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The Right to Counsel: Attachment Before Criminal Judicial Proceedings?

Karen Akst Schecter
THE RIGHT TO COUNSEL: ATTACHMENT BEFORE CRIMINAL JUDICIAL PROCEEDINGS?

INTRODUCTION

The period from 1932 to 1967 witnessed an unprecedented expansion of the scope of the constitutional right to counsel in the pretrial stages of criminal prosecutions. This extension of the right to counsel followed two routes.

1. The question of when an accused is entitled to the assistance of counsel permeates both judicial and nonjudicial pretrial events. In reference to the latter, the issue is whether, and when, an individual who is the subject of a police investigation is entitled to have counsel present at such common police procedures as interrogations and corporeal identifications. The realm of judicial pretrial events is broader, encompassing arraignment, preliminary hearing, and other similar hearings involving one who has already been arrested, as well as grand jury proceedings. The issue of a putative defendant's right to counsel at a grand jury investigation, however, is beyond the scope of this Comment.

There are several reasons why counsel is not needed in the grand jury room. First, grand jury proceedings frequently occur after the preliminary hearing, a stage which requires the assistance of counsel. Coleman v. Alabama, 399 U.S. 1 (1970). Generally, therefore, an accused is already represented at the time of his grand jury appearance and no question is raised as to whether counsel need be retained or appointed before the accused testifies. Second, the accused does not stand alone in the grand jury room against the full organized force of the prosecutor or police; rather, the constitutional guarantee of a grand jury indictment, U.S. Const. amend. V, provides a buffer against oppressive government action. United States v. Mandujano, 425 U.S. 564, 571, 589-90 (1976) (Brennan, J., concurring). Third, counsel is allowed to be outside the grand jury room and the putative defendant is permitted to consult with his attorney as often as he wishes during questioning. See, e.g., United States v. George, 444 F.2d 310, 315 (6th Cir. 1971); United States v. Capaldo, 402 F.2d 821, 824 (2d Cir. 1968), cert. denied, 394 U.S. 989 (1969); United States v. Isaacs, 347 F. Supp. 743, 759 (N.D. Ill. 1972). Hence, the issue with regard to grand juries is not when the right to counsel attaches, but whether counsel has the right to be in the grand jury room. It could be argued that counsel is needed in the grand jury room in order to guarantee the effective assistance of counsel at the trial itself. Cf. Coleman v. Alabama, 399 U.S. 1, 9 (1970) (preliminary hearing); Powell v. Alabama, 287 U.S. 45, 58-59 (1932) (sufficient period before trial for investigation). However, given the fact that use of prior grand jury testimony at the trial itself is limited to impeachment purposes, and that the testimony of another witness cannot be used substantively unless the putative defendant had the opportunity to cross-examine him fully, Fed. R. Evid. 804(b)(1), it seems that the absence of counsel in the grand jury room would not affect the fairness of the trial.

Whether counsel is outside or inside the grand jury room also does not derogate from counsel's function under Miranda v. Arizona, 384 U.S. 436 (1966), as guardian of the putative defendant's fifth amendment privilege against self-incrimination. The witness is free to consult with his attorney initially to determine whether an answer might incriminate him. If he raises the claim of privilege, he has a right to counsel at a hearing on the issue. See United States v. Mandujano, 425 U.S. at 606 (Brennan, J., concurring). Alternatively, the witness may be granted immunity, in which case the privilege against self-incrimination is no longer involved. Id. at 574-75; see Counselman v. Hitchcock, 142 U.S. 547, 562 (1892). For a discussion of the effect of the fifth amendment privilege against self-incrimination and the sixth amendment right to counsel on the putative defendant called before the grand jury, see United States v. Mandujano, 425 U.S. at 584-609 (Brennan, J., concurring).

2. The line of Supreme Court cases extending the right to counsel in pretrial stages commenced with Powell v. Alabama, 287 U.S. 45 (1932), and ended with United States v. Wade, 388 U.S. 218 (1967).
First, in *Miranda v. Arizona*, the Supreme Court held that the assistance of counsel at pretrial custodial interrogations was mandated under the *fifth* amendment as a means of protecting the defendant's privilege against self-incrimination. This right to counsel attaches as soon as "a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Second, the explicit *sixth* amendment right to counsel attaches at the critical stage of a criminal prosecution, which, as broadly defined by the Court in *United States v. Wade*, means at any stage at which "potential substantial prejudice to defendant's rights inheres."

The sixth amendment pretrial right to counsel, however, was severely limited in 1972 when the Supreme Court, in *Kirby v. Illinois*, narrowed its


4. 384 U.S. at 444.

5. *Id.* (footnote omitted). The Court stated, however, that the defendant could make a knowing and intelligent waiver of his right. *Id.*

6. The sixth amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him... and to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The constitutional guarantee of counsel was intended to overrule English common law. Originally, the right to counsel in England was limited to misdemeanors and only one felony, treason. Even in those instances when the accused was entitled to counsel, the attorney was permitted to advise only on "matters of law," not on "matters of fact." *See* W. Beaney, *The Right to Counsel in American Courts* 8-14 (1955).

A defendant may challenge an alleged violation of his sixth amendment right to counsel in a number of ways. He may move for a new trial within seven days of the finding of guilt. Fed. R. Crim. P. 33. Second, he may make a motion in arrest of judgment, asserting that the trial court lost jurisdiction by denying the defendant a basic constitutional right. Fed. R. Crim. P. 34. If the time for appeal has lapsed, the defendant may ask for a writ of coram nobis. This writ asks the trial judge to correct judgment because of the discovery of material facts not known earlier. *United States v. Steese*, 144 F.2d 439, 442-47 (1944) (Biggs, J., concurring in part and dissenting in part). This is generally of little help, since the judge is aware of the facts surrounding the absence of counsel. Fourth, the defendant may move to correct or set aside the sentence "upon the ground that the sentence was imposed in violation of the Constitution." 28 U.S.C. § 2255 (1976). This motion is a combination of traditional habeas corpus and coram nobis relief, addressed to the trial court at any time after conviction. To limit its abuse, it must precede a habeas corpus proceeding, the petitioner need not be at the hearing, and the motion need only be heard once. *Id.* Of course, the defendant may file a direct appeal, but if that fails, the most common means of collateral attack is the writ of habeas corpus, in which the defendant shows how and why he is retained illegally. *Id.* §§ 2241-2242. The scope of review is limited to the trial court's alleged lack of jurisdiction because of an unconstitutional or otherwise unlawful act. *See* *Johnson v. Zerbst*, 304 U.S. 458, 466-68 (1938).


8. *Id.* at 227.

9. 406 U.S. 682 (1972). The *Kirby* decision was a plurality opinion, with four Justices dissenting and Justice Powell writing a separate concurring opinion.
broad definition of critical stage to those periods triggered by "the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." As a result of this decision, a defendant is entitled to counsel before the start of judicial proceedings in only one situation—custodial interrogation. To justify this result, the Kirby Court reasoned that in those pretrial stages to which a constitutional right to counsel does not attach, the defendant is given adequate protection by the due process provisions of the fifth and fourteenth amendments.

This Comment will submit that the accused needs the protection accorded by the sixth amendment right to counsel in pre-judicial stages. Part I of this Comment will trace the development of the "critical stage" standard of the sixth amendment. As Part II will demonstrate, the due process safeguards relied on by the Kirby Court have not adequately protected the defendant's rights. Part III will contend that since counsel protects substantially similar interests under the fifth and sixth amendments, the sixth amendment right to counsel should attach as early as the right to counsel does under the fifth amendment.

I. THE SIXTH AMENDMENT'S APPLICABILITY AND "CRITICAL STAGE" STANDARD

A. Pre-Kirby Attachment

The importance of the sixth amendment right to counsel is reflected in the breadth of its scope. It applies to defendants in all federal prosecutions

10. Id. at 689.
11. Formal charge is not the same as arrest. A suspect can be arrested if there is probable cause, U.S. Const. amend. IV; Draper v. United States, 358 U.S. 307, 310-11 (1959), but he will generally not be formally charged by means of indictment or information in the absence of a stronger showing. Cf. Brinegar v. United States, 338 U.S. 160, 172-73 (1949) (proof required to prove guilt greater than that required to show probable cause).
12. 406 U.S. at 690-91. For a discussion of the due process protections envisioned by the Court, see notes 75-82 infra and accompanying text.
13. The right to the assistance of counsel, which has been characterized as the "most pervasive" of a defendant's rights, Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 8 (1956); see Douglas, The Right to Counsel—A Forward, 45 Minn. L. Rev. 693, 693 (1961), has traditionally been accorded legislative and constitutional protection. Congress guaranteed a statutory right to counsel in the first federal criminal code, Act of April 30, 1790, ch. 9, § 29, 1 Stat. 112 (current version at 18 U.S.C. § 3005 (1976)). Less than one year later, the right was given constitutional stature when the sixth amendment, which had been adopted by Congress without debate in 1789, was ratified by the states. D. Fellman, The Defendant's Rights Today 210 (1976). Moreover, 49 states have recognized the importance of the right by adopting a constitutional provision guaranteeing defendants legal representation in criminal prosecutions. Of these, seven states adopt the wording of the federal constitution. Alaska Const. art. 1, § 11; Iowa Const. art. 1, § 10; Mich. Const. art. 1, § 20; Minn. Const. art. 1, § 6; N.J. Const. art. 1, § 10; R.I. Const. art. 1, § 10; W. Va. Const. art. 3, § 14. The constitutions of 19 states declare that an accused has the right to be heard by himself, by counsel, or by both. Ala. Const. art. 1, § 6; Ark. Const. art. 2, § 10; Conn. Const. art. 1, § 8; Del. Const. art. 1, § 7; Fla. Const. art. 1, § 16; Ind. Const. art. 1, § 13; Ky. Const. § 11; Me. Const. art. 1, § 6; Mass. Const. § 13; Miss. Const. art. 3, § 26; N.H. Const. pt. 1, art. 15; Okla. Const. art. 2, § 20; Or. Const. art. 1, § 11; Pa. Const. art. 1, § 9; S.C. Const. art. 1, § 14; Tenn. Const. art. 1, § 9; Tex. Const. art. 1, § 10; Vt. Const.
and, by means of the fourteenth amendment, to defendants in all state prosecutions. The exercise of this right does not depend on the nature or severity of the offense; no criminal defendant may be imprisoned for any offense—capital or noncapital, felony, misdemeanor or petty—unless he has been represented by counsel. Likewise, a defendant’s ability to afford an

ch. 1, art. 10; Wis. Const. art. 1, § 7. Eighteen states provide the accused with the right to appear and defend himself in person, by counsel, or by both. Ariz. Const. art. 2, § 24; Cal. Const. art. 1, § 15; Colo. Const. art. 2, § 16; Idaho Const. art. 1, § 13; Ill. Const. art. 1, § 8; Kan. Const. Bill of Rts., § 10; Mo. Const. art. 1, § 18(a); Mont. Const. art. 2, § 24; Neb. Const. art. 1, § 11; Nev. Const. art. 1, § 8; N.M. Const. art. 2, § 14; N.Y. Const. art. 1, § 6; N.D. Const. art. 1, § 13; Ohio Const. art. 1, § 10; S.D. Const. art. 6, § 7; Utah Const. art. 1, § 12; Wash. Const. art. 1, § 22; Wyo. Const. art. 1, § 10. The provisions of five states are uniquely worded. Ga. Const. art. 1, § 2-111 (a defendant is to have the privilege and benefit of counsel); Hawaii Const. art. 1, § 11 (right to the assistance of counsel and, if the accused is indigent, the appointment of counsel); La. Const. art. 1, § 13 (same); Md. Const. Decl. of Rts., art. 21 (an accused is to be allowed counsel); N.C. Const. art. 1, § 23 (the accused has the right to counsel). Virginia, the one state without a constitutional provision, protects the right to counsel by statute, Va. Code §§ 19.2-157 to -163 (1975 & Supp. 1978), and by judicial interpretation. See Whitley v. Cunningham, 205 Va. 251, 252, 135 S.E.2d 823, 825 (1964); Barnes v. Commonwealth, 92 Va. 794, 803, 23 S.E. 784, 787 (1895).

14. Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938), declared that the sixth amendment encompassed the right to appointed counsel for indigent defendants in federal felony prosecutions, capital and non-capital, as well as the unqualified right to retained counsel. An indigent defendant’s right to appointed counsel in federal courts is also guaranteed by statute. Fed. R. Crim. P. 44.

15. Gideon v. Wainwright, 372 U.S. 335, 339 (1963). Gideon overruled the “special circumstances” test of Betts v. Brady, 316 U.S. 455 (1942), a pure due process analysis which required the Supreme Court to determine whether, under the totality of the circumstances, the absence of counsel resulted in a trial which was fundamentally unfair. Betts comported with the belief held by most states that the presence or absence of counsel was a matter of state criminal procedure and did not rise to the level of a constitutionally protected right. Even though all but one state had a constitutional provision regarding the right to counsel, see note 13 supra, less than half of these states required counsel to be appointed in all cases when the defendant was indigent. In some of these, the appointment was at the discretion of the trial judge. The rest appointed counsel only on request, or only for capital crimes and felonies. See W. Beaney, supra note 6, at 238 app. II. In the years between Betts and Gideon, the Court almost always found “special circumstances” and a consequent denial of the right to counsel and due process. E.g., Carney v. Cochran, 369 U.S. 506 (1962); Chewning v. Cunningham, 368 U.S. 443 (1962); Hudson v. North Carolina, 363 U.S. 697 (1960). See generally Gideon v. Wainwright, 372 U.S. at 349 (Harlan, J., concurring).

16. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972). The accused may make a “knowing and intelligent waiver” of this right, id. at 37, but this waiver is not presumed. An affirmative act of the accused accompanied by a demonstrated understanding of the disadvantages of defending without counsel would constitute such a waiver. Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938); see Brewer v. Williams, 430 U.S. 387, 404 (1977). Argersinger also raises a number of issues beyond the scope of this Comment, such as the possibility that counsel is essential when a deprivation of property, rather than a deprivation of liberty, is the criminal penalty. See generally Center for Criminal Justice, Boston University Law School, The Right to Counsel in Criminal Cases: The Mandate of Argersinger v. Hamlin S-11 (National Institute of Law Enforcement and Criminal Justice 1976) [hereinafter cited as Mandate]. The Supreme Court, however, recently limited the Argersinger right to counsel to situations actually resulting in imprisonment. Scott v. Illinois, 99 S. Ct. 1158 (1979).
attorney is immaterial. If indigent, a defendant must be provided with court-appointed counsel.\textsuperscript{17}

The question of when the right attaches, however, has been the subject of considerable debate. Although the sixth amendment is silent on the issue,\textsuperscript{18} the Supreme Court in \textit{Powell v. Alabama}\textsuperscript{19} established that a defendant is entitled to the assistance of counsel at the critical stage of a criminal prosecution. In \textit{Powell}, seven indigent black defendants were charged and later convicted of the rape of two white women. The defendants were not provided with counsel until immediately preceding the commencement of trial.\textsuperscript{20} The Court held that the sixth amendment was violated because appointing counsel only for the trial itself denied the defendants the assistance of counsel in any meaningful sense.\textsuperscript{21} The Court reasoned that the assistance of counsel is vitally important at any critical pretrial period for the purposes of consultation, investigation, and preparation for trial.\textsuperscript{22} In words that would resurface in most subsequent right to counsel cases, the majority noted:

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 is unfamiliar with the rules of evidence . . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.\textsuperscript{23}

The \textit{Powell} Court established the critical stage standard for determining when the right to counsel attached, but provided little guidance as to what constituted a critical stage. The Court merely stated that the accused was entitled to the assistance of counsel commencing at a point before trial

\begin{itemize}
\item \textsuperscript{17} Argersinger v. Hamlin, 407 U.S. 25, 37 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963).
\item \textsuperscript{18} The sixth amendment refers to "criminal prosecutions" without further defining the term.
\item \textsuperscript{19} 287 U.S. 45 (1932).
\item \textsuperscript{20} \textit{Id.} at 53-54.
\item \textsuperscript{21} \textit{Id.} at 52. The Court adopted the rationale of two early state cases which interpreted state constitutional provisions similar to the sixth amendment right to mandate in spirit, if not in letter, that the accused who is appointed counsel enjoy all benefits that flow from retaining counsel for his defense. \textit{Id.} at 57 (citing Batchelor v. State, 189 Ind. 69, 125 N.E. 773 (1920); Burgess v. Risley, 66 How. Pr. 67 (N.Y. Sup. Ct. 1883)). In \textit{Burgess}, the court stated: "Perhaps the literal letter of the constitutional provision would be complied with by allowing . . . counsel [at] 'trial,' but such a construction would illustrate the truth of . . . [the] maxim . . . : 'The letter killeth,' and disregard its conclusion, 'while the spirit giveth life.' . . . Where a right is conferred by law, everything necessary for its protection is also conferred. . . . [T]his must include . . . counsel prior to the trial." 66 How. Pr. at 68-69.
\item \textsuperscript{22} 287 U.S. at 57. The Court stated that the aid of counsel in a capital offense is of "fundamental character." \textit{Id.} at 68.
\item \textsuperscript{23} \textit{Id.} at 68-69. In addition, the majority opinion rejected the argument that the trial judge could act as counsel for defendant. The Court reasoned that a judge can ensure only that the defendant is treated fairly; he can neither investigate for the defendant nor "participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional." \textit{Id.} at 61.
\end{itemize}
sufficient to allow adequate preparation.\textsuperscript{24} Although this critical stage standard was widely followed after \textit{Powell},\textsuperscript{25} it was not until the 1967 decision in \textit{United States v. Wade}\textsuperscript{26} that the Court clearly defined "critical stage" as any stage where "potential substantial prejudice to defendant's rights inheres."\textsuperscript{27}

In \textit{Wade}, defendant was indicted on a federal bank robbery charge, arrested, and subsequently provided with court-appointed counsel.\textsuperscript{28} Thereafter, an agent of the Federal Bureau of Investigation arranged for a lineup\textsuperscript{29} to be held in the absence of counsel. At the lineup, two eyewitnesses to the robbery identified the defendant.\textsuperscript{30} At trial, both eyewitnesses made an in-court identification of the defendant and testified as to their prior lineup identification on cross-examination. The defendant was convicted, in large part because of the identification testimony.\textsuperscript{31}

The Supreme Court reversed, holding that the pretrial lineup was a critical stage of the prosecution and that, therefore, the defendant's sixth amendment right to counsel had been violated.\textsuperscript{32} The Court reasoned that because the

\textsuperscript{24} \textit{Id.} at 71.
\textsuperscript{25} See, e.g., \textit{White v. Maryland}, 373 U.S. 59 (1963) (certain preliminary hearings); \textit{Douglas v. California}, 372 U.S. 353 (1963) (first appeal as matter of right); \textit{Gideon v. Wainwright}, 372 U.S. 335 (1963) (trial); \textit{Hamilton v. Alabama}, 368 U.S. 52 (1964) (arraignment where rights must be asserted or lost). The use of "critical stage" as the functional criterion went furthest when the Supreme Court developed the accusatory-focus rationale in \textit{Escobedo v. Illinois}, 378 U.S. 478 (1964), \textit{discussed at} note 3 \textit{supra}. The Court held that when an investigation was no longer a general inquiry but had focused on the accused, a pre-indictment interrogation of the accused was critical to him. Therefore, such an interrogation conducted in the absence of an attorney was a violation of the sixth amendment right to counsel. \textit{Id.} at 490-91.

\textsuperscript{26} 388 U.S. 218 (1967).

\textsuperscript{27} \textit{Id.} at 227. The Court used this definition in \textit{Wade}, a federal prosecution, and in its companion cases of \textit{Gilbert v. California}, 388 U.S. 263 (1967) and \textit{Stovall v. Denno}, 388 U.S. 293 (1967), both of which were state prosecutions.

\textsuperscript{28} The Court attached little importance to the fact that \textit{Wade} was already represented at the time of the lineup. This is evidenced by the Court's decision in a companion case, \textit{Stovall v. Denno}, 388 U.S. 293 (1967), in which the police staged a showup without giving the accused time to hire an attorney. The Court did not distinguish \textit{Stovall} from \textit{Wade} on this ground.

\textsuperscript{29} Corporeal identification procedures can be divided into two types: lineups and showups. In a lineup, the witness views the accused in addition to a number of other suspects. In a showup, the accused is the only suspect the witness sees. P. Wall, \textit{Eye-Witness Identification in Criminal Cases} 27-28, 40-41 (1965); Williams & Hammelmann, \textit{Identification Parades} (pt. 1), 1963 Crim. L. Rev. 479. The latter is by its nature suggestive and hence disfavored. \textit{Stovall v. Denno}, 388 U.S. 293, 302 (1967).

\textsuperscript{30} 388 U.S. at 234. All the participants in the lineup wore tape on their face, as had the robber, and all spoke the words allegedly spoken by him. \textit{Id.} at 220.

\textsuperscript{31} At the close of testimony, defendant's attorney unsuccessfully moved to strike the witness' in-court identification on the grounds that the lineup, held without notice to and in the absence of counsel, was in violation of the fifth amendment privilege against self-incrimination and the sixth amendment right to counsel. \textit{Id.} Testimony about the pretrial identification itself was not in issue.

\textsuperscript{32} \textit{Id.} at 224-25. The Court first dispensed with the fifth amendment claim, holding that the privilege against self-incrimination only pertains to evidence of a testimonial or communicative nature. The majority held that being compelled to participate in a lineup, and even to speak, did not amount to giving evidence against one's self; using the accused's voice as an identifying physical characteristic did not require the accused to speak his guilt. \textit{Id.} at 221-23. The Court similarly rejected the fifth amendment claim asserted in \textit{Schmerber v. California}, 384 U.S. 757.
Identification procedure was virtually impossible to reconstruct later,\(^\text{33}\) not (1966), where a blood sample was taken from defendant against his wishes after he was arrested for drunk driving. The Schmerber Court held that the privilege against self-incrimination is not violated by compelling submission to "fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." \textit{Id.} at 764 (footnote omitted).

Although the \textit{Wade} Court upheld the defendant's right to counsel at the lineup, it also recognized the importance of an in-court identification to the prosecution's case. The Court framed the remedy for use of an in-court identification based on a pretrial confrontation held without counsel narrowly: the in-court identification would be excluded only if there was no independent basis for it. \textit{388 U.S.} at 240. Whether an independent basis existed for the in-court identification could be determined at a hearing outside the presence of the jury at which the trial court would consider: (1) the conduct of the confrontation; (2) how well and how long the witness observed the suspect during the crime; (3) the witness' opportunity to observe the crime itself; (4) the differences, if any, between the witness' prelineup description of the suspect and the suspect's actual appearance; (5) whether the witness had previously identified the suspect from a photographic array; (6) whether the witness failed to identify the suspect at an earlier opportunity; (7) whether the witness had already identified someone else; (8) the amount of time between the crime and the confrontation; and (9) how well the witness knew the suspect. \textit{Id.} at 241.

In contrast, when dealing with testimony about the tainted identification itself, the Court held that only a per se exclusionary rule would suffice. \textit{Gilbert v. California}, \textit{388 U.S.} 263, 273 (1967). In that case, the witnesses made an in-court identification of the defendant and also testified about the identification they had made at a lineup held without defendant's counsel. See \textit{Gilbert v. United States}, 366 F.2d 923, 956 (9th Cir. 1966), \textit{cert. denied}, 393 U.S. 985 (1968). The \textit{Gilbert} Court held that Wade's test was applicable to the states and that any in-court identification made during a state trial, based on a tainted pretrial identification procedure, must therefore meet the independent basis test. \textit{388 U.S.} at 272. Moreover, the Court found the testimony about the lineup itself to be the direct result of the illegal conduct and therefore ruled that the prosecution would not be entitled to show an independent basis for this earlier identification. \textit{Id.} at 272-73 (citing \textit{Wong Sun v. United States}, \textit{371 U.S.} 471, 488 (1963) (evidence derived "by exploitation of [the primary] illegality" must be excluded)).

Testimony about the witness' prior identification serves two purposes: (1) to bolster, corroborate, or serve as independent evidence of the witness' in-court identification and testimony, in some cases, even if the witness' testimony remains unimpeached; and (2) to use in place of a courtroom identification when, for example, the defendant's appearance has substantially changed since the time of the crime or pretrial identification, rendering an in-court identification impossible. \textit{See}, \textit{e.g.}, \textit{People v. Gould}, 54 Cal.2d 621, 626, 354 P.2d 865, 867, 7 Cal. Rptr. 273, 275 (1960); \textit{Fed. R. Evid. 801(d)(1)(C); N.Y. Crim. Proc. Law §§ 60.25, .30 (McKinney 1975). The dangers of this testimony, however, are paramount. First, a jury is generally more impressed by a pretrial identification since it has greater probative value than an in-court identification. \textit{Gilbert v. California}, \textit{388 U.S.} at 273-74; \textit{People v. Gould}, 54 Cal.2d at 626, 354 P.2d at 867, 7 Cal. Rptr. at 275. Second, unless counsel was present at the initial lineup, there would be no effective way to elicit any doubt the witness may have then entertained, \textit{United States v. Wade}, \textit{388 U.S.} at 230, because a witness rarely changes his mind after making an identification. \textit{Id.} at 229; \textit{see Williams & Hammelmann, supra} note 29, at 482. Hence, the \textit{Gilbert} majority found that only a strict per se exclusionary rule would be an effective deterrent against law enforcement authorities who persisted in denying the accused his right to the assistance of counsel at the "critical lineup." \textit{388 U.S.} at 273.

\textit{33} \textit{388 U.S.} at 229-30. The Court recognized that a secret procedure resulted in "a gap in our knowledge" and hence prevented accurate reconstruction at trial. \textit{Id.} at 230 (quoting \textit{Miranda v. Arizona}, \textit{384 U.S.} 436, 448 (1966)). Neither witnesses nor participants are trained to recognize or remember suggestive influences. Besides, the defense can rarely rely on participants to testify at trial since their names are seldom available. \textit{United States v. Wade}, \textit{388 U.S.} at 230.
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having counsel present at that point denied the accused the effective assistance of counsel at the trial itself.\(^4\) Furthermore, the inherent suggestiveness and untrustworthiness of corporeal identification procedures render the resulting identification suspect.\(^5\) Hence, the corporeal identification is critical to the accused because his trial and determination of his guilt 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 [any] overreaching, intentional or unintentional, and with little or no effective appeal from the judgment there rendered by the witness—"that's the man."\(^6\)

Applying the definition of critical stage established in *Wade*, it would appear that a defendant is entitled to counsel at pre-indictment corporeal identifications as well as at post-indictment ones.\(^7\) The *Wade* Court focused on the potential for substantial prejudice in a particular procedure and not on the point at which the proceeding occurred.\(^8\) The potential for substantial

In addition, the accused, under tension, will rarely be cognizant of prejudicial practices. See Williams & Hammelmann, *supra* note 29, at 482.


\(^5\) 388 U.S. at 235-36.

\(^6\) There are several limitations and exceptions to the *Wade* rules. First, a suspect can knowingly and intelligently waive his right to counsel at the pretrial corporeal identification. Taylor v. Swenson, 458 F.2d 593, 596-97 (8th Cir. 1972); see note 16 *supra*. Second, the right to counsel will be suspended if time or circumstances render the presence of counsel impractical, if not impossible. The most common examples of exigent circumstances are accidental confrontations, see, e.g., United States v. Famulari, 447 F.2d 1377, 1380-82 (2d Cir. 1971); Commonwealth v. D'Ambra, 357 Mass. 260, 263, 258 N.E.2d 74, 76 (1970), on-the-scene confrontations occurring shortly after the commission of a crime, see, e.g., United States ex rel. Cummings v. Zelker, 455 F.2d 714, 716 (2d Cir.), cert. denied, 406 U.S. 927 (1972); United States v. Perry, 449 F.2d 1026, 1028 (D.C. Cir. 1971); State v. Salcido, 10 Ariz. 380, 382, 509 P.2d 1027, 1029 (1973), and the witness' poor state of health. See, e.g., Stovall v. Denno, 388 U.S. 293, 302 (1967)

Furthermore, Congress has attempted to limit the *Wade* rules with Title II of the Omnibus Safe Streets & Crime Control Act of 1968, 18 U.S.C. § 3502 (1976), which allows the admission of in-court identification testimony whether or not it has an independent basis. The Supreme Court, however, has eschewed the Act in later cases interpreting *Wade*. This fact underscores the view of many commentators that the Act is an unconstitutional attempt by Congress to overrule what the Supreme Court has held to be a constitutionally required rule. Read, *Lawyers at Lineups: Constitutional Necessity or Avoidable Extravagance?*, 17 U.C.L.A. L. Rev. 339, 359-61 (1969); *The Pretrial Right, supra* note 3, at 406-07 n.38. See generally N. Sobel, *Eye-Witness Identification: Legal and Practical Problems* 18-41 (1972).

\(^8\) 388 U.S. at 227; see notes 27, 32-36 *supra* and accompanying text. The *Wade* Court observed that precedent mandated scrutinizing any pretrial confrontation to determine whether there was a violation of the accused's constitutional rights. 388 U.S. at 227. The Court reasoned that the principle established in *Miranda v. Arizona*, 384 U.S. 436 (1966) and *Escobedo v. Illinois*, 378 U.S. 478 (1964), that there was a right to counsel at interrogations once the suspect was in police custody, even if before indictment, was equally applicable to the corporeal identification situation. "It is central to that principle that . . . the accused is guaranteed that he need not stand alone . . . at any stage . . . formal or informal, in court or out . . ." 388 U.S. at
prejudice is just as great in a pre-indictment confrontation as it is in a post-indictment one.\textsuperscript{39} In light of the realities of modern investigatory procedures,\textsuperscript{40} pre-indictment confrontations of the accused often result in identifications or other information which then and there determine the accused's guilt or innocence for all practical purposes and render the trial itself a mere formality to seal the accused's fate.\textsuperscript{41}

The contention that pre-indictment confrontations fall within the critical stage standard is further supported by the Court's decision in a companion case to \textit{Wade, Stovall v. Denno}.\textsuperscript{42} In that case, before he was indicted or arraigned, the defendant was brought to the victim's hospital room for a showup.\textsuperscript{43} The defendant was not given the opportunity to obtain counsel.\textsuperscript{44}

\textsuperscript{39} This potential prejudice is underscored by the many instances of abuse at both the pre-indictment and post-indictment stage. United States v. Wade, 388 U.S. at 232-33 nn.17-23. Consistent with this observation, most state courts and all federal circuit courts ruling on the issue subsequent to \textit{Wade} but before \textit{Kirby} applied the sixth amendment right to counsel to all corporeal identifications. Kirby v. Illinois, 406 U.S. 682, 704 n.14 (1972) (Brennan, J., dissenting); Note, \textit{The State Responses to Kirby v. United States} [sic], 1975 Wash. U. L.Q. 423, 431 n.46, 436-37 nn.74-75. They reasoned that any other interpretation would exalt form over substance. \textit{E.g.}, Wilson v. Gaffney, 454 F.2d 142, 144 (10th Cir. 1972) (there can be no constitutional distinction as to critical status based upon formal charge), \textit{cert. denied}, 409 U.S. 854 (1972). One court noted that if the return of an indictment was controlling on the issue, it would "only lead to a situation wherein substantially all lineups would be conducted prior to indictment or information" in order to escape the constitutional mandate. People v. Fowler, 1 Cal.3d 335, 344, 461 P.2d 643, 650, 82 Cal. Rptr. 363, 370 (1969).

\textsuperscript{40} The \textit{Wade} Court noted that today, in contrast to the late eighteenth century when the Bill of Rights was adopted, most of the investigation, marshalling of evidence, and confrontations between an accused and a witness occur well before trial. 388 U.S. at 224-25.

\textsuperscript{41} The \textit{Wade} Court indicated that legislative innovations which would correct defects in the identification procedure, thereby eliminating potential prejudice to the accused, might suffice to remove pretrial corporeal identifications from the critical class. \textit{Id.} at 239. For examples of proposed model statutes, see J. Wigmore, The Science of Judicial Proof 540-42 (3d ed. 1937) and Murray, \textit{The Criminal Lineup at Home and Abroad}, 1966 Utah L. Rev. 610, 627-28. The Metropolitan Police Department of the District of Columbia has attempted to institute an objective lineup procedure. The procedure requires the presence of counsel and the participation of eight to twelve individuals who are physically similar to the suspect. The attorney is given the opportunity to regroup the participants. Moreover, the identification is videotaped with sound for later use at trial, so that reconstruction and cross-examination are possible and any doubt on the part of the identifying witness, or any question of suggestiveness, can be discerned by the jury. B. Forst, J. Lucianovic, & S. Cox, \textit{What Happens After Arrest?} 80 (Institute for Law & Social Research, PROMIS Research Project No. 4 1977).

\textsuperscript{42} 388 U.S. 293 (1967).

\textsuperscript{43} For a discussion of the distinction between showups and lineups, see note 29 supra. Defendant in \textit{Stovall} was arrested for the murder of a doctor and the stabbing of the doctor's wife. Defendant was handcuffed to one of five accompanying policemen and brought to the wife's hospital room. The defendant, the only black in the room, was identified after the wife was asked if he was the assailant. At trial, the victim testified about the hospital room identification and made an in-court identification. 388 U.S. at 295.

\textsuperscript{44} 388 U.S. at 295.
The Court, based on its rationale in Wade, found the procedure to be potentially prejudicial to the defendant. The Court, however, held that the Wade rule was not to apply retroactively. Had the Court ruled otherwise, the Wade rule would have been applied to this pre-indictment showup. The Court emphasized that it was not minimizing the importance of the rights set forth in Wade by making their application prospective only, but was instead recognizing that, before the date of the decision, law enforcement authorities were not warned that evidence derived from a confrontation held in the absence of counsel would not be admissible in court. It ruled that, in place of the Wade rules, a due process test should be used for pre-Wade situations.

The Wade critical stage standard also requires the assistance of counsel at or after indictment or the filing of an information. The critical stage standard also encompasses arraignments because a procedural error at that proceeding "may affect the whole trial." Similarly, defendants are entitled to representation by counsel at preliminary hearings. At a preliminary hearing, which is trial-like in form, a lawyer's cross-examination may expose fatal flaws in the state's case and thereby possibly prevent the defendant from being bound over for trial. Even if the defendant is bound over, the lawyer can prevent prejudice to the defendant by using his cross-examination at the preliminary hearing to impeach state witnesses at the subsequent trial, or, at the very least, to preserve any favorable preliminary hearing testimony given by a witness who for some reason does not testify at trial. Finally, the right to counsel has also been extended to post-conviction events such as sentencing and first appeal as of right.

The Wade standard, however, does not call for the assistance of counsel at scientific investigations and photographic identifications. Scientific investi-
gations, which include the taking and examining of handwriting exemplars, fingerprints, and blood samples, are not critical because "there is minimal risk that the absence of counsel might derogate from [the defendant's] right to a fair trial." These tests utilize established scientific procedures with few variations in technique and can be effectively reconstructed and contradicted at trial by the defendant's expert witnesses. In addition, the possibility of suggestiveness is significantly lessened in scientific investigations because in those tests, unlike corporeal identifications, the human element is absent. Similarly, photographic identifications do not require the assistance of counsel because the defendant is not present and it is easy to reconstruct the events at trial.

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57. See, e.g., Gilbert v. California, 388 U.S. 263 (1967) (handwriting exemplars); Woods v. United States, 397 F.2d 156, 156 (9th Cir. 1968) (fingerprinting); Sandoval v. State, 172 Colo. 383, 389, 473 P.2d 722, 725 (1970) (taking photographs of the accused); State v. Hughes, 244 La. 774, 783, 154 So.2d 395, 399 (1963) (physical examination and measurement of the accused). Moreover, these procedures do not invoke the right to counsel which accompanies the fifth amendment privilege against self-incrimination. The privilege does not reach "compulsion which makes a suspect or accused the source of 'real or physical evidence.'" Schmerber v. California, 384 U.S. 757, 764 (1966). But see 388 U.S. at 277 (Black, J., concurring in part and dissenting in part); United States v. Wade, 388 U.S. at 243 (Black, J., concurring); Schmerber v. California, 384 U.S. at 773 (Black, J., dissenting). See generally Gilbert v. California, 388 U.S. 263, 264-66 (1967).


59. Id.; United States v. Wade, 388 U.S. at 227-28. If the defendant believes the test is deficient, he can take new samples or have the old samples analyzed by defense experts. Gilbert v. California, 388 U.S. at 267.


61. United States v. Ash, 413 U.S. 300, 317-19 (1973). "[T]here are substantially fewer possibilities of impermissible suggestion when photographs are used, and those unfair influences can be readily reconstructed at trial." Id. at 324 (Stewart, J., concurring). The defendant, however, can make a due process claim on the ground that the identification is unreliable because of the suggestiveness of the photographic array. Compare Stovall v. Denno, 388 U.S. 293, 301-02 (1967) with Simmons v. United States, 390 U.S. 377, 382-86 (1968). See generally United States v. Crawford, 576 F.2d 794 (9th Cir. 1978) (per curiam).

Many police departments are striving to use more objective photographic arrays. In the District of Columbia, for example, photographic identifications precede the lineup. Only one police officer is present, and the witness changes the slides at his own speed. The files include pictures of every person ever arrested by the Metropolitan Police Department. B. Forst, J. Lucianovic & S. Cox, supra note 41, at 79-80, 86 n.22. Despite the use of objective arrays, the human element cannot be reconstructed later. See United States v. Ash, 413 U.S. at 332-38 (Brennan, J., dissenting). Commentators, in evaluating identification methods, have consistently favored lineups over showups, and both over photographic identifications. See, e.g., ALI Model Code of Pre-Arraignment Procedure §§ 160.1, .2 (1975); P. Wall, supra note 29, at 70-71; Sobel, Assailing the Impermissible Suggestion: Evolving Limitations on the Abuse of Pre-trial Criminal Identification Methods, 38 Brooklyn L. Rev. 261, 264, 296 (1971); Comment, Photographic Identification: The Hidden Persuader, 56 Iowa L. Rev. 408, 410-11, 419 (1970). See also Simmons v. United States, 390 U.S. 377, 384 (1968). After examining the most objective photographic identification
B. Attachment Under Kirby

Nearly five years after the *Wade* decision, the Supreme Court, in *Kirby v. Illinois*, redefined critical stage to cover only those procedures occurring at or after the commencement of adversary judicial proceedings, by way of formal charge, arraignment, preliminary hearing, indictment, or information. In that case, defendant Kirby, who had not been informed of his right to counsel, was brought to the police station and identified in a showup by a robbery victim. Kirby was not indicted and counsel was not appointed until six weeks after the showup. At trial, evidence of the victim's stationhouse identification and an in-court identification were admitted over the defendant's objections that his right to counsel had been denied, and defendant was convicted.

In affirming the conviction, the Supreme Court reasoned that a "criminal prosecution," to which the sixth amendment right to counsel is explicitly limited, commences only with the initiation of adversary judicial proceedings. The Court concluded that it was only at the point of formal charge that the state committed itself to prosecute the defendant. The majority observed that its decision was consistent with precedent since all previous cases in which the Court upheld the sixth amendment right to counsel involved post-formal charge events. Furthermore, the Court justified its procedures, one study concluded: "Many instances may exist in which the offender was apprehended only as a result of an accurate photographic identification. . . . Many other instances may exist in which the witness was quite sure of an accurate identification, yet in fact mistaken. It will often be the case that a picture . . . will resemble the offender, yet not be that person. Subsequent identification of the pictured person at a lineup might reflect only that the witness remembered and identified the person who was in the picture, not the person who committed the offense." B. Forst, J. Lucianovic & S. Cox, supra note 41, at 80.


63. *Id.* at 689. The accused, therefore, is left unprotected from the time of arrest until he is formally charged. Permitting this uncounseled period encourages police to delay indictment or rush confrontations. *See* People v. Fowler, 1 Cal.3d 335, 344, 461 P.2d 643, 650, 82 Cal. Rptr. 363, 370 (1969); College of Law, Arizona State Univ. & Police Foundation, Model Rules for Law Enforcement—Eyewitness Identification R. 402 (1974) [hereinafter cited as Model Rules].

64. 406 U.S. at 684-85. No effort was made to organize a lineup. Instead, a showup was conducted with the suspects seated at a table with two police officers. *Id.* at 691-92 (Brennan J., dissenting).

65. *Id.* at 685.

66. *Id.* at 685-86.

67. *Id.* at 689-90. The Court reasoned that a confrontation that took place six weeks before indictment "took place long before the commencement of any prosecution" to which the sixth amendment guarantees are applicable. *Id.* at 690. *But cf.* United States v. Marion, 404 U.S. 307 (1971) (sixth amendment speedy trial guarantee in "criminal prosecution" attaches at arrest).

68. 406 U.S. at 689.

69. *Id.* at 688-89. This justification, however, overlooks two cases decided after *Wade*, which dealt with pre-*Wade* confrontations occurring before the commencement of judicial criminal proceedings. In these cases, the Court applied the *Stovall* due process test without giving any indication that the *Wade* rules were inapplicable because the confrontations occurred before formal charge. *See* Coleman v. Alabama, 399 U.S. 1 (1970); Foster v. California, 394 U.S. 440 (1969).
holding by stating that a defendant in a pre-formal charge procedure, though without counsel, would be adequately protected by due process safeguards.70

Under the standard established in Kirby, a criminal suspect, deprived of his bodily freedom, has no right to the assistance of counsel for his defense in any situation, with the exception of fifth amendment protection in custodial interrogations,71 which occurs before formal charge. In most cases, the defendant's right to counsel remains the same as it was under Wade. Thus, indictments, informations, arraignments, preliminary hearings, and post-conviction events would still constitute critical stages, while photographic identifications and scientific investigations would not.72 On the other hand, a different result would occur in corporeal identifications held before the initiation of "adversary judicial proceedings." No right to counsel would attach since the identification occurs before formal charges have been filed against the defendant.73 Such a standard ignores the fact that a corporeal identification can be just as critical to a criminal suspect who is not yet formally charged as it can be to a defendant who is charged before the confrontation.74

70. 406 U.S. at 690-91. The Court adopted the Stovall due process test to protect the accused from prejudicial procedures. Due process "forbids a lineup that is unnecessarily suggestive and conducive to irreparable mistaken identification." Id. at 691 (citing Stovall v. Denno, 388 U.S. 293, 302 (1967)). Defendant subsequently sought a writ of habeas corpus, alleging a denial of due process. The Seventh Circuit denied the application, reasoning that the identification testimony was reliable. United States ex rel. Kirby v. Sturges, 510 F.2d 397 (7th Cir.), cert. denied, 421 U.S. 1016 (1975).

71. The Kirby limitation applied only to the critical stage test of the sixth amendment and did not affect the holding of Miranda v. Arizona, 384 U.S. 436 (1966). Kirby v. Illinois, 406 U.S. at 688.

72. See notes 56-61 supra and accompanying text.

73. A substantial majority of state courts have followed Kirby's critical stage definition. Note, The State Responses to Kirby v. United States [sic], 1975 Wash. U. L.Q. 423, 436-41. The highest state court of only one state has rejected Kirby. People v. Jackson, 391 Mich. 323, 338, 217 N.W.2d 22, 27 (1974). Nevertheless, some state courts have recently indicated the need for a more flexible standard in defining the commencement of "adversary proceedings" at earlier points in time. For example, one state court purporting to follow Kirby has ruled that counsel should be appointed at arrest. Commonwealth v. Richman, 458 Pa. 167, 171, 320 A.2d 351, 353 (1974). Another court has held that the issuance of an arrest warrant initiates adversary proceedings, Arnold v. State, 484 S.W.2d 248, 250 (Mo. 1972), and still others have held that the right to counsel attaches with "the filing of an instrument other than one forming the basis of an arraignment or . . . arrest warrant." People v. Coleman, 43 N.Y.2d 222, 225, 371 N.E.2d 819, 821, 401 N.Y.S.2d 57, 59 (1977). By interpreting critical stage more flexibly than Kirby, these state courts seemingly recognize that only counsel, and not due process, can adequately prevent prejudice to an accused's rights.

74. Indeed, some commentators view confrontations occurring before judicial criminal proceedings as more critical than those occurring after. They reason that in the latter the police have already garnered sufficient evidence to convict the accused and that, therefore, admission of evidence of a suggestive confrontation at trial might be harmless error. In the former case, the result of the confrontation may determine whether the government will prosecute. N. Sobel, supra note 37, at 11-12; see Kirby v. Illinois, 406 U.S. at 699 (Brennan, J., dissenting); Wilson v. Gaffney, 454 F.2d 142, 144 (10th Cir.), cert. denied, 409 U.S. 854 (1972).
II. THE INADEQUACIES OF Kirby

In Kirby, the Court stated that the due process safeguards enunciated in Stovall would be an adequate substitute for counsel in procedures occurring before formal charge. Under the Stovall test, which had been developed by the Court for confrontations occurring prior to the date of the Wade decision, a per se due process violation exists if the totality of the circumstances surrounding the confrontation indicate that it was “unnecessarily suggestive and conducive to irreparable mistaken identification.” Under the test, once the conduct of the procedure is found to be unnecessarily suggestive, no further evaluation of the actual reliability of the resulting identification is required.

The due process clause forbids the procedure and hence evidence derived from the unconstitutional confrontation is inadmissible. This test furthers the two major objectives of due process: it ensures the fairness of the proceeding involved and, by eliminating the suggestiveness, it increases the likelihood of the reliability of the evidence obtained.

The protections envisioned by Kirby, however, have not resulted. For one, the protection accorded by the Stovall due process standard has eroded since the Kirby decision. Notwithstanding this erosion, it is submitted that due

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75. 406 U.S. at 690-91.
76. 388 U.S. at 296, 301-02; see notes 42-48 supra and accompanying text.
77. 388 U.S. at 302.
80. See Manson v. Brathwaite, 432 U.S. 98, 110 (1977); Neil v. Biggers, 409 U.S. 188, 196 (1972); United States ex rel. Kirby v. Sturges, 510 F.2d 397, 405-08 (7th Cir.), cert. denied, 421 U.S. 1016 (1975). In Simmons v. United States, 390 U.S. 377 (1968), the test which Stovall had applied to testimony about the pretrial identification was modified by the Court for in-court identifications based on allegedly suggestive pretrial identifications. The Simmons test asked whether the pretrial identification was “so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” Id. at 384. This shift in focus from suggestiveness to reliability of evidence is consistent with the Wade Court’s rationale in applying the independent basis test to in-court identifications. See note 32 supra.
83. Manson v. Brathwaite, 432 U.S. 98, 118 (1977) (Marshall, J., dissenting); Grano, Kirby, Biggers and Ash: Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?, 72 Mich. L. Rev. 717, 719 (1974). Five major due process cases have been decided since Stovall. In the two cases decided since Kirby, no due process violations were found. Manson v. Brathwaite, 432 U.S. 98 (1977), discussed at notes 96-105 infra and accompanying text; Neil v. Biggers, 409 U.S. 188 (1972), discussed at notes 85-93 infra and accompanying text. In the three cases decided before Kirby, all of which involved confrontations before the date of the Stovall decision, the Court found only one due process violation. Coleman v. Alabama, 399 U.S. 1 (1970) (no denial of due process); Foster v. California, 394 U.S. 440 (1969) (due process
process is inferior to the assistance of counsel as a safeguard of the defendant's rights.\footnote{United States v. Ash, 413 U.S. 300, 309-13 (1973); id. at 338-44 (Brennan, J., dissenting); Kirby v. Illinois, 406 U.S. at 696-99 (Brennan, J., dissenting).}

\section*{A. The Erosion of Due Process}

The erosion of the \textit{Stovall}/\textit{Kirby} test began in \textit{Neil v. Biggers}.\footnote{409 U.S. 188 (1972).} In that case, the victim of a rape identified the defendant in a showup at which the defendant was flanked by two policemen and was required to speak the words of the assailant.\footnote{Id. at 200-01. The Court reasoned that the witness' previous failure to identify a suspect established a "record for reliability" which outweighed the lapse of seven months between crime and identification. \textit{Id.} at 201.} Despite the inherent suggestiveness\footnote{84. United States v. Ash, 413 U.S. 300, 309-13 (1973); \textit{id.} at 338-44 (Brennan, J., dissenting); Kirby v. Illinois, 406 U.S. at 696-99 (Brennan, J., dissenting).} and lack of necessity\footnote{90. \textit{Id.} at 200-01. The Court reasoned that the witness' previous failure to identify a suspect established a "record for reliability" which outweighed the lapse of seven months between crime and identification. \textit{Id.} at 201.} of a showup conducted in this manner, the Court did not find that due process had been violated.\footnote{92. The \textit{Biggers} Court said that the \textit{Stovall} test was aimed at preventing unjustified utilization of a less reliable procedure. 409 U.S. at 199; \textit{cf.} Gilbert v. California, 388 U.S. 263, 273 (1967) (more important to deter objectionable police conduct than to admit relevant evidence).} The Court reached this result by modifying the \textit{Stovall} test to provide that so long as the reliability of an identification can be shown, no due process violation will be found regardless of the procedure's unnecessary suggestiveness.\footnote{87. \textit{Stovall} v. \textit{Denno}, 388 U.S. 293, 302 (1967); \textit{P. Wall}, \textit{supra} note 29, at 27-28, 40-41; \textit{Williams} \& \textit{Hammelmann}, \textit{supra} note 29, at 486. It has been argued that a showup is a per se due process violation in the absence of exigent circumstances. \textit{Wright} v. \textit{United States}, 404 F.2d 1256, 1262 (D.C. Cir. 1968) (Bazelon, J., dissenting); \textit{Note}, \textit{Due Process Considerations in Police Showup Practices}, \textit{44 N.Y.U. L. Rev.} 377, 384 (1969).} When applying its test to the facts in \textit{Biggers}, the Court found the identification evidence reliable because of the witness' certainty about her identification, her chance to view the accused during the crime, her accuracy in previously describing her assailant, and her failure previously to identify a suspect.\footnote{88. The Court agreed with the finding of the lower courts that the police did not make an exhaustive attempt to organize a lineup. 409 U.S. at 199.}

As rationale for its modification, the \textit{Biggers} Court stated that the \textit{Stovall} per se exclusionary rule was intended to deter the use of suggestive procedures by law enforcement officials.\footnote{89. The court of appeals had found that the confrontation procedure was unduly suggestive and the evidence unreliable. \textit{Biggers} v. \textit{Neil}, 448 F.2d 91 (6th Cir. 1971).} Accordingly, the \textit{Biggers} Court reasoned that...
since the confrontation in that case occurred before the date of the *Stovall* decision, when law enforcement officials were first informed that evidence derived from such procedures was per se inadmissible, the application of the *Stovall* exclusionary rule in *Biggers* would serve no deterrent purpose.\(^9\) This analysis, however, misinterprets the intention of the Court in *Kirby* and *Stovall*. In those decisions, the Court was less interested in deterring police conduct than in ensuring that the procedure in issue was fundamentally fair.\(^9\) Because unnecessarily suggestive procedures are inherently unfair to the defendant, the Court in those two decisions concluded that the due process clause prohibits such confrontations.\(^9\)

The erosion of the *Stovall/Kirby* test continued in *Manson v. Brathwaite*,\(^9\) when the Supreme Court extended the *Biggers* test to confrontations occurring after the date of the *Stovall* decision. In *Manson*, the identifying witness, an undercover policeman, allegedly stood two feet away from the defendant during a drug buy.\(^9\) After the sale, the undercover policeman described the seller in detail to another officer.\(^9\) The latter officer left a photograph of the defendant, who fit this description, with the undercover agent. Two days later the undercover policeman identified the person in the photograph as the seller.\(^9\) At the trial, the undercover agent testified about his initial photographic identification and made an in-court identification of the defendant.\(^10\) On the basis of this testimony, the defendant was convicted.

Applying the *Biggers* test to the identification, the Supreme Court affirmed the conviction,\(^10\) holding that although a lineup or photographic array could have been used instead of the concededly more suggestive single-photo identification,\(^10\) due process was satisfied because the evidence was


\(^{94}\) An examination of *Stovall* shows that it was divided into two major sections, one on retroactivity of the *Wade* decision, 388 U.S. at 296-301, and the other on due process. *Id.* at 301-02. Although the Court found deterrence to be a major factor in determining that *Wade* would not have retroactive effect, the Court did not mention deterrence as a factor in its discussion of due process.

\(^{95}\) *Kirby v. Illinois*, 406 U.S. at 691; *Stovall v. Denno*, 388 U.S. at 301-02; see notes 75-82 supra and accompanying text.

\(^{96}\) 432 U.S. 98 (1977).

\(^{97}\) *Id.* at 100.

\(^{98}\) *Id.* at 101.

\(^{99}\) *Id.*

\(^{100}\) *Id.* at 102.

\(^{101}\) The Supreme Court reversed the Second Circuit which had held that under the *Stovall* test the identification testimony should have been excluded, regardless of reliability, because the testimony was the direct result of an unnecessarily suggestive procedure. *Brathwaite v. Manson*, 527 F.2d 363, 367, 371 (2d Cir. 1975). The Second Circuit reasoned that the *Biggers* modification of the *Stovall* test was limited to pre-*Stovall* identifications and that the *Stovall* test was still viable for confrontations held after that date. *Id.* at 369-71; accord, *Rudd v. Florida*, 477 F.2d 805, 809 (5th Cir. 1973); *Smith v. Colier*, 473 F.2d 877, 880-81 (4th Cir.), cert. denied, 414 U.S. 1115 (1973); *Workman v. Cardwell*, 471 F.2d 909, 910 (6th Cir. 1972), cert. denied, 412 U.S. 932 (1973). In any event, the court found the evidence unreliable. 527 F.2d at 371.

\(^{102}\) 432 U.S. at 102, 109. The prosecutor failed to explain why a less suggestive procedure was not used. *Id.*
sufficiently reliable. The indicia of reliability included the training of the eyewitness as a police officer, his opportunity to view the suspect in a lighted hallway, and his certainty about the identification.

The application of the Biggers modified test would seem inapposite to the Manson situation. In Manson, both the identification and trial took place after the date of the Stovall decision. Therefore, unlike the police in Biggers, the law enforcement officials in Manson were forewarned of the consequences of conducting suggestive procedures. As a result, the deterrent effect of the Stovall test could have been realized in Manson.

As a consequence of the modification in Biggers and Manson, the due process interest in a defendant's right to fair play has been eroded. Stovall protected the due process interests in both fairness and reliability by looking no further than the conduct of the corporeal identification procedure. A suggestive procedure constitutes a per se due process violation because suggestiveness is obnoxious to notions of fair play and raises a substantial likelihood that the evidence is unreliable. On the other hand, Biggers and Manson, by looking only at the resulting identification, protect the interest in reliability at the expense of the concern with fundamental fairness. Under the modified approach, due process is violated only when the identification is unreliable. A suggestive procedure is merely one factor in determining reliability and is no longer determinative as to admissibility. In Biggers and Manson, the Court shifted the focus from fairness to reliability because it reasoned that withholding relevant evidence from the trier of fact's consideration would be too high a cost for society to pay. But the Court ignored the fundamental unfairness of subjecting a defendant to a suggestive procedure which, in effect, raises an inference of guilt before guilt has been proven. Moreover, this reasoning eschews the disrespect for law enforcement occasioned by less than circumspect police behavior.

103. Id. at 117. The dissent agreed with the Second Circuit's conclusion that the totality of the circumstances indicated the evidence's unreliability. Id. at 129-32 (Marshall, J., dissenting).

104. Id. at 114-16.

105. The Manson Court recognized the factual distinction between Manson and Biggers, 432 U.S. at 106-07; id. at 124-25 (Marshall, J., dissenting), but nevertheless concluded that "reliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-Stovall confrontations." Id. at 114.

106. Manson v. Brathwaite, 432 U.S. at 110, 113-14; see notes 87-90 supra and accompanying text. The Manson Court stated that "the corrupting effect of the suggestive identification itself" is to be weighed along with the indicia of reliability. Id. at 114. Most authorities adhere to the contrary view that unnecessary suggestiveness should result in exclusion. See, e.g., Smith v. Coiner, 473 F.2d 877, 881-82 (4th Cir.), cert. denied, 414 U.S. 1115 (1973); Grano, supra note 83, at 782-83; ALI, A Model Code of Pre-Arraignment Procedure §§ 160.1, .2 (1975); 73 Colum. L. Rev. 1168, 1180 (1973).


108. See Manson v. Brathwaite, 432 U.S. at 128-29 (Marshall, J., dissenting) (the Manson test imports "the question of guilt into the initial determination of whether there was a constitutional violation [which] undermines the protection afforded by the Due Process Clause"); Kirby v. United States, 174 U.S. 47, 55 (1899); Palmer v. Peyton, 359 F.2d 199, 202 (1966).

B. Due Process Versus the Right to Counsel

Notwithstanding its erosion, the Stovall due process protection is an inadequate substitute for the presence of counsel. The protections accorded by due process and the right to counsel are not coextensive. In addition to protecting the due process interests in reliability and fairness, the numerous functions of counsel ensure that the defendant will be able to exercise any other rights he might have, including his right to confrontation and meaningful cross-examination, his right to be convicted only on evidence independently gathered and proven by the prosecutor, and his right to the necessary tools for his defense.

Perhaps the most important function of counsel at the early stages of the proceedings is to ensure his own effectiveness at the trial itself. Because of his knowledge of substantive and procedural law, counsel is able to discover illegal conduct of the police and prosecutor which, because of its subtlety, is imperceptible to the untrained layman. Moreover, counsel is able to ascertain the state's strategy in the case. This information is necessary to preserve the right to cross-examine and confront witnesses because, without observing what might be illegal activity, counsel's challenge to either the admissibility or credibility of evidence introduced at trial would be uninformed, based on conjecture and hearsay. Counsel's presence avoids the serious difficulties that are encountered under a due process standard in reconstructing what transpired at the procedure.

110. Schaefer, supra note 13, at 8; see notes 21-23 supra and accompanying text.
113. One report concluded that proceeding without counsel resulted in denying the accused "access to the tools of contest [which] is offensive . . . [and] detrimental to the proper functioning of the [adversary] system of justice. . . . [T]he loss in vitality of the adversary system, thereby occasioned, significantly endangers the basic interests of a free community." Attorney General's Comm. on Poverty and the Administration of Federal Criminal Justice, Report 11 (1963).
114. Coleman v. Alabama, 399 U.S. 1, 9 (1970); Powell v. Alabama, 287 U.S. 45, 57 (1932); see notes 21-23 supra and accompanying text.
117. By being present, counsel subjects himself to the possibility of later being called to testify about the questionable procedure, resulting in a conflict of interest. If so, the attorney may be forced to withdraw as defense counsel. See ABA Code of Professional Responsibility, EC 5-9 to -10, DR 5-102A (1973); State v. Blake, 157 Conn. 99, 102, 249 A.2d 232, 234 (1968) (if called as a witness, counsel should withdraw as defendant's attorney). One possible solution would be to use substitute counsel at the confrontation. United States v. Wade, 388 U.S. 218, 237 & n.27 (1967); see Zamora v. Guam, 394 F.2d 815, 816 (9th Cir. 1968) (approving use of substitute counsel); People v. Morrow, 276 Cal. App.2d 700, 703, 81 Cal. Rptr. 201, 203 (1969) (outside counsel may testify about the fairness of the identification). Another solution would be for counsel to bring another person with him to the lineup. This person could then testify at the trial if the need arises.
118. At least one commentator has gone so far as to conclude that if investigation for trial relies solely on the knowledge of the defendant, even the most exacting cross-examination would not elicit information that would be revealed by a more thorough investigation conducted by the attorney. Kamisar, supra note 81, at 60-61.
119. As the Wade Court observed: "[T]here is serious difficulty in depicting what transpired at
Unlike due process, the assistance of counsel provides a balancing force to the police and prosecutor at the pretrial procedure. In contrast to law enforcement officials, who are familiar with criminal procedure, "the idiosyncrasies of juries," and personnel of both the police department and the courts, the accused is usually an inexperienced layman. As such, the accused needs counsel to ensure an effective assertion of his pretrial procedural and substantive rights which would be accorded dubious protection if "entrust[ed] to the discretion of those whose job is the detection of crime and the arrest of criminals." Thus, if counsel were present, he could ensure that a defendant asserts his right to an early appearance before a magistrate, to contest probable cause for arrest, to secure release on bail, or to undergo an early psychiatric examination.

In contrast to due process, the presence of an attorney in pretrial stages can prevent the occurrence of abuse. Assuming that an innocent suspect is the subject of a potentially suggestive confrontation, his attorney can suggest a change of procedure which may result in the nonidentification and exoneration of the defendant. If an attorney is not present at the procedure and the suspect is mistakenly identified, the identification will frequently be sufficient grounds for a subsequent trial. Because of the unnecessary suggestiveness of the procedure, the evidence will probably be excluded at trial under the Stovall test. Thus, the same result will most likely ensue—the defendant will be set free—but the individual's fundamental right to fairness will have been accorded less protection by due process. He will have been unnecessarily subjected to a deprivation of liberty and the pain and expense of trial.

[Secret confrontations]" since the names of the participants are rarely divulged, and neither the eyewitness, the participants, nor the suspect are apt to be alert to the surrounding conditions. 388 U.S. at 230-31.

A prosecutor's role before judicial criminal proceedings includes the power to decide whether to bring the case before a grand jury for indictment and whether the evidence is strong enough to bring the case to trial. See B. Forst, J. Lucianovic & S. Cox, supra note 41, at 15, 61-64, 66-68.


McDonald v. United States, 335 U.S. 451, 455-56 (1948).

Fed. R. Crim. P. 5(a) provides that a suspect is to be brought before a magistrate without "unnecessary delay."


The Wade Court noted that counsel's presence is necessary to effectuate defendant's "first line of defense [which is] the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself." 388 U.S. at 235 (emphasis added).

See note 141 infra and accompanying text.


Gilbert v. California, 388 U.S. 263, 272 (1967). It is difficult to predict the result under the Stovall test. That test has been characterized as unpredictable and "amorphous at best and capricious at worst." The Pretrial Right, supra note 3, at 418-19 n.108; see The Supreme Court, 1966 Term, 81 Harv. L. Rev. 112, 179 (1967).

One commentator has indicated that the holding of Argersinger v. Hamlin, 407 U.S. 25
Finally, the sixth amendment right to counsel provides a more certain standard for law enforcement officials to follow than does due process. Due process is a retrospective test which involves a case-by-case approach turning on such factors as the completeness and clarity of the record on appeal. It does not and cannot give the states, the federal government, or judges permanent constitutional standards with which to comply. On the other hand, a standard that mandates the appointment or retention of counsel for the accused provides adequate forewarning to all parties of the consequences of a violation and removes the uncertainty that now accompanies conduct occurring before the Kirby standard attaches.

In any event, the presence of counsel may also benefit the government. When counsel actively advises on the methods employed, he indirectly provides a better identification procedure. Thus, more efficient utilization of the investigatory and enforcement resources of the government results. Indeed, one commentator contends that better identification procedures lead to higher conviction rates.

An examination of two cases in which the Court applied the Stovall test prior to its erosion illustrates the more adequate protection accorded the defendant when counsel is present. First, in Foster v. California, the police had the defendant participate in three identifications before the same witness, the victim of a robbery. The witness was unable to identify the defendant at either of the first two procedures, a lineup and a showup. In the second procedure, the witness identified the defendant. A habeas corpus petition was filed in the California Supreme Court, and the court held that no person may be imprisoned for any offense unless represented by counsel, may mean that a defendant cannot be detained before trial on the basis of evidence obtained in the absence of his attorney. See Mandate, supra note 16, at 6.


132. One commentary has argued that in the absence of counsel at the pretrial identification, it is nearly impossible to show a due process violation since the claim has to rest on the defendant's observations. The Supreme Court, 1966 Term, 81 Harv. L. Rev. 112, 179 (1967); cf. United States v. Wade, 388 U.S. 218, 230 (1967) (practical impossibility of reconstructing what transpired at the confrontation).


135. "Counsel can hardly impede legitimate law enforcement; on the contrary . . . law enforcement may be assisted by preventing the infiltration of taint in the prosecution's identification evidence. That result cannot help the guilty avoid conviction but can only help assure that the right man has been brought to justice." United States v. Wade, 388 U.S. 218, 238 (1967) (footnotes omitted).


137. 394 U.S. 440 (1969). The Court applied the Stovall test because the Foster confrontations occurred before the date of the Wade decision. Foster is the only case in which a due process violation has been found to date. See note 83 supra and accompanying text.
lineup, at which the defendant was the only one who had also participated in the first lineup, the victim finally identified the defendant. Defendant was tried and convicted on the basis of this identification evidence. On appeal, the Court found a denial of due process under Stovall because of the egregiously suggestive police behavior which "[i]n effect . . . said to the witness, 'This is the man.'"

Had counsel been appointed for the pretrial procedure, it is likely that both the due process violations and the trial could have been avoided. The first lineup was suggestive because of the defendant's disproportionate height as well as the fact that he alone wore the clothes the thief allegedly wore. This due process violation could have been prevented if counsel had been present and had requested that the lineup be conducted with participants bearing a closer physical resemblance to the defendant. Following the victim's failure to make an identification at the first lineup, the police then staged a showup, an inherently more suggestive procedure than a lineup. Because there were no exigent circumstances justifying the use of the latter, the attorney might have successfully demanded that a lineup be used instead. After the victim's failure to identify defendant a second time, the attorney might have been able to secure the defendant's release. Instead, in the absence of counsel, the defendant was subjected to a third procedure at which he was finally identified by the victim. Thus, although the result would have been the same if the accused had had the assistance of counsel—exoneration—such assistance might have prevented the deprivation of liberty and the agony of a trial. The due process standard gave only retrospective relief.

The second case, Coleman v. Alabama, involved a pretrial lineup in which only the defendant wore a hat similar to the one worn by the assailant and, although the record was inconsistent on the issue, in which only some of the participants in the lineup were required to speak the assailant's

138. 394 U.S. at 441-42.
139. Id. at 443.
140. Id. at 442-43.
141. Such suggestions comport with the Wade guidelines, which allowed counsel an active role. 388 U.S. at 224-38. The dissent interpreted Wade as giving counsel a managerial role. Id. at 235 (White, J., concurring in part and dissenting in part). The Court in United States v. Ash, 413 U.S. 300, 312 (1973), stated that the function of an attorney at an identification procedure was similar to that of the advocate at trial. See Model Rules, supra note 63, R. 409, Comments B-C. In jurisdictions that assign an active role to counsel, his silence may act as a waiver of objectionable lineup procedures. 1 B. George, Criminal Procedure Sourcebook 461 (1976). However, most codes regulating the lawyer's role at identification procedures envision a passive role. E.g., ALI Model Code of Pre-Arraignment Procedure 428-30 (1975); Model Rules, supra note 63, R. 409 & Comment A; accord, Read, supra note 37; Uviller, The Role of the Defense Lawyer at a Line-Up in Light of the Wade, Gilbert, and Stovall Decisions, 4 Crim. L. Bull. 273 (1968).
142. See note 29 supra.
143. Since a lineup had already been held, and since one was to follow, neither time nor lack of participants appear to have been a problem. It would seem that the only reason the showup was held was to obtain a conclusive identification. See Foster v. California, 399 U.S. at 443.
144. Id.
146. Although the case actually involved the appeals of two of the three defendants, only defendant Coleman's claims will be discussed.
The Court did not find undue suggestiveness, reasoning that the record indicated that the victim's identification was made before the defendant spoke and after the defendant's hat was removed.

On the basis of the Court's factual assumptions, the holding was correct under a due process analysis because under the totality of the circumstances the procedure itself was not unnecessarily suggestive. Nevertheless, the case illustrates the importance of early assistance of counsel to enable effective reconstruction and cross-examination. An attorney's presence might have resolved the conflict about whether the suspects were the only ones required to speak and whether they spoke before the identification was made. As it was, the Court had to rely on the victim's recollections. In cross-examining the witness, the attorney also had to rely on the victim's version. Thus, because reconstruction was impossible, the due process claim, essentially a factual claim, had to be based on unresolved facts.

These two cases demonstrate that even a strictly applied Stovall standard would not be an adequate substitute for counsel in confrontations held before the initiation of "adversary judicial proceedings." Due process cannot accomplish the same goals that counsel can. Counsel can potentially prevent the inherent dangers of suggestion and the likelihood of misidentification, whereas due process protections only have retrospective application. Counsel also enables effective reconstruction of the pretrial corporeal identification, preserving the defendant's basic rights to cross-examine and confront the witnesses against him, which is a practical impossibility under the due process standard. Moreover, counsel provides the tools needed to maintain the system as an adversarial one, whereas under the due process standards, the accused is left to stand alone against his opponents. In sum, the substitu-

147. 399 U.S. at 5-6. The detective testified that all the participants spoke; the eyewitness testified that only some of the participants spoke; and the defendant testified that only he and his co-defendants spoke. Id. at 6.

148. Although the Court affirmed the lower court's finding that there was no denial of due process, it reversed the conviction because the accused was not represented by counsel at the preliminary hearing. Id. at 9-11; see notes 51-53 supra and accompanying text. In deciding the due process issue, the Court applied the Stovall test as modified by Simmons v. United States, 390 U.S. 377, 384 (1968), discussed at note 80 supra, because the issue was the admissibility of an in-court identification rather than testimony about the pre-trial identification itself.

149. 399 U.S. at 5-6.

150. The Court was unsure whether only the defendants were required to speak and it assumed from the silent record that the defendant was not forced to wear the hat. Id. Moreover, because the record was silent, the Court assumed that the police did nothing to prompt the identification. Id.


152. 399 U.S. at 5-6.

153. Had counsel been present, these points might have been clarified. See The Supreme Court, 1966 Term, 81 Harv. L. Rev. 112, 178-79 (1967); The Pretrial Right, supra note 3, at 420 n.108.

154. See notes 126-30 supra and accompanying text.

155. See notes 114-19 supra and accompanying text.

156. See notes 120-25 supra and accompanying text.
tion of due process for the right to counsel has merely widened the gap between the rights afforded a defendant before and after formal charge.

III. THE RIGHT TO COUNSEL ACCOMPANYING THE FIFTH AMENDMENT VS. THE SIXTH AMENDMENT RIGHT TO COUNSEL

The explicit sixth amendment right to counsel is guaranteed to defendants in "all criminal prosecutions."157 According to Kirby, this right attaches at or after the commencement of judicial criminal proceedings.158 In contrast, the fifth amendment159 mandates the assistance of counsel at pretrial police interrogations as a means of protecting the privilege against self-incrimination.160 This right attaches as soon as "a person has been taken into custody or otherwise deprived of his freedom of action in any significant way,"161 that is, at arrest, which frequently occurs before the initiation of judicial criminal proceedings. This distinction seems unwarranted. The fifth amendment and the sixth amendment rights to counsel protect substantially the same interests: reliability of evidence, the integrity of the individual, and the integrity of the adversary system. Counsel is essential to protect these interests, not only in the context of the custodial interrogations protected by the fifth amendment, but in all other pretrial procedures within the potential scope of the sixth amendment as well.162 Accordingly, it is contended that the right to counsel guaranteed by the sixth amendment should attach at the same time as the right to counsel accompanying the fifth amendment.

The fifth amendment right to counsel originated in Miranda v. Arizona163 as a means of protecting the privilege against self-incrimination from overreaching by police and prosecutors. The privilege is intended to protect three different but overlapping interests164 expressing "the moral striving of the community" and reflecting "our common conscience."165 The first interest, the

157. U.S. Const. amend. VI.
158. 406 U.S. at 689 (1972). One commentator asserts that, under the Kirby standard, the sixth amendment right to counsel "has no life it can call its own" in the pre-judicial proceeding situations, but is rather dependent on an interrogation situation. Kamisar, Brewer v. Williams, Massiah and Miranda: What Is Interrogation? When Does It Matter?, 67 Geo. L.J. 1, 61 (1978).
159. The fifth amendment provides in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. Const. amend. V.
161. Id. at 444.
162. The pre-judicial proceeding corporeal identification is the pretrial procedure that would be most appropriately protected by the sixth amendment right to counsel. Unlike fingerprinting, the taking of handwriting exemplars, and photographing the accused, corporeal identifications can be conducted in a variety of ways and there is little way to challenge effectively the results at trial. See notes 56-61 supra and accompanying text. In contrast to photographic identification procedures, corporeal identifications are conducted in the presence of the defendant, which raises the "possibility . . . that [he] might be misled by his lack of familiarity with the law or overpowered by his professional adversary." United States v. Ash, 413 U.S. 300, 317 (1973).
reliability of evidence, 166 expresses the traditional Anglo-American distrust of self-deprecatory statements. 167 These statements, since they are often made under psychologically or physically abusive treatment, 168 are inherently untrustworthy. 169 This concern with trustworthiness is reflected by the pre-
Miranda standard used to determine whether a confession was voluntary and therefore admissible. 170 Voluntariness was decided by examining the totality of the circumstances to determine whether the accused was deprived of a “free choice to admit, to deny, or to refuse to answer.” 171 If the confession was not a product of free will, it was inadmissible because the “pressure of calamity” and “the law of nature, which commands every man to endeavor his own preservation” in the face of psychological or physical threats, lead to inherent untrustworthiness. 172

The integrity of the individual, the second interest, is intended to secure “respect for the inviolability of the human personality and of the right of each individual ‘to a private enclave where he may lead a private life’ ” 173 by


167. Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964). One commentator traced this distrust to the Old Testament, wherein it was stated that a person could not be found guilty on the basis of his own statements. Lamm, The Fifth Amendment and Its Equivalent in the Halakhah, 5 Judaism 53, 55-56 (1956).

168. The Miranda Court enumerated many instances of physical abuse, such as burning the suspect with cigarettes, focusing naked lights on the suspect, and beating the suspect. 384 U.S. at 446-47 & n.7. The Miranda Court was also concerned with mentally coercive tactics used by police to elicit confessions. Id. at 448-54. Such techniques placed the suspect in an unfamiliar environment and isolated him from family and friends, so that he was forced to rely on the “fairness” and “friendship” of his police interrogators. Id.

169. Id. at 470; Spano v. New York, 360 U.S. 315, 320 (1959) (one reason for society’s abhorrence of coerced confessions is their “inherent untrustworthiness”); Lisenba v. California, 314 U.S. 219, 236 (1941) (the states prohibit use of involuntary confessions in order “to exclude presumptively false evidence”).

170. The voluntariness standard was enunciated in Wilson v. United States, 162 U.S. 613 (1896), in which the Court stated that “the true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort.” Id. at 623. This test was applicable for all confessions occurring before the date of the Miranda decision. See Michigan v. Tucker, 417 U.S. 433 (1974); Darwin v. Connecticut, 391 U.S. 346 (1968) (per curiam); Clewis v. Texas, 386 U.S. 707 (1967). The use of confessions obtained in the absence of the Miranda procedural safeguards is still permitted to impeach the credibility of the defendant if he chooses to take the stand. Oregon v. Hass, 420 U.S. 714 (1975) (statement given after defendant requested a lawyer and was told he must wait); Harris v. New York, 401 U.S. 222 (1971) (statement elicited in violation of Miranda admissible for impeachment purposes to avoid giving the defendant license to perjure). The statements, however, will be excluded for even this purpose if found to be involuntary. Mincey v. Arizona, 437 U.S. 358, 398 (1978).


172. Bram v. United States, 168 U.S. 532, 546-47 (1897) (quoting G. Gilbert, Evidence 140 (2d ed. 1950)). The Court reasoned that when faced with the possibility of physical or mental abuse, the individual will endeavor to satisfy his interrogators by acknowledging as true anything they assert. See id. at 547.

prohibiting early common law practices that, in effect, required a person to inform the government of his behavior and merely wait for punishment to be doled out. The interest focuses on the compulsion that often leads to inhumane treatment and an infringement of the individual’s right to privacy. By ensuring that the individual need not speak and that an infringement of this right by overzealous law enforcement officials will not be rewarded, the privilege against self-incrimination seeks to prevent the coercive tactics which subject a defendant to a choice of confession and incrimination, perjury, or citation for contempt.

Reliability and integrity of the individual are both components of the third interest, the integrity of the adversary system. This interest seeks to maintain the American system of justice as an accusatorial, rather than an inquisitorial one. The adversary system treats the defendant and the

174. At early common law, a person not yet formally accused of a specific crime was bound under an oath ex officio of the ecclesiastical courts to answer all questions posed by the proper official. A defendant who was formally accused was also required to answer all questions put to him and the penalty for refusing to comply ranged from automatic conviction for treason and misdemeanors to physical torture for felonies. See Morgan, The Privilege Against Self-Incrimination, 34 Minn. L. Rev. 1, 1-18 (1949).

175. The Miranda Court stated that the primary purpose of interrogation techniques was to subjugate the defendant’s will to that of his accuser, so that the defendant adopted the position held by the police. 384 U.S. at 455. Exploiting the individual’s psychological or physical weakness is, without more, an infringement on individual liberty and the right to be left alone. Id.; see Tehan v. United States ex rel. Shott, 382 U.S. 406, 416 (1966). The Court demonstrated its concern with human dignity in Rochin v. California, 342 U.S. 165 (1952). In that case, a doctor, at the direction of the police, pumped the suspect’s stomach against his will and two morphine capsules were recovered. Id. at 166. Notwithstanding the fact that the evidence was reliable, the Court held that the methods employed violated due process for they “shocked the conscience” and resembled “the rack and the screw.” Id. at 172. The Court reasoned that the situation was analogous to the use of coerced confessions and stated that “[u]se of involuntary verbal confessions . . . is constitutionally obnoxious not only because of their unreliability. They are inadmissible . . . even though statements contained in them may be independently established as true. Coerced confessions offend the community’s sense of fair play and decency.” Id. at 173.


178. The choice between incrimination, perjury, or contempt has been characterized as a “cruel trilemma.” Murphy v. Waterfront Comm’n, 378 U.S. 52, 55 (1964).

179. See id.; In re Groban, 352 U.S. 330, 340-52 (1957) (Black, J., dissenting); Note, An Historical Argument for the Right to Counsel During Police Interrogation, 73 Yale L.J. 1000, 1048-51 (1964) [hereinafter cited as Police Interrogation].

180. Malloy v. Hogan, 378 U.S. 1, 7 (1964). Malloy reasoned that the fifth amendment was the “essential mainstay” of an adversary system. Id. In an inquisitorial system, on the other hand, the prosecutor’s evidence cannot be contradicted and the defendant is convicted on ex parte affidavits. Furthermore, he is required to answer all questions put to him and may not be
government as opponents and places the burden of proof on the government. This burden mandates that the government convict the individual on the basis of independent evidence and not on the basis of his own words.\textsuperscript{181} The self-incrimination privilege supports the adversary system by protecting society's notion of fair play, which abhors coerced confessions,\textsuperscript{182} and by preventing fundamental unfairness in the use of evidence without regard to its truth or falsity.\textsuperscript{183} Moreover, even if the government has borne its burden of producing the evidence, respect for the privilege increases reliability.

The privilege against self-incrimination's concern with a fair adversary proceeding is illustrated by the fact that the accused can refuse to answer only if criminal prosecution may result.\textsuperscript{184} Although the privilege attaches to most, if not all, situations in which a person may have to give testimony tending to be self-deprecatory,\textsuperscript{185} it is not applicable if that person is granted immunity from any prosecution that might be related to the utterances.\textsuperscript{186} For example, a person cannot be compelled to testify at a civil hearing or before the grand jury if it is possible that a criminal prosecution will result, but he can be compelled to testify if the government has guaranteed not to prosecute on the matter in question.\textsuperscript{187} The concern, therefore, is with the use of the self-incriminating statement at a subsequent trial of the accused.

Prior to \textit{Miranda}, these three interests were frequently thwarted by unlawful police behavior.\textsuperscript{188} Accordingly, in order to ensure that the privilege permitted to introduce his own evidence. See W. Beaney, \textit{supra} note 6, at 8-14; \textit{Police Interrogation, supra} note 179, at 1034-41; note 174 \textit{supra}.
against self-incrimination did "not become but a 'form of words' in the hands of government officials," the Miranda Court mandated that a defendant was entitled to retained or appointed counsel during custodial interrogations.\footnote{189}{384 U.S. at 444 (quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)). The accused must also be informed that he is entitled to exercise the fifth amendment privilege; he must be told that the consequence of speaking is that his statement may be used at trial against him; and he must be told that counsel will be appointed for him if he is indigent. Id.} If the defendant was uninformed or did not make a knowing and intelligent waiver of this right,\footnote{190}{Id. at 444-45, 475-76. Even if the suspect initially waives these rights, the interrogation must be stopped at any time the suspect indicates a desire to speak to an attorney. Id. at 444-45.} the fifth amendment required the exclusion of any exculpatory or inculpatory statements made by him at a custodial interrogation.\footnote{191}{See note 177 supra and accompanying text. Of course, a prosecutor would not want to use statements which are in fact exculpatory. Statements intended by the defendant to be exculpatory, however, may later be used to impeach the defendant's credibility at trial. Miranda v. Arizona, 384 U.S. at 477. For example, in Escobedo v. Illinois, 378 U.S. 478 (1964), the suspect thought he was clearing himself when he told the police that someone else actually pulled the trigger of the murder weapon. He did not know that the penalty for an accomplice is the same as for the principal. Id. at 482-83.
193. Id. at 470. See also Crooker v. California, 357 U.S. 433, 447-48 (1958) (Douglas, J., dissenting).} The assistance of counsel provided by Miranda is designed to further the three interests protected by the fifth amendment. First, when the defendant speaks to his adversaries without counsel, the statements are often unreliable. Counsel safeguards the interest in reliability by eliminating the characteristic secrecy of the interrogation\footnote{192}{Miranda v. Arizona, 384 U.S. at 448.} and by lessening the accused's fear of his accusers, resulting in fairer, more accurate statements.\footnote{193}{Id. at 467-69.}

Counsel is also needed to guarantee that the accused's statements are not the product of coercion, thereby preserving the individual's integrity. Because of the inherently coercive atmosphere of the custodial interrogation,\footnote{194}{Id. at 467-69.} there is no certainty that an unrepresented suspect knows that he could exercise his right to remain silent without repercussion or that he is aware of the consequences of speaking.\footnote{195}{Id. at 467-69.} Moreover, even if the accused is aware that he has a right to remain silent, the coercive atmosphere of the interrogation might overtake the defendant's will not to speak.\footnote{196}{Id.} Clearly, the government alone cannot be entrusted with the preservation of these rights of a defendant.\footnote{197}{Id. at 444, 466.} Instead, an attorney's presence is needed to prevent actual physical and mental brutality as well as to reduce the atmosphere of compulsion and isolation.

Finally, counsel is needed at the early interrogation to protect the defendant's rights at trial and to maintain a fair adversary system. If the accused does decide to speak at an interrogation, and the Miranda requirements in no way
prohibit this, the presence of an attorney guarantees that "the most compelling possible evidence of guilt, a confession, [is not] obtained at the unsupervised pleasure of the police." Counsel's advice and questioning in areas left unexplored by the police enables the accused to give a full and accurate statement. Moreover, counsel can later see that the statement is accurately reported at trial. Thus, counsel's presence at the interrogation encourages a probing examination of the circumstances surrounding the interrogation and the substance of the confession at trial, increasing the likelihood that only constitutional evidence will be used as grounds for conviction.

The interests that the sixth amendment right to counsel protects in the context of pretrial police investigations are not dissimilar to the three interests safeguarded by the right to counsel accompanying the fifth amendment. In the Wade and Kirby decisions, the Court noted the danger of unreliable identifications caused by suggestive pretrial corporeal identifications. Counsel can prevent unreliability by, for example, making suggestions which could at least point out the suggestive features of a pretrial identification procedure and at best encourage the police to correct them. If counsel takes this active role, he can prevent undue attention from being directed at his client by requesting that, within reason, all the participants look alike, speak alike, and act alike. As covert and overt influences on the witness decrease, the likelihood that the identification will be based on the witness' own observations during the crime increases.

The second interest, the integrity of the individual, is disparaged when a criminal defendant is unnecessarily incarcerated. An innocent man should not be deprived of his liberty and subjected to the demeaning status of a prisoner. Unnecessary incarceration results from suggestive procedures in which an identification of a particular suspect is all but inevitable. For example, in Wade, the Court noted that suggestiveness often derives from the frequency with which the witness is accidentally, or even intentionally, shown the suspect before the actual lineup. In addition, the police's belief that they

198. Miranda merely established guidelines for the taking of confessions and did not deny the accused the right to speak if the statement was a product of free will. Id. at 470.
199. Id. at 466 (quoting Mapp v. Ohio, 367 U.S. 643, 685 (1961) (Harlan, J., dissenting)).
200. Once a statement has been given by the accused, the government will probably use it at trial. If the statement is not complete, it will nevertheless carry substantial weight with the jury. Id.
201. Id. at 470. The Court noted that if coercion is exercised at the interrogation despite the lawyer's presence, the lawyer can testify to his observations in court. Id. But see note 117 supra.
203. United States v. Wade, 388 U.S. at 229; Williams & Hammelmann, supra note 29, at 482.
204. See note 141 supra and accompanying text.
205. 388 U.S. at 233.
have caught the criminal will often be communicated to the witness, thereby
pressuring him to make an identification. This influence on the witness
cannot be tolerated, since it may result in a situation in which the accused
may be held on the basis of contrived, rather than independent, evidence.
The interest in an individual's integrity is left inviolate only when he can face
his accusers without fear of being treated unfairly, with the confidence to
avoid a guilty appearance, and when he is not humiliated by being compelled
to act in a manner different from other participants.

Counsel can protect the integrity of the individual by preventing overreach-
ing and suggestive conduct of the police. Because of the inherently sugges-
tive atmosphere of the identification procedure, the government alone cannot
make certain that the accused is treated fairly. The Wade Court pointed
out that the witness, the participants, and the accused himself cannot be
expected to observe or correct the suggestiveness—only counsel can.
Counsel would also prevent the abuse occasioned by delaying indictments and
arraignment so that the police can conduct the confrontation before the
presence of counsel is mandated in accordance with the Kirby holding.

Finally, the integrity of the adversary system is furthered because the sixth
amendment right to counsel safeguards defendant's other rights, such as
confrontation and cross-examination. The right to confrontation goes un-
protected when the circumstances under which a corporeal identification is
made cannot be reconstructed at trial. Just as the fifth amendment ensures
the integrity of the system by guaranteeing that the accused will be convicted
by the prosecution's own efforts, the right to counsel guarantees that the evidence developed against a defendant shall come from the witness stand . . .
where there is full judicial protection of the defendant's right of confronta-
tion [and] of cross-examination . . . .

By leaving the defendant to stand alone at the pretrial confrontation, he is denied effective confrontation and probing cross-examination, mainstays of an adversary system. This gives the prosecution an impermissible advantage and calls to mind the common law

206. Id. at 235; see Williams & Hammelmann, supra note 29, at 483.
208. The police often are the ones who, intentionally or otherwise, cause the suggestive
features. United States v. Wade, 388 U.S. at 234-35. Justice Douglas once stated that it would be
unconscionable to entrust a defendant's rights to his opponents. McDonald v. United States, 335
U.S. 451, 455-56 (1948).
211. Cross-examination has been characterized as a "matter of right" and "one of the safeguards essential to a fair trial." Alford v. United States, 282 U.S. 687, 691, 692 (1931). One of the early cases that discussed the right of confrontation reasoned that a fact can only be proved
by witnesses whom a defendant can confront because "[t]he presumption of the innocence of an
accused attends him throughout the trial and has relation to every fact that must be established in
order to prove his guilt beyond reasonable doubt." Kirby v. United States, 174 U.S. 47, 55 (1899).
practice, long since condemned, in which the accused was denied the right to be heard in his defense because he did not have the chance to examine witnesses fully.\textsuperscript{214} The fundamental fairness of an adversarial trial is occasioned only by effectively counterbalancing the government's power and making it bear the burden of proof.

This counterbalancing is achieved when counsel personally observes the identification procedure and the witness' identification. As a result of his observations, counsel is able to decide whether to elicit from the eyewitness the circumstances surrounding the pretrial identification in order to impeach both the eyewitness' prior and in-court identification, and, if the attorney so decides, which circumstances to question. If suggestion occurred despite the attorney's presence, the lawyer can bring the alleged irregularities to the court's attention.\textsuperscript{215} Ensuring that the accused, through his attorney, has at his disposal the same procedural and substantive knowledge\textsuperscript{216} that the prosecutor has renders nugatory the fear of the \textit{Wade} and \textit{Miranda} majorities that a trial and determination of guilt would occur at the pretrial event rather than in the courtroom.\textsuperscript{217}

Because the interests of reliability, integrity of the individual, and integrity of the adversary system are protected by both the fifth and sixth amendments, the right to counsel under the two amendments should attach at the same time. The majority in \textit{Wade} concluded that

nothing decided or said in [\textit{Miranda}] links the right to counsel only to protection of Fifth Amendment rights. Rather [that decision] "no more than [reflects] a constitutional principle established as long ago as \textit{Powell v. Alabama} . . . ." It is central to that principle that . . . the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial. The security of that right is . . . the aim of the right to counsel . . . .\textsuperscript{218}

It has been demonstrated that, without counsel, the accused may be convicted by the use of untrustworthy evidence of a confession or a witness' identification, and that an accused's integrity is threatened by the unsupervised exercise of police investigatory tactics, whether by psychological and physical coercion in the interrogation, or by manifest or latent suggestiveness at the identification. As a result, the adversary trial is relegated to an inquisitorial process, depriving the accused of his major tools of contest—confrontation and cross-examination—and shifting the burden of the government to prove guilt to the defendant to prove innocence. It is contended that only the assistance of counsel at all pretrial investigatory procedures can adequately prevent this result.

\textsuperscript{214} See notes 6, 174 supra and accompanying text. See generally In re Oliver, 333 U.S. 257, 273 (1948).

\textsuperscript{215} But see note 117 supra.

\textsuperscript{216} Justice Schaefer has stated that criminal procedural and substantive law is designed for the lawyer who is familiar with it and that if the accused is not represented by counsel, the rules "become a source of entrapment" to him. Schaefer, supra note 13, at 8; see Kamisar, \textit{The Right to Counsel & The Fourteenth Amendment: A Dialogue of "The Most Pervasive Right" of the Accused}, 30 U. Chi. L. Rev. 1, 7 (1962).

\textsuperscript{217} See notes 36, 198-201 supra and accompanying text.

\textsuperscript{218} 388 U.S. at 226 (footnotes and citation omitted).
Furthermore, there are no substantial countervailing considerations against requiring the presence of counsel in all situations at the earlier time. Mandating the presence of an attorney will not forestall prompt identification. A lawyer cannot prevent his client's participation in a corporeal identification procedure since the latter, as a noncommunicative procedure, does not invoke the privilege against self-incrimination. To require counsel to be present when he can advise his client to thwart the police totally by remaining silent, but to dispense with his presence at a procedure in which he can only observe and advise, is an anomaly that the Court has yet to explain.

Finally, requiring counsel from the moment of arrest will not obstruct a legitimate criminal investigation. Fear that counsel could "obstruct the course of justice is contrary to the basic assumptions upon which [the] Court has operated" in deciding the Miranda line of cases as well as the Wade line of cases. If anything, the presence of counsel results in better law enforcement; it not only prevents the use of tainted evidence but also lends added credence and respectability to investigatory techniques. This in turn protects the integrity of the individual and our system of justice by guaranteeing that the innocent avoid conviction and the guilty be brought to justice.

Karen Akst Schecter

219. Id. at 237.
220. See note 32 supra.
222. See Miranda v. Arizona, 384 U.S. at 480-81. See also Police Interrogation, supra note 179, at 1049-50.
223. United States v. Wade, 388 U.S. at 238. It appears that the Court may be reassessing its Kirby doctrine. In Brewer v. Williams, 430 U.S. 387 (1977), Justice Stewart, writing for the majority, noted that "[w]hatever else it may mean, the right to counsel . . . means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him." Id. at 398 (emphasis added). In Kirby, the Court stated absolutely that the right to counsel did not attach before the commencement of formal adversary proceedings. The language of the Court in Brewer seems to leave open the possibility that the sixth amendment right attaches sooner.