioner's conviction and held that the Illinois rule[3] limiting *United States v. Wade*,[4] wherein the right to counsel at lineups was first established, was correct.

The petitioner and co-defendant in *Kirby* were arrested two days after a robbery. After their arrest Kirby and his co-defendant were identified by the victim in a two-man showup without the presence of counsel. Petitioner was indicted six weeks after the identification and was subsequently convicted. At the trial, the victim identified Kirby and testified to his previous showup identification at the police station.

Kirby appealed to the Illinois appellate court. His conviction was affirmed notwithstanding the absence of counsel at the showup.[5] The appellate court held that *People v. Palmer*,[6] which limited right to counsel to post-indictment lineups, controlled, thus eliminating any constitutional error.

The Supreme Court limited certiorari to the question whether *United States v. Wade* should "extend" to pre-indictment lineups. Because the right to counsel at lineups in *Wade* was based on the

[1] 406 U.S. 682 (1972).
[2] Justices Stewart, Blackmun, and Rehnquist, as well as Chief Justice Burger, constituted the plurality. Mr. Justice Powell concurred in the result.
[3] People v. Palmer, 41 Ill. 2d 571, 244 N.E.2d 173 (1969).
[4] 388 U.S. 218 (1967).
[5] People v. Kirby, 121 Ill. App. 2d 323, 257 N.E.2d 589 (1970). Kirby's co-defendant's conviction was reversed. People v. Bean, 121 Ill. App. 2d 332, 257 N.E.2d 562 (1970).
[6] 41 Ill. 2d 571, 244 N.E.2d 173 (1969). Several other states have followed the Illinois rule. *See, e.g.*, State v. Dessureault, 104 Ariz. 380, 453 P.2d 951 (1969); Perkins v. State, 228 So. 2d 382 (Fla. 1969); State v. Walters, 457 S.W.2d 817 (Mo. 1970); Wright v. State, 46 Wis. 2d 75, 175 N.W.2d 646 (1970).

Court's designation of those identification procedures as critical stages, the Court in *Kirby* addressed itself to a consideration of the criticality of pre-indictment lineups. The Court noted that the lineups in *Wade* and its companion case, *Gilbert v. California*,[7] occurred after indictment. The Court further noted that, in all but one instance, those cases where right to counsel was found to exist because of the "critical" nature of the stage of prosecution involved a post-indictment situation.[8] Consequently, the *Kirby* Court held that *Wade*, *Gilbert*, and earlier critical stage cases meant that a critical stage can occur only after indictment and therefore pre-indictment lineups could not be critical stages warranting the right to counsel.

Justice Brennan, in a dissent joined by Justices Douglas and Marshall, vigorously objected to the plurality's finding that post-arrest "routine police investigations" in the form of lineups and showups were not critical stages. The dissenters noted that the Court in *Wade* and *Gilbert* was not influenced by the fact that the identifications in those cases occurred after the indictments were returned. Rather, the dissenters argued, the primary concerns of the *Wade* Court were the possibilities of prejudice to an accused caused by lineups. The dissenters emphasized the *Wade* Court's finding that lineups without counsel could result in unreliable identifications which would adversely and unfairly affect the effectiveness of counsel at trial and the defendant's right to cross-examine witnesses. The dissenters noted that these possibilities of prejudice are not eliminated by holding a lineup before an indictment. They felt that an identification proceeding occurring after an arrest was a critical stage within the plurality's understanding of that term. They found that police practices and procedures subsequent to an arrest were in effect prosecutorial and accusatorial activities rather than investigatorial, and therefore were critical stages requiring attachment of the right to counsel.

Although preceding Supreme Court cases which recognized the right to counsel on the basis of a critical stage analysis concerned post-indictment situations,[9] none of them found the pre-/post-indictment distinction relevant or controlling. The Court in *Escobedo v. Illinois*[10] found the principal criterion for determining whether a situation was a critical stage to be police activity which was accusatory rather than investigatory. *Kirby* is the first case holding that the critical stage determination is contingent primarily upon an artificial point in time—that the event deemed to require the presence of counsel occur only after indictment. Police identification procedures in the form of lineups and showups present an inappropriate basis for making such an arbitrary determination for when the right to counsel should attach.

The Court decided *United States v. Wade* in response to objections to the suggestive conduct of police-orchestrated pretrial identification proceedings and the resulting possibility of prejudicial effects on a defendant's right to a fair trial.[11] The prejudice noted by the Court was to the sixth amendment rights to confrontation and to an effective defense.[12] Not only the possibility of convictions based on unrelieble evidence obtained in pretrial identifications, but also the inability of defendants to expose and impeach this evidence led to the Court's holding that the right to counsel must attach at such proceedings.

The lineups and showups[13] discussed in *Wade* were found to result in identifications of speculative certainty and reliability. The very nature of the pretrial confrontations created this situation.[14] Moreover, by virtue of the secrecy of the lineups and the variety of suggestive techniques potentially inherent in them, a defendant was incapable of attacking the credibility and certainty of a witness' identification.[15] The Court found that the inability to acquire knowledge about these identifications necessarily frustrated any meaningful

[7] 388 U.S. 263 (1967).

[8] Coleman v. Alabama, 399 U.S. 1 (1970); Massiah v. United States, 377 U.S. 201 (1964); White v. Maryland, 373 U.S. 59 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961). The one exception was Escobedo v. Illinois, 378 U.S. 478 (1964).

[9] *See* note 8 *supra*.

[10] 378 U.S. 478 (1964).

[11] The defendants in United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967), did not specifically demonstrate prejudice by the absence of counsel at their respective lineups. In fact, the Court remanded both cases to determine whether counsel's absence was prejudicial to these petitioners. The Court did however examine the suggestiveness of the lineups in these cases. *See* 388 U.S. at 233–34. The Court's discussion of the possibilities of prejudice resulting from suggestive identification proceedings was founded primarily on treatises and commentaries. *See id.* at 228–34.

[12] *Id.* at 235.

[13] Hereinafter, unless otherwise expressly stated, the term "lineup" shall refer to all pretrial identification proceedings except those using photographs and voice identification. Lineups are procedures in which the witness is confronted with several individuals at once and asked to identify one of them. Showups, on the other hand, are procedures in which an accused or suspect is brought before the witness alone and the witness is asked to identify him.

[14] United States v. Wade, 388 U.S. 218, 235 (1967).

[15] *Id.* at 230–32.

cross-examination of eyewitnesses. There was no way a defendant could effectively attempt to impeach the credibility of pretrial identifications or the certainty of in-court identifications. The Court therefore found that pretrial identification proceedings withheld from defendants the constitutional right to confront witnesses against them.[16]

Suggestion, either intentional or unintentional, was found to be the primary cause of unreliable identifications. The Court catalogued many cases and offered several reasons why lineups caused both unreliable identifications at the proceedings themselves and contributed to in-court identifications of questionable reliability.[17] As with the problem of cross-examination, it was found that the accused could do nothing to remedy the inherent prejudice in the pretrial confrontation.[18]

Because they could possibly result in prejudicial evidence and the loss of the constitutional right to confront witnesses, pretrial identifications were held to be critical stages of the proceedings. The determination by the Court of the critical nature of lineups triggered the attachment of the right to counsel.[19] In *Wade*, it was said that the presence of counsel at pretrial lineups would eliminate the prejudice to a defendant caused by unreliable identifications and ineffectual cross-examination. Citing previous sixth amendment cases which established the right to counsel in certain situations on the basis of their being critical stages,[20] the Court in *Wade* found that a determination of a lineup's criticality was necessary.[21] The Court found that lineups themselves are critical stages and made no distinction between the pre- and post-indictment criterion established in *Kirby*.[22]

[16] *Id.* at 235.
[17] *Id.* at 232–34.
[18] *Id.* at 235–36.
[19] *Id.* at 236–37.
[20] Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 201 (1964); Hamilton v. Alabama, 368 U.S. 52 (1961); Powell v. Alabama, 287 U.S. 45 (1932).
[21] This test for the application of the right to counsel was synthesized in *Wade* as requiring the court "... to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." United States v. Wade, 388 U.S. 218, 227 (1967). Finding that defendants are prejudiced at identification confrontations in two significant ways and that counsel could avert this prejudice, the Court held that these proceedings by definition necessarily must be critical stages requiring counsel.
[22] The Court in *Wade* did not make a distinction between the suggestiveness of pre- and post-indictment lineups; nor did it at any time even imply that an accused in a pre-indictment lineup would be any less prejudiced than a post-indictment lineup participant. In discussing the possibilities of prejudice and suggestion, the *Wade* Court spoke of lineups in an all-inclusive manner making no reference to the significance or insignificance of the timing of the lineup. Mr. Justice White, joined in dissent by Justices Harlan and Stewart, explicitly noted that the only correct application of *Wade* would be to all lineups. *Id.* at 251 (White, J., dissenting). Although White vigorously dissented in *Wade*, he also dissented in *Kirby*. 406 U.S. 705 (1972).

The sixth amendment commands that an accused shall have the assistance of counsel for his defense.[23] The courts have used the critical stage analysis to determine when a particular fact situation requires the right to counsel in order to fulfill this constitutional command.[24]

Situations which impair the effectiveness of counsel are critical stages by virtue of *Powell v. Alabama*.[25] *Powell* held that where one has a right to counsel, that right must attach at the point where it will have substance and make the defense effective. That point is the critical stage of the proceedings.[26]

Knowledge about the witnesses and evidence of the prosecution have been held important to the

[23] "In all criminal prosecutions, the accused shall enjoy the right ... to the assistance of Counsel for his defense." U.S. CONST. amend. VI.
[24] *See* Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 201 (1964). Critical stage is not the only method of determining whether the right to counsel should attach. Miranda v. Arizona, 384 U.S. 436 (1966), never used this phrase. Rather, it found the right to counsel necessary as a "protective device" for the fifth amendment privilege against self-incrimination. Some courts recognize the right to counsel through an extension of Gideon v. Wainwright, 372 U.S. 335 (1963), by finding prosecutorial activity tantamount to the initiation of the criminal prosecution. State v. Lucero, 445 P.2d 731 (Mont. 1968). Furthermore, the right to counsel can be sustained on grounds other than the sixth amendment. Powell v. Alabama, 287 U.S. 45 (1932), employed the due process clause of the fourteenth amendment, and Douglas v. California, 372 U.S. 353 (1963), wherein the right to counsel was granted for appeals, used the equal protection clause of the fourteenth amendment.
[25] 287 U.S. 45 (1932). The defendants in *Powell* were charged with a capital offense, which, under ALA. CODE §5567 (1923) (now ALA. CODE tit. 15 §318 (Supp. 1971)), entitled them to appointment of counsel. An attorney was not selected until the day of the trial. The result of this tardy appointment, the Court held, was that the right to counsel the defendants had under the statute was virtually without substance.
[26] Although *Powell* was specifically concerned with a fact situation where trial counsel was appointed too late to be of much assistance in defending his clients, the rationale of that case—that the sixth amendment requires that the state not act so as to inhibit or restrain the effectiveness of counsel—has been employed in many of the Supreme Court's succeeding right to counsel cases. *See* Coleman v. Alabama, 399 U.S. 1, 7 (1970); United States v. Wade, 388 U.S. 218, 225 (1967); Escobedo v. Illinois, 378 U.S. 478, 486 (1965); Hamilton v. Alabama, 368 U.S. 52, 54 (1961).

effectiveness of defense counsel.[27] Just as the effectiveness of counsel was held in *Powell* to depend on the time he is allowed to prepare his defense, so also the effectiveness of counsel can depend on his knowledge of unreliable evidence admitted against a defendant and his ability to question it. Because lineups by their suggestiveness can result in mistaken and unreliable identifications which could be admitted as evidence in trial, they *a fortiori* affect counsel's effectiveness. Counsel's in-court actions are affected by what occurs at the lineup. Thus, to the extent that lineups could adversely affect the effectiveness of counsel, they would be critical stages.

The rationale of preceding Supreme Court cases in recognizing the right to counsel at critical stages is that these circumstances are fraught with inherent possibilities of prejudice to a defendant's effective assistance of counsel.[28] The Court in *Kirby* did not deny that lineups occurring before an indictment would or could prejudice a defendant's right to effective assistance of counsel. By retaining the *Wade* rights in post-indictment lineups, it implicitly recognized that lineups do or can contribute to prejudice. The Court did not deny that a lineup participant would be prejudiced by pre-indictment lineups. It simply held that the right to counsel to remedy such prejudice attaches only to post-indictment identifications.

This holding is in no way consistent with prior case law. In other critical stage cases, the Court addressed itself to the petitioner's need for an attorney and granted the right to counsel to the fullest extent necessary to eliminate the prejudice to an accused created by counsel's absence. In those cases where critical stages were found in post-indictment situations, the scope of the right to counsel covered all possibilities of injury and prejudice created by the fact situations before the Court.[29] In *Kirby*, the Court did not purport to protect an accused from all possibilities of prejudice caused by lineups, but only from those lineups occurring after an indictment. To this extent, the Supreme Court has made a radical break from prior case law. By not focusing on the inherent and unfair possibilities of prejudice and injury to which a defendant's right to the effective assistance of counsel would be subject, the Court has discarded the heretofore recognized basis of critical stage—the time an accused needs a lawyer most—for the more arbitrary consideration of whether the time a defendant needs a lawyer is before or after the *de jure* proceedings have commenced.

The more logical avenue open to the Court in *Kirby* would have been to hold that lineups themselves are not critical stages.[30] Such an approach would not have broken the long line of critical stage cases.

A necessary element in determining whether a fact situation is a critical stage is whether a lawyer would be of assistance in those circumstances claimed to be a critical stage. If the prejudice to a defendant's right to effective assistance of counsel can be remedied without counsel at the point claimed to require his presence, such as a lineup, then the necessity of having an attorney there is obviated. That point is not a critical stage so the right to counsel does not attach.[31]

A corollary to the above criterion of critical stage is that if counsel is necessary in a particular situation, then he must be able to do something which will avoid or guard against prejudice to an effective defense. This is clear in most other critical stages cases.[32] *Wade* imposed no duties upon counsel nor did it offer any clues as to what he is to do at

[27] In Coleman v. Alabama, 399 U.S. 1 (1970), the Court held that preliminary hearings require counsel's presence because of the opportunities for discovery which are important for counsel's effectiveness. The court in Bastida v. Braniff, 444 F.2d 396 (5th Cir. 1971), held that effective assistance of counsel was denied where the defendant's substituted counsel was not given a transcript of a suppression hearing until ten minutes before trial, thus limiting discovery.

[28] Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 201 (1964); Hamilton v. Alabama, 368 U.S. 52 (1961); Powell v. Alabama, 287 U.S. 45 (1932).

[29] *See* Massiah v. United States, 377 U.S. 201 (1964); Hamilton v. Alabama, 368 U.S. 52 (1961); Powell v. Alabama, 287 U.S. 45 (1932). *See also* Coleman v. Alabama, 399 U.S. 1 (1970); Mempa v. Rhay, 389 U.S. 128 (1967); Moore v. Michigan, 355 U.S. 155 (1957); Reece v. Georgia, 350 U.S. 85 (1955).

[30] The constitutionality and reasoning of *Wade* was briefed and argued before the Court. *See* Brief for Respondent at 23, Kirby v. Illinois, 406 U.S. 682 (1972).

[31] *See* People v. Killebrew, 16 Mich. App. 624, 168 N.W.2d 423 (1969); State v. Williams, 97 N.J. Super. 573, 235 A.2d 684 (1967).

[32] *See, e.g.*, Coleman v. Alabama, 399 U.S. 1 (1970): (In preliminary hearings, counsel could prevent the case from going to the grand jury; he could preserve testimony for later impeachment; he could make discovery for the trial; and he could prepare for the medical and mental examinations which could excuse criminal liability.); Mempa v. Rhay, 389 U.S. 128 (1967) (Counsel could change the plea, make notice of appeal, and present expertise for sentence mitigation); Escobedo v. Illinois, 378 U.S. 478 (1964) (counsel could protect against self-incrimination); Hamilton v. Alabama, 368 U.S. 52 (1961) (counsel could make insanity pleas and move to quash the indictment).

lineups. It simply stated a conclusion that he will be able to avert prejudice.[33]

This absence of affirmative duties for the lawyer creates speculation as to his responsibilities.[34] Unlike an attorney in a *Miranda* situation, where the accused is asked to respond to a question, the lawyer in *Wade* cannot prevent the defendant from taking part in the lineup.[35] While the Court in *Wade* wanted to insure that pretrial identifications were conducted fairly, it provided the attorney with no means to achieve this goal.[36] A lawyer is not empowered by *Wade* or any other Supreme Court decision to dictate the forms of lineup procedures for his client or to prevent suggestive practices.[37] In relation to gathering information to impeach identification testimony because it was acquired by a lineup, at least one commentator has noted that attorneys rarely seek impeachment information themselves.[38] Secondly, it is doubtful if an attorney could himself become a witness to impeach identification testimony. The ABA Code of Professional Responsibility acts to prohibit such practices.[39] In sum, since a lawyer cannot necessarily do anything to insure against prejudice at the lineup itself, other than to observe the proceedings, it is doubtful if such identification proceedings can be deemed a critical stage.

Alternatives to an attorney's presence at lineups support the view that a lineup does not qualify as a critical stage. Like *Wade*, the goal of *Stovall v. Denno*[40] is to guard against unreliable identification testimony. It achieves this through pretrial hearings which present a means of discovering evidence with which to attack the credibility of these identifications in trial. It also prohibits the admission of identification testimony obtained through lineups so unduly prejudicial and suggestive that they constitute a denial of due process. *Stovall* presents a true alternative to *Wade*. It is addressed to the same substantive right—the effective assistance of counsel.

The significant difference in the *Wade* and *Stovall* approaches is that in the former there is a presumption of suggestion in lineups, while in the latter the suggestiveness and consequent prejudice must be proven. Under *Gilbert v. California*,[41] pretrial identification testimony is per se excluded when obtained in the absence of counsel. Under *Stovall*, there is no exclusion of the pretrial identification unless the defendant can show that in the totality of the circumstances the pretrial proceeding was unnecessarily suggestive and the identification unreliable by virtue of its suggestive origins.

As in *Wade*, hearings are required in *Stovall* to determine the legality and admissibility of eyewitness identifications. The courts have been inconsistent in their application of the *Stovall* test.[42] Some have been strict in applying the criterion of unnecessary suggestion;[43] others consider the totality of the circumstances in determining whether the

[33] [I]t appears that there is grave potential for prejudice . . . in the pretrial lineup, which may not be capable of reconstruction at trial, and . . . [the] presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial . . . . United States v. Wade, 388 U.S. 218, 236 (1967). Justices Black, Fortas, and Douglas and Chief Justice Warren believed that petitioner's privilege against self-incrimination was at stake in the lineup. Arguably, their concurrence on the critical stage issue is rooted at least partially on this fact.

[34] For some suggestions on the lawyer's function at lineups *see* Quinn, *In the Wake of Wade: The Dimensions of the Eyewitness Identification Cases*, 42 U. COLO. L. REV. 135 (1970); LaFave, *"Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond*, 67 MICH. L. REV. 39, 122 (1969); Comment, *The Right to Counsel During Pretrial Identification Proceedings—An Examination*, 47 NEB. L. REV. 740 (1968).

[35] Participation in a lineup is not a violation of the privilege against self-incrimination. United States v. Wade, 388 U.S. 218 (1967); Schmerber v. California, 384 U.S. 757 (1966).

[36] *See* Read, *Lawyers at Lineups: Constitutional Necessity or Avoidable Extravagance?*, 17 U.C.L.A. L. REV. 339, 373 (1969), for assertion by Washington, D.C., Legal Aid Bureau that lawyers can do nothing to prevent unfairness at a lineup. Read's conclusion is that a lawyer has no function other than observer.

[37] *See* Comment, *Right to Counsel at Police Identification Proceedings: A Problem in Effective Implementation of an Expanding Constitution*, 29 U. PITT. L. REV. 65 (1967), and Comment, *Lawyers and Lineups*, 77 YALE L. J. 390 (1967), both of which note that lawyers can take little if any affirmative action at lineups.

[38] Comment, *Confrontation, Cross Examination, and the Right to Prepare a Defense*, 56 GEO. L. J. 939 (1968), where it is noted that such information is generally acquired by employees of an attorney or neutral observers.

[39] AMERICAN BAR ASSOCIATION, CODE OF PROFESSIONAL RESPONSIBILITY DR 5-102 requires that lawyers who become witnesses for their clients must disqualify themselves henceforth as their attorneys.

[40] 388 U.S. 293 (1967).

[41] *Id.* at 263.

[42] *See* Comment, *No Panacea: Constitutional Supervision of Eyewitness Identification*, 62 J. CRIM. L.C. & P.S. 363 (1971), and Note, *Pretrial Identification Procedures—Wade to Gilbert to Stovall: Lower Courts Bobble the Ball*, 55 MINN. L. REV. 779 (1971), for discussions of lower court applications of the *Wade* and *Stovall* rules.

[43] These courts have set rules whereby certain conduct by the police and approaches taken in the lineups themselves are per se unnecessarily suggestive and, therefore, identifications obtained therefrom are inadmissible. *See, e.g.*, Foster v. California, 394 U.S. 440 (1969); Wright v. United States, 404 F.2d 1256 (D.C. Cir. 1968); United States v. Clark, 294 F. Supp. 44 (D.D.C. 1968).

pretrial proceeding results in irreparable mistaken identification.[44]

Although the *Stovall* and *Gilbert* approaches in the exclusion of pretrial identification testimony are different, the inquiry on the admission of the in-court testimony is very similar. Many courts have explicitly required the use of the same standards employed in *Wade* on the proof of independent origins of identification when holding *Stovall* hearings.[45] Furthermore, the time of the hearings in relation to the trial[46] and the rules on the exclusion of the pretrial and in-court identifications in *Stovall* are frequently identical to those in *Wade*.[47]

There are procedures other than the *Wade* approach whereby the defense can learn of the underlying circumstances of a pretrial identification. First, the *Stovall* hearings themselves are a discovery device whereby information can be acquired for later use in trial. Second, under *Simmons v. United States*,[48] decided after *Wade*, defendants will be able to take the stand in hearings on motions to suppress evidence and testify to the suggestiveness of lineups and the possible unreliability of identifications without fear of admission at trial of any incriminating statements they might make.[49] Finally, in addition to the *Stovall* hearing itself and the defendant's unfettered opportunity to testify on the reliability of evidence, traditional discovery is available. *Brady v. Maryland*[50] allows a defendant to discover favorable evidence in the hands of the prosecution. Doubtful, suspect, and unreliable pretrial identifications and lineup proceedings which relate to the credibility of trial testimony should qualify as information favorable to an accused and come within the ambit of *Brady*. At least one court has held that such evidence at the disposal of the prosecution must be disclosed to the defense.[51]

The *Stovall* approach, coupled with free testimonial privileges and discovery to the defense, speaks to the same prejudice as *Wade*. Therefore, *Wade's* emphasis on insuring the effectiveness of counsel can be achieved by other means. Since counsel is not absolutely necessary at a lineup to insure his subsequent effectiveness, then a lineup cannot be a critical stage of the proceedings requiring the right to counsel.

In limiting the right to counsel to post-indictment situations, the *Kirby* Court not only has made a radical departure from prior law, but has effectively overruled *Escobedo v. Illinois*[52] and placed the applicability of other right to counsel cases in serious doubt. In declaring that a critical stage can occur only after indictment, *Kirby* is inconsistent with the *Escobedo* holding which states that a critical stage occurs when police activity becomes accusatory rather than investigatory. The critical stage in *Escobedo* was pre-indictment, demonstrating that police accusatory activity can occur before formal indictment. Some courts have held that police photo identification proceedings are critical stages requiring the right to counsel without considering whether these procedures are pre- or post-indictment.[53] The application of the right to counsel in these cases would certainly be limited by *Kirby*. Although the Court in *Kirby* stated that its inquiry was limited to determining whether *Wade* should "extend" to pre-indictment situations, it set a precedent of much more far reaching effect.

[44] When considering the totality of the circumstances, the courts look to the witness' independent pre-lineup basis of identification. If they find these bases are so strong as not to be influenced by the suggestiveness of the later identification proceeding, then, under the totality of the circumstances, that proceeding was not so suggestive as to result in mistaken identification. The rationale of these cases is that the witness would have identified the defendant at the lineup regardless of suggestion. *See, e.g.*, Coleman v. Alabama, 399 U.S. 1 (1970); United States *ex rel.* Rutherford v. Deegan, 406 F.2d 217 (2d Cir. 1969).

[45] Clemons v. United States, 408 F.2d 1230 (D.C. Cir. 1968). *See also* cases cited *supra* note 43.

[46] *See* United States *ex rel.* Ragazzini v. Brierley, 321 F. Supp. 440 (W.D. Pa. 1970); People v. Burwell, 26 N.Y.2d 331, 258 N.E.2d 714 (1970).

[47] *See, e.g.*, Clemons v. United States, 408 F.2d 1230 (D.C. Cir. 1968); Wright v. United States, 404 F.2d 1256 (D.C. Cir. 1968) (*Wade* and *Gilbert* exclusionary rules explicitly adopted).

[48] 390 U.S. 377 (1968).

[49] This case eliminates one problem of finding alternatives to *Wade* which one commentator had previously found unavailable. *See* Quinn, *supra* note 34.

[50] 373 U.S. 83 (1962).

[51] *See* People v. Ahmed, 20 N.Y.2d 958, 233 N.E.2d 854 (1967).

[52] 378 U.S. 478 (1964).

[53] *See* United States v. Zeiler, 427 F.2d 1305 (4th Cir. 1970); Thompson v. State, 451 P.2d 704 (Nev. 1969).