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Right to Counsel in Virginia

Right to Counsel in Virginia—*Martin v. Commonwealth* and *Buchanan v. Commonwealth*

The sixth amendment guarantees to an accused the right to assistance of counsel,[1] and this right is extended to state prosecutions through the Due Process clause of the fourteenth amendment.[2] The Supreme Court has interpreted this right to include steps in the proceeding before the trial itself has commenced.[3] In *United States v. Wade*[4] and *Gilbert v. California*[5] the Court held post-indictment confrontations for identification purposes to be "critical stages" of the proceedings at which the accused is entitled to the presence of counsel.[6] Although in both cases the confrontations took place after indictment, the Court indicated that any pretrial confrontation should be scrutinized to determine if the presence of counsel is necessary.[7] Since these decisions,[8] both state and federal courts have been faced with the task

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

[2] ". . . [N]or shall any state deprive any person of life, liberty, or property without due process of law . . . ." U.S. CONST. amend. XIV § 1. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

[3] *See* Miranda v Arizona, 384 U.S. 436 (1966) (accused entitled to counsel during custodial interrogation); Escobedo v. Illinois, 378 U.S. 478 (1964) (accused entitled to counsel during custodial interrogation); Massiah v. United States, 377 U.S. 201 (1964) (accused entitled to counsel from the time of arraignment until the beginning of the trial); Gideon v. Wainwright, 372 U.S. 335 (1963) (counsel must be provided for defendants unable to employ counsel); Powell v. Alabama, 287 U.S. 45 (1932) (accused has the right to have sufficient time to advise with counsel and prepare a defense).

[4] 388 U.S. 218 (1967). *See The Supreme Court, 1966 Term,* 81 HARV. L. REV. 69, 176-82 (1969). For an analysis of the lineup opinions, *see* Read, *Lawyers at Lineups: Constitutional Necessity or Avoidable Extravagance,* 17 U.C.L.A.L. REV. 339, 345-57 (1969).

[5] 388 U.S. 263 (1967). *See The Supreme Court, 1966 Term,* 81 HARV. L. REV. 69, 176-82 (1967).

[6] United States v. Wade, 388 U.S. 218, 236-37 (1967). On March 23, 1965 an indictment was returned against Wade. He was arrested on April 2, and counsel was appointed to represent him on April 26. Fifteen days later the lineup was conducted without notice to Wade's lawyer. Gilbert v. California, 388 U.S. 263, 272 (1967). Gilbert was identified at a lineup which occurred sixteen days after indictment and after appointment of counsel, who was not notified.

[7] United States v. Wade, 388 U.S. 218, 227 (1967). Justice Brennan stated that the Court should "analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." *Id.* at 227.

[8] The decisions were made prospective after June 12, 1967. *See* Stovall v. Denno, 388 U.S. 293 (1967). The *Stovall* decision also held that an identification confrontation may be challenged on the grounds that it was so unfair that it denied the defendant due process of law. The *Stovall* decision is not within the scope of this report. For

of determining the scope and application of this principle. Recently, the Virginia Supreme Court of Appeals rendered two decisions involving the right to counsel during an on-the-scene identification and at a pre-indictment police lineup.

In one of these cases, *Martin v. Commonwealth*,[9] the accused was identified near the scene of a robbery shortly after the crime was committed. The victim was driven by the police to a nearby location where three suspects were being held for identification. These suspects were released immediately after he informed the police that they were not the criminals. Afterwards, the victim was driven to another location where the defendant was in custody. The identification took place while the defendant and his companion were in the headlight beams of the police vehicle. The Virginia court held that the circumstances of this incident did not warrant the application of *Wade*.[10] The court stressed that the confrontation in this case had led to the early release of the innocent suspects and a rapid apprehension of the criminals.[11]

The second decision, *Buchanan v. Commonwealth*,[12] involved facts more closely related to those in *Wade*. In *Buchanan* the defendant was identified approximately twelve hours after the crime during a pre-indictment police lineup. Again, the Virginia court refused to extend the right to counsel to a pre-indictment confrontation.[13] This decision did not close the door

discussion of due process requirements, *see* Comment, *Due Process Considerations in Police Showup Practices*, 44 N.Y.U.L. REV. 377 (1969).

[9] 210 Va. 686, 173 S.E.2d 794 (1970).

[10] *Id.* at 691-92, 173 S.E.2d at 798-99. The Court relied heavily on Russell v. United States, 408 F.2d 1280 (D.C. Cir. 1969), where the court held it not improper to return the suspect to the scene for identification. The court recognized that the broad language in *Wade* would seem to include prompt on-the-scene identifications, but such identifications do not fall within the purview of *Wade*. For analysis of *Russell*, *see* 14 VILL. L. REV. 535 (1969).

Massachusetts was the first state to confront the problem of applying *Wade* to an on-the-scene confrontation. Commonwealth v. Bumpus, 354 Mass. 494, 238 N.E.2d 343 (1968).

[11] *Id.* at 691, 173 S.E.2d at 798.

[12] 210 Va. 664, 173 S.E.2d 792 (1970).

[13] *Id.* at 667, 173 S.E.2d at 794. The court cited People v. Palmer, 41 Ill. 2d 571, 244 N.E.2d 173 (1969), where the Illinois court held *Wade* and *Gilbert* applicable only to post-indictment lineups. The court relied on the Supreme Court's language in *Wade* and *Gilbert* and in Simmons v. United States, 390 U.S. 377 (1968). In *Simmons* the Court referred to the "lineup cases" by stating that an accused is entitled to counsel at any "critical stage" and that a post-indictment lineup is such a stage. The Illinois court did not discuss the language in Biggers v. Tennessee, 390 U.S. 404 (1968), where Justice Douglas, writing the dissenting opinion for an equally divided Court, indicated that an identification taking place the same day as arrest and

to all pre-indictment identifications, however, since the court indicated that there is no fixed time between the crime and the indictment when the right to counsel accrues.[14] The Virginia court, in rendering such a narrow interpretation of *Wade,* has attempted to circumvent the liberal approach of the United States Supreme Court under the guise of distinguishing *Buchanan* on its facts. The superficial distinction between a pre-indictment and post-indictment lineup obliterates the clear purpose of the *Wade* principle.[15]

The *Wade* decision is based on the Supreme Court's finding that confrontations for identification purposes are "riddled with innumerable dangers."[16] One possible danger is the fallibility of identifications made by strangers.[17] The danger of identifying an innocent suspect is increased because of the possible improper suggestion by the police, as where the lineup includes only one suspect resembling the description given by the victim.[18] In addition to this, experience has shown that a witness, once

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before indictment, would clearly violate *Wade.* However, the Court refused to apply *Wade* retroactively, and the case was decided on the basis of due process.

[14] *Id.* Although the court stated that there is no fixed time when the right to counsel accrues, the fact remains that the pre-indictment lineup in this case was held not to be in violation of *Wade.* The court in referring to *Stovall* stated that all cases depend on the "totality of the circumstances." In the *Stovall* case the Supreme Court was not dealing with the right to counsel when they used that phrase, but rather a violation of due process in the conduct of the confrontation. The Supreme Court never indicated that the right to counsel should depend on the "totality of the circumstances." For other cases following this strict interpretation, *see* Robinson v. State, 237 So. 2d 268 (Fla. Dist. Ct. App. 1970); State v. Walters, 457 S.W.2d 817 (Mo. 1970); State v. Thomas, 107 N.J. Super. 128, 257 A.2d 377 (Super. Ct. 1969).

[15] The clear purpose of the Supreme Court's decision in *Wade* was to prevent potential substantial prejudice to the defendant's rights. United States v. Wade, 388 U.S. 218, 227 (1967). Such prejudice would exist whether the lineup was conducted before or after the indictment. *See, e.g.,* Long v. United States, 424 F.2d 799 (D.C. Cir. 1969); United States v. Wilson, 283 F. Supp. 914 (D.D.C. 1968); People v. Fowler, 1 Cal. 3d 335, 461 P.2d 643, 82 Cal. Rptr. 363 (1969); Smith v. State, 6 Md. App. 59, 250 A.2d 285 (1969); People v. Hutton, 21 Mich. App. 312, 175 N.W.2d 840 (1970). People v. C., 32 App. Div. 2d 840, 303 N.Y.S.2d 218 (Sup. Ct. 1969); State v. Williams, 274 N.C. 328, 163 S.E.2d 353 (1968); Commonwealth v. Hall, 217 Pa. Super. 218, 269 A.2d 352 (1970); *In re* Holley, — R.I. —, 268 A.2d 723 (1970). In the *Long* decision the court stated that the more informal the confrontation procedure the greater the danger of suggestiveness.

[16] United States v. Wade, 388 U.S. 218, 228 (1967).

[17] *Id.*

[18] *Id.* at 228-34. The Court listed such examples as:

1.) where one of six in a lineup was oriental;
2.) where one in a lineup had black hair;
3.) where a tall person was in a lineup with short people;
4.) where a young person was in a lineup with old people;
5.) where all were known to the identifying witness, except the suspect;

having made a selection, will seldom change his identification later during the proceedings.[19] Through the presence of counsel during a confrontation these dangers can be minimized, and thus the chances of receiving a fair trial are enhanced.[20]

Logically, the dangers enumerated by the Court are present during all pre-trial identifications,[21] yet the majority of courts refuse to extend the *Wade* ruling to on-the-scene confrontations.[22] Although the courts merely distinguish *Wade* on its facts, the underlying reason is that such an enlargement would present numerous practical problems.[23] The necessity of counsel in this situation would require either a lawyer in every squad car or require the police to transport all suspects to the stationhouse, where each could

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6.) where there was a grossly dissimilar appearance or distinctive clothing;
7.) where police told the witness they had caught the culprit, then he was viewed alone;
8.) where the suspect was pointed out before or during the lineup; and
9.) where the suspect was required to try on clothes that fit only him.

[19] *Id.* at 229.

[20] *Id.* at 231-32. The Court did not indicate what role counsel would play at the identification. For an analysis of counsel's role, *see* Read, *Lawyers at Lineups: Constitutional Necessity or Avoidable Extravagence*, 17 U.C.L.A.L. REV. 339 (1969); Comment, *Right to Counsel at Police Identification Proceedings: A Problem in Effective Implementation of an Expanding Constitution*, 29 U. PITT. L. REV. 65, 72-76 (1967); Comment, *Lawyers and Lineups*, 77 YALE L.J. 390, 396-98 (1967). In discussing the role of counsel, most authorities agree that his presence would not prevent more subtle suggestiveness than those mentioned in *Wade*.

[21] *See* Rivers v. United States, 400 F.2d 935 (5th Cir. 1968). It may be that on-the-scene identifications would be more dangerous than a formal post-indictment lineup since the victim may be physically injured as well as emotionally shaken. Also, the lighting may be defective and the police have a greater opportunity to make improper suggestions. *Id.* at 940.

[22] *See, e.g.*, Mason v. United States, 414 F.2d 1176 (D.C. Cir. 1969); Soloman v. United States, 408 F.2d 1306 (D.C. Cir. 1969); Russell v. United States, 408 F.2d 1280 (D.C. Cir. 1969); United States v. Barbati, 284 F. Supp. 409 (E.D.N.Y. 1968); People v. Ferguson, 7 Cal. App. 3d 13, 86 Cal. Rptr. 383 (Ct. App. 1970); People v. Green, 118 Ill. App. 2d 36, 254 N.E.2d 663 (1969); Parker v. State, — Ind. —, 261 N.E.2d 562 (1970); McPherson v. State, — Ind. —, 253 N.E.2d 226 (1969); State v. Meeks, 205 Kan. 261, 469 P.2d 302 (1970); Commonwealth v. Bumpus, 354 Mass. 494, 238 N.E.2d 343 (1968); State v. Moore, 111 N.J. Super. 528, 269 A.2d 534 (Super. Ct. 1970); State v. Bertha, 4 N.C. App. 422, 167 S.E.2d 33 (1969); State v. Spencer, 24 Utah 2d 361, 471 P.2d 873 (1970). *But see* Rivers v. United States, 400 F.2d 935 (5th Cir. 1968), where the court concluded that *Wade* applies to any lineup or any technique employed to produce an identification; United States v. Kinnard, 294 F. Supp. 286 (D.D.C. 1968). For discussion of the right to counsel in the lower courts, *see* Comment, *The Right To Counsel at Lineups: Wade and Gilbert in the Lower Courts*, 36 U. CHI. L. REV. 830 (1969).

[23] For a discussion of practical problems, *see* 14 VILL. L. REV. 535 (1969).

contact his own attorney or one could be appointed for him.[24] Where the victim is near death and the only evidence which can be obtained is his identification of the culprit, the requirement of counsel could result in the criminal evading prosecution. In addition to the problems for the police, innocent suspects found near the scene of the crime would be subjected to police custody for a longer period of time. Under this majority view the ruling in *Martin* is certainly proper.

On the other hand, a pre-indictment police lineup, such as the one in *Buchanan,* is more readily adaptable to the requirement of counsel. The exigencies present in an on-the-scene identification are not as likely in a pre-indictment lineup, because generally a few hours have passed since the crime and apprehension. During the time the suspect is in custody at the stationhouse he could contact his own attorney, or one could be appointed for him.[25] Although innocent suspects would again be detained for a longer period of time, the benefits of counsel's presence far outweigh this inconvenience. Since the practical problems are all but eliminated and the dangers of an incorrect identification exist, it is superficial and unwarranted to distinguish between a post-indictment and a pre-indictment confrontation.

The Supreme Court's clear purpose in *Wade* was to minimize the dangers of an improper identification of an innocent suspect. Most authorities balance these risks against the burden this places on society. In so doing, the majority holds that an accused should be guaranteed the presence of counsel unless the circumstances of the particular case indicates that the interests of society would be better protected by not requiring the presence of counsel.[26] This rationale, which was espoused by the Virginia court in *Martin,* could easily lead to the police holding more improper identifications on-the-street in order to avoid the impact of the *Wade* decision. However, this is the only realistic approach, in the context of current police investigation procedures and society's unwillingness to change them.

C.M.P.

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[24] *Id.* at 539.

[25] In *Buchanan* twelve hours had passed between the time the suspect was apprehended and when the lineup was conducted.

[26] For a statement of the balancing involved, *see* McPhearson v. State, — Ind. —, 253 N.E.2d 226 (1969). For a discussion of other possible approaches, *see generally* Comment, *Regulation and Enforcement of Pretrial Identification Procedures,* 69 COLUM. L. REV. 1296 (1969); Note, *Due Process Considerations in Police Showup Practices,* 44 N.Y.U.L. REV. 377 (1969). For a model regulation dealing with lineups, *see* Read, *Lawyers at Lineups: Constitutional Necessity or Avoidable Extravagance,* 17 U.C.L.A.L. REV. 339, 388-93 (1969).