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Extension of the Sixth Amendment Right to Counsel- The Road from Wade to Ash

EXTENSION OF THE SIXTH AMENDMENT RIGHT TO COUNSEL—THE ROAD FROM *WADE* TO *ASH*

The sixth amendment of The United States Constitution provides: "[I]n all criminal prosecutions, the accused shall enjoy the right . . . to have Assistance of Counsel for his defence." The constitutional guarantee of right to counsel is no more explicit than this, thus creating the problem of determining at what point in our adversarial criminal system the guarantee attaches.

As early as *Powell v. Alabama*[1] the Supreme Court of the United States recognized that counsel should be present at any critical stage of the proceedings against the accused, and found the period from arraignment to trial to be "perhaps the most critical period"[2] of such proceedings. More recently, in *Hamilton v. Alabama*,[3] the Court found the constitutional guarantee to apply to those types of arraignments where certain rights could be irretrievably lost through lack of competent counsel. In *Escobedo v. Illinois*[4] the Court extended the right to counsel of the accused to pre-arraignment interrogations wherein the accused sought legal advice before responding to questions. This rationale was logically formalized two years later in *Miranda v. Arizona*,[5] where the Court set out a definitive set of rules concerning interrogation of one in custody. A further extension of the accused's right to counsel came in *Mempa v. Rhay*.[6] There the Court found state probation revocation hearings, at which deferred sentence could be imposed, a critical stage in a criminal proceeding. But one of the most interesting and controversial Supreme Court interpretations of the sixth amendment guarantee in the last decade, *United States v. Wade*,[7] held the right to counsel to attach at a lineup.[8]

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[1] 287 U.S. 45 (1932). The Court took the *Powell* logic to an extreme in Massiah v. United States, 377 U.S. 201 (1964), in which it declared incriminating statements overheard by a narcotics agent by use of a radio transmitter installed in petitioner's car were not admissible at trial because petitioner had been indicted and had retained a lawyer who, alas, was not present when the incriminating statements were made. In so holding the Court declined to rule on a more logical and less far-reaching argument advanced by petitioner concerning violation of his fourth amendment rights.

[2] 287 U.S. at 57.

[3] 368 U.S. 52 (1961). And *see* White v. Maryland, 373 U.S. 59 (1963), in which defendant's plea of guilty at a preliminary hearing in absence of counsel was deemed violative of defendant's constitutional rights.

[4] 378 U.S. 478 (1964).

[5] 384 U.S. 436 (1966).

[6] 389 U.S. 128 (1967).

[7] 388 U.S. 218 (1967) (analyzed in 5 U. RICH. L. REV. 442 (1971)). *United States v. Wade* was in reality one of a trio of cases in which the lineup issue was presented, the

I. The *Wade* Rationale

The Court's logic in *Wade* hinged basically on the problems of eyewitness identification frequently noted in criminal cases.[9] The conclusion that led to the ultimate extension of the constitutional guarantee was that significant opportunities for prejudice, whether intentional or merely fortuitous, are inherent in the lineup procedure, and that a defendant in a criminal case cannot be considered adequately protected from these prejudicial possibilities unless his attorney is present. The Court concluded that the presence of counsel at the lineup would significantly promote fairness at the confrontation and lead to a complete elucidation of the issue of identification at trial.

By recognizing the problem of eyewitness identification as one of sufficient proportion to warrant some supervisory guarantee, and by turning for that guarantee to a broad interpretation of the sixth amendment's basic mandate of an accused's right to counsel, the *Wade* Court opened the door to a flood of contention in all criminal cases involving eyewitness identification.[10]

II. Application of *Wade* to Pre-Trial Photographic Identifications

It is not surprising, indeed it was the next logical step, that defendants should have attempted repeatedly to extend the *Wade* rationale to pre-trial photographic identifications. If the defendant has a constitutional right to

other two being Gilbert v. California, 388 U.S. 263 (1967), and Stovall v. Denno, 388 U.S. 293 (1967), the latter of which decided the *Wade* rule would apply prospectively only, as of June 12, 1967.

The Supreme Court has recently interpreted *Wade* quite narrowly in Kirby v. Illinois, 40 U.S.L.W. 4607 (U.S. June 7, 1972). The majority saw *Wade* as applying only to post-indictment lineups and declined to extend it to such procedure before indictment; the dissenters, headed by Mr. Justice Brennan who wrote the *Wade* opinion, saw the majority opinion as a limitation of *Wade* and deemed it merely accidental that both *Wade* and *Gilbert* had involved post-indictment lineups.

[8] Other more obvious examples of critical stages are the trial, Gideon v. Wainwright, 372 U.S. 335 (1963), and the appeal, Douglas v. California, 372 U.S. 353 (1963). The Court has refused to find that stages in the criminal investigation are critical which make use of processes of accepted scientific accuracy, *q.v.* Gilbert v. California, 388 U.S. 263 (1967) (handwriting exemplars); Schmerber v. California, 384 U.S. 757 (1966) (blood samples). The Supreme Court has also rejected fingerprinting as a critical stage. Smith v. United States, 324 F.2d 879 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 954 (1964).

[9] *See* 388 U.S. at 228, n. 6 (1967).

[10] For an excellent discussion of the problems created by the sweep of *Wade*, not just in cases involving eyewitness identifications but in all cases in which the accuracy of the fact-finding process is suspect, *see*, Note, *Lawyers and Lineups*, 77 Yale L.J. 390 (1967). On *Wade* generally, see 14 Loyola L. Rev. 222 (1967-68); 63 Nw. U.L. Rev. 251 (1968); 2 Suffolk U.L. Rev. 117 (1968); 36 U. Chi. L. Rev. 830 (1969); 9 Wm. & Mary L. Rev. 528 (1967).

have his attorney present at a pre-trial lineup to detect and properly note any prejudicial procedure in the attempt at identification that might occur, then should not a defendant also have such a right at a pre-trial photographic identification where the possibilities of prejudice, if different, are no less real? And should not this right be even more pronounced in reference to a proceeding at which the defendant himself is not present?[11] Such arguments, the basic foundation of the defendants' claims, seem to make sense, but the overwhelming majority of courts have turned a deaf ear to the defendants' pleas.

A. *Majority View as to Extension of* Wade *to Pre-Trial Photographic Identifications*

Every circuit of the intermediate system of federal courts has heard argument concerning problems of photographic identification. The First and Eighth Circuits have yet to decide the right to counsel issue,[12] but every other Circuit save two have adamantly refused to extend *Wade* to photographic identifications.[13] The exceptions are the Third Circuit, in which *United States v. Zeiler*[14] reversed earlier Third Circuit precedent[15] without referring to it, and the District of Columbia Circuit, in which the recent

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[11] *See generally*, Comment, 43 N.Y.U.L. REV. 1019 (1968).

[12] They have dealt with photographic identifications, but not in sixth amendment terms. *See* United States v. Valez, 431 F.2d 622 (8th Cir. 1970); United States v. Butler, 426 F.2d 1275 (1st Cir. 1970).

[13] Second Circuit: United States v. Mojica, 442 F.2d 920 (2d Cir. 1971); United States v. Roth, 430 F.2d 1137 (2d Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971); United States v. Sanchez, 422 F.2d 1198 (2d Cir. 1970); United States v. Bennett, 409 F.2d 888 (2d Cir. 1969), *cert. denied*, Haywood v. United States, 396 U.S. 852 (1969). Fourth Circuit: United States v. Canty, 430 F.2d 1332 (4th Cir. 1970); United States v. Collins, 416 F.2d 696 (4th Cir. 1970), *cert. denied*, 396 U.S. 1025 (1970); United States v. Marson, 408 F.2d 644 (4th Cir. 1968). Fifth Circuit: United States v. Ballard, 423 F.2d 127 (5th Cir. 1970). Sixth Circuit: United States v. Serio, 440 F.2d 827 (6th Cir. 1971). Seventh Circuit: United States v. Hutul, 416 F.2d 607 (7th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970); United States v. Robinson, 406 F.2d 64 (7th Cir. 1969), *cert. denied*, 395 U.S. 926 (1969). Ninth Circuit: United States v. Washabaugh, 442 F.2d 1127 (9th Cir. 1971); United States v. Fowler, 439 F.2d 133 (9th Cir. 1971); United States v. Williams, 436 F.2d 1166 (9th Cir. 1970); United States v. Roustio, 435 F.2d 923 (9th Cir. 1970); United States v. Goetluck, 433 F.2d 971 (9th Cir. 1970); United States v. Edwards, 433 F.2d 357 (9th Cir. 1970); Allen v. Rhay, 431 F.2d 1160 (9th Cir. 1970); United States v. Smith, 423 F.2d 1290 (9th Cir. 1970), *cert. denied*, 398 U.S. 930 (1970); United States v. Sartain, 422 F.2d 387 (9th Cir. 1970). Tenth Circuit: United States v. Von Roeder, 435 F.2d 1004 (10th Cir. 1971); Rech v. United States, 410 F.2d 1131 (10th Cir. 1969); McGee v. United States, 402 F.2d 434 (10th Cir. 1968), *cert. denied*, 394 U.S. 908 (1969).

[14] 427 F.2d 1305 (3d Cir. 1970).

[15] United States v. Conway, 415 F.2d 158 (3d Cir. 1969).

case of *United States v. Ash*,[16] a close case with two dissents, also refused to follow the majority. The sixth amendment of the Federal Constitution, by virtue of the due process clause of the fourteenth amendment, applies to all the states, thus giving frequent occasion to the argument for extension of *Wade* to pre-trial photographic identifications in the state courts. Likewise, these courts have almost invariably refused to extend the *Wade* decision.[17] Perhaps California has been the most besieged with pleas to extend *Wade* to photographic identifications. However, that state has yet to recant its long-standing denial that there is sufficient analogy between the *Wade* line-up logic and the logic applicable to photographic identification procedure to merit extension of *Wade*.[18]

The courts resort to various arguments in their refusals to extend *Wade* into the photographic realm. *United States v. Bennett*,[19] for example, noted that to require counsel's presence at a proceeding where the defendant himself is not present would extend the role of the defense attorney beyond anything envisioned by the classic analyses of assistance given by counsel.[20] The court in *McGee v. United States*[21] was unable to see anything more involved in a pre-trial photographic identification than "preparation for trial by the Government . . . [in which] there was no form of confrontation of the accused." [22] The court held this could not merit any application of the *Wade* rule. Other arguments often invoked are that skill-

[16] No. 22,340 (D.C. Cir. March 1, 1972).

[17] *See* Reed v. State, — Del. —, 281 A.2d 142 (1971); Staten v. State, 248 So. 2d 697 (Fla. Ct. App. 1971); Perkins v. State, 228 So. 2d 382 (Fla. 1969); Jenkins v. State, 228 So. 2d 114 (Fla. Ct. App. 1969); People v. Martin, 47 Ill. 2d 331, 265 N.E.2d 685 (1970); People v. Holliday, 47 Ill. 2d 300, 265 N.E.2d 634 (1970); Wells v. State, — Ind. —, 267 N.E.2d 371 (1971); Johnson v. State, 9 Md. App. 327, 264 A.2d 280 (1970); Smith and Samuels v. State, 6 Md. App. 59, 250 A.2d 285 (1969); Barnes v. State, 5 Md. App. 144, 245 A.2d 626 (1968); Commonwealth v. Geraway, 355 Mass. 433, 245 N.E.2d 423 (1969); Stevenson v. State, — Miss. —, 244 So. 2d 30 (1971); State v. Randolph, 186 Neb. 297, 183 N.W.2d 225 (1971); State v. Accor, 276 N.C. 65, 175 S.E.2d 583 (1970); State v. Searcy, 4 Wash. App. 860, 484 P.2d 417 (1971); State v. Grays, 1 Wash. App. 422, 463 P.2d 182 (1969); Kain v. State, 48 Wis. 2d 212, 179 N.W.2d 777 (1970).

[18] *See, e.g.*, People v. Lawrence, 4 Cal. 3d 273, 93 Cal. Rptr. 204, 481 P.2d 212 (1971); People v. Stuller, 10 Cal. App. 3d 582, 89 Cal. Rptr. 158 (1970); People v. Wesley, 10 Cal. App. 3d 902, 89 Cal. Rptr. 377 (1970); People v. Hawkins, 7 Cal. App. 3d 117, 86 Cal. Rptr. 428 (1970); People v. Lineman, 5 Cal. App. 3d 1, 84 Cal. Rptr. 891 (1970); People v. Wendling, 4 Cal. App. 3d 317, 84 Cal. Rptr. 310 (1970); People v. Green, 3 Cal. App. 3d 240, 83 Cal. Rptr. 491 (1969); People v. Adair, 2 Cal. App. 3d 92, 82 Cal. Rptr. 460 (1969); People v. Short, 269 Cal. App. 2d 746, 75 Cal. Rptr. 156 (1969); People v. Padgitt, 264 Cal. App. 2d 443, 70 Cal. Rptr. 345 (1968).

[19] 409 F.2d 888 (2d Cir. 1969).

[20] *Id.* at 899-900.

[21] 402 F.2d 434 (10th Cir. 1968), *cert. denied*, 394 U.S. 908 (1969).

[22] *Id.* at 436.

ful cross-examination can bring out the details of any pre-trial photographic display,[23] and that because the photographs themselves are available in evidence there is no need for counsel.[24]

The argument that skillful cross-examination may serve as a useful safeguard in photographic identification questions has an interesting genesis since it apparently arose in a case having absolutely nothing to do with a defendant's right to counsel. In that case, *Simmons v. United States*,[25] the United States Supreme Court decided that no denial of due process of law resulted when photographs of suspects were shown to various witnesses while the perpetrators of the crime were still at large. No right to counsel issue was or could have been logically raised in *Simmons*, because there was not yet any defendant; no arrest had been made. It was because of this, in the interest of expediency and public good, as well as justice to innocent suspects, that the Court ruled as it did. Yet courts, in innumerable cases[26] where the primal issue before the bar was right to counsel after arrest, not denial of due process before arrest, have persisted in eager resort to remarks made by Mr. Justice Harlan in *Simmons*. Particularly popular in cases where an extension of *Wade* to photographic identification is sought is the *Simmons* test to determine if a pre-arrest photographic showing has been in substantial derogation of rights of the accused, *i.e.* was the showing "so impermissably suggestive as to give rise to a very substantial likelihood of irreparable misidentification." [27] Some courts have recognized the different facts involved in *Simmons*, and have noted that the above remarks seem applicable nonetheless;[28] but some courts have resorted to *Simmons* without noting the fundamental factual differences between the *Simmons* case and the usual right to counsel case.[29] This latter procedure cannot but adversely affect the credibility of the courts so doing.

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[23] *See, e.g.*, United States v. Ballard, 423 F.2d 127, 131 (5th Cir. 1970); United States v. Collins, 416 F.2d 696, 700 (4th Cir. 1969); United States v. Bennett, 409 F.2d 888, 900 (2d Cir. 1969), *cert. denied*, Haywood v. United States, 396 U.S. 852 (1969); United States v. Robinson, 406 F.2d 64 (7th Cir. 1969).

[24] Comment, 43 N.Y.U.L. REV. 1019, 1025 (1968).

[25] 390 U. S. 377 (1968).

[26] Cases cited note 23, *supra*.

[27] 390 U.S. at 384 (1968).

[28] *E.g.*, United States v. Ballard, 423 F.2d 127, 131 (5th Cir. 1970); United States v. Bennett, 409 F.2d 888, 900 (2d Cir. 1969), *cert. denied*, Haywood v. United States, 396 U.S. 852 (1969).

[29] *See, e.g.*, United States v. Collins, 416 F.2d 696, 700 (4th Cir. 1969), *cert. denied*, 396 U.S. 1025 (1970). In his dissent in *Collins*, Judge Winter noted the inapplicability of *Simmons*, stating:

> I do not read *Simmons* as modifying the application of *Wade* and *Gilbert* to post custody identifications as I read the majority's opinion to suggest. Simmons was not in custody at the time of the identification made from photographs. . . . In

B. *Minority View of* Zeiler *and* Ash

In contrast to the voluminous precedent refusing to extend the *Wade* decision to pre-trial photographic identifications,[30] there is a paucity of authority contra.[31] The most often-cited case so extending *Wade* is *United States v. Zeiler*,[32] *supra*, which made the Third Circuit the first circuit of the system of intermediate federal courts to extend *Wade*. This pre-eminence of *Zeiler* is unfortunate, for the court confines all argument on the issues to a single paragraph, the extent of which would have been inadequate for purposes far less sweeping than overturning an established precedent of the magnitude here concerned.[33]

In *Zeiler* the appeal concerned a so-called "Commuter Bandit" who allegedly had been committing a series of bank robberies in the Pittsburgh area over a period of more than five years. Zeiler was the suspect arrested in connection with these robberies. After the arrest a lineup was held at which Zeiler's counsel had been present in compliance with *Wade*. It later appeared, however, that after Zeiler had been taken into custody and counsel appointed, but before the already scheduled lineup had been held, the FBI had privately confronted each eyewitness with a series of photographs for identification. Zeiler contended that *Wade* ought to apply equally to such prejudicial circumstances as these, and the Third Circuit agreed, noting "[t]he considerations that led the court in *Wade* to guarantee the right of counsel at lineups apply equally at photographic identifications conducted after the defendant is in custody." [34] As reasons therefore the court enumerated: (1) the dangers of suggestion inherent in a corporal lineup to be as prevalent in a photographic identification; (2) the absence of the defendant himself at such photographic identification making accurate reconstruction at the trial even more difficult; and (3) the possibility of complete nullifi-

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the instant case Collins was in custody and a corporeal lineup had been held. This is the crucial distinction between *Simmons* and the instant case. *Id.* at 701. And *see* United States v. Robinson, 406 F.2d 64, 67 (7th Cir. 1969).

[30] Cases cited notes 13, 17 and 18, *supra*.

[31] In addition to *Zeiler* and *Ash*, discussed in the above text, see Cox v. State, 219 So. 2d 762 (Fla. Ct. App. 1969) (court held use of videotape for identification purposes to be an unlawful evasion of *Wade*); People v. Rowell, 14 Mich. App. 190, 165 N.W.2d 423, 427 (1968) (Levin, J., concurring) ("I am persuaded . . . that on principle photographic identifications should be prohibited where the defendant is in custody unless the witness is physically incapacitated from going to a place where a lineup can be conducted."); Thompson v. State, 85 Nev. 134, 451 P.2d 704 (1969); Commonwealth v. Whiting, 439 Pa. 205, 266 A.2d 738 (1970).

[32] 427 F.2d 1305 (3d Cir. 1970). On *Zeiler* generally, see 9 DUQUESNE L. REV. 257 (1970); 16 VILL. L. REV. 741 (1971); 28 WASH. & LEE L. REV. 173 (1971).

[33] 427 F.2d at 1307.

[34] *Id.*

cation of the constitutional safeguards of *Wade* due to use by the police of photographs prior to lineup.[35] With these three arguments *Zeiler* extended *Wade.*

More recent, and far more extensive in treatment, is *United States v. Ash*,[36] decided March 1st of this year by the District of Columbia Circuit. The facts of *Ash* make the perils of eyewitness identification spectacularly apparent. On August 26, 1965, a gunman entered a bank in Washington, D. C. and ordered everyone in the bank not to move. A few seconds later another man rushed into the bank, scooped up the money and fled. The entire robbery took three to four minutes. At the trial Ash was identified as the gunman by testimony of incredible dubiousness. A bank teller said Ash looked similar to the gunman, but she could not be sure because the robber had worn a stocking mask. Another teller believed Ash to be the gunman but also was uncertain because she had been unable to see the gunman's face. A bank customer said Ash looked "sort of like" the gunman, but he could not be certain. This witness had observed the gunman for a few seconds as he approached the bank sans mask. There was also an identification of Ash by a woman who had been sitting in an automobile outside the bank. She had seen the gunman without his mask, but admitted that she had gotten only a fleeting glimpse of him. The only other testimony against Ash was that of an informer who was serving a sentence in connection with another robbery. He testified that the day before the robbery Ash had asked him to help rob the bank, that he had refused, and that he had talked to Ash after the robbery, at which time defendant had told him of the crime. The defense later showed that this witness had been promised certain favors by the prosecution, including testimony by an Assistant United States Attorney before the parole board on his behalf.

At a pre-trial hearing it was brought out that at the time of the crime not one of the four eyewitnesses to the robbery had been able to give the police a description of the gunman's facial characteristics. The description given to the police at the time had been merely a description of the felon as tall and thin. The police later described the robber as a Negro male, 19 years old, six feet tall, 165 pounds, thin build. This was the extent of the description of the robber until, some five months after the crime, the FBI showed mug shots of five Negro males to the identification witnesses. All four identified Ash as the gunman, but not one was certain. The day before the trial the FBI and the prosecutor showed five color photographs to three of the four identification witnesses. All three picked the picture of Ash. Of the five color pictures shown, only two were full length and only

[35] *Id.*

[36] No. 22,340 (D.C. Cir. March 1, 1972).

two were of tall and slim Negroes. One full length picture of a tall and slender black man was a photograph of Ash.[37]

It was on the basis of this "eyewitness" testimony that Ash was convicted of robbery. He appealed on two grounds, contending first that the color photographs were so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification under the rationale of *Simmons v. United States*.[38] The court declined to rule on the *Simmons* test of denial of due process, even though it found ample cause to think the spirit of the test perhaps had been violated. The court rather chose to rule on Ash's second contention, that his sixth amendment rights had been violated by the Government's showing of pictures to identification witnesses without attendance of counsel. On this ground the court found that Ash's constitutional rights had been violated.

In concluding that the *Wade* rationale applied to photographic identifications, the court put great dependence on *Zeiler*.

> While we think the rule is subject to exceptions, we agree with *Zeiler's* analysis that the dangers of mistaken identification from uncounseled lineup identifications set forth in *Wade* are applicable in large measure to photographic as well as corporeal identifications.[39]

The court then proceeded to enumerate these dangers as: (1) the possibility of suggestive influence or mistake, "particularly where witnesses had little or no opportunity for detailed observation during the crime"; (2) the difficulty of reconstructing suggestive or prejudicial procedure at a photographic identification at which the defendant himself was not present; and (3) the tendency of a witness' identification to become "frozen" by the photographic procedure.[40] The majority discounted the panacea of cross examination often invoked by the courts in refusing to extend *Wade*, finding that while "[s]ometimes this may suffice to bring out all pertinent facts, even at a lineup, . . . this would not suffice under *Wade* to offset the constitutional infringement wrought by proceedings without counsel."[41] The argument of preservation of the photograph as a curative measure fell to the same sword, for "it may also be said that a photograph can preserve the record of a lineup; yet this does not justify a lineup without counsel."[42]

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[37] The other was of one Bailey, also arrested in connection with the robbery. Bailey, whom the prosecution claimed was the party who ran into the bank and scooped up the money, was acquitted.

[38] 390 U.S. 377 (1968).

[39] No. 22,340 at 15 (D.C. Cir. March 1, 1972).

[40] *Id.* at 15.

[41] *Id.*

[42] *Id.*

After thus dismissing two of the more frequent arguments of courts having dealt with the same issue, the court concluded by noting that in certain circumstances a photographic identification cannot be regarded as a critical stage of the prosecution requiring attendance of counsel because it is "too preliminary and preparatory." [43] As illustrative of such preliminary identification, the court noted the practical justification for photographic identification when the defendant is still at large as discussed in *Simmons v. United States*.[44]

III. Analysis of *Zeiler* and *Ash*

Were the courts in *Zeiler* and *Ash* justified in their extension of *Wade*? Purely on the basis of what is actually stated in *Wade* they were, for Mr. Justice Brennan's opinion in that case is a perplexing mixture of logical deductions and blind alleys. Although the Court does refer to "the confrontation compelled by the State between the accused and the victim or witnesses to a crime," [45] which would tend to exclude extension of the rule to photographic identifications where the defendant is not present, most of the rationale of *Wade* seems equally or more applicable to photographic identifications. For instance, the Court notes "the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification" [46] as a possibility of prejudice (certainly equally a danger in arrangement of photographs or posing for the photographs themselves). The Court also notes the likelihood that once the accused has been picked out of a lineup by a witness, that witness will be unlikely to change his mind about that identification later[47] (also an equal danger with photographs). Another point made by *Wade* and equally or more relevant to photographic proceedings, is that "the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification." [48] *Ash* makes all of these points in the course of its justification for extending *Wade*,[49] and they all seem to be sound arguments in favor of the *Ash* decision.

But this is where the logical deductions of *Wade* lead into the blind alleys, and certainly the courts in *Zeiler* and *Ash* cannot be faulted for failing to find convincing points which the Supreme Court has failed to make. The basic issue involved in the *Wade* case, and in its countless de-

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[43] *Id.* at 17.
[44] 390 U.S. 377 (1968).
[45] 388 U.S. 218, 228 (1967).
[46] *Id.* at 228.
[47] *Id.* at 229.
[48] *Id.* at 231-32.
[49] *See* note 40 and accompanying text, *supra*.

rivative cases, is not whether the procedure under consideration (whether lineup or photographic identification) threatens great prejudice, but is whether, granted an environment in which prejudice is inherent, presence of counsel is likely to mitigate this prejudicial capacity. Of course the Court in *Wade* thought the answer to be in the affirmative, but in justifying its conclusion it failed to enumerate a single specific thing counsel could do at a lineup.[50] How much more ambiguous is the lawyer's role at a pre-trial photographic identification at which his client is not even present? By failing to specifically delineate the function of the lawyer at the lineup, the Supreme Court's decision not only made the role of counsel at a lineup proceeding ambiguous, but also had the ultimate effect of fostering the implicit suggestion that presence of counsel may be remedial in areas of pretrial procedure only vaguely similar to the lineup itself.

Is a pre-trial photographic identification "only vaguely similar" to a lineup? There are sound arguments that it is. The number of possible procedural variations and permutations in a lineup are incredibly diverse, since the accused may be asked to speak, move about, wear certain garments, stand in a prescribed manner or perform any number of other graphic exercises for observation of witnesses.[51] Any of these possibilities may be greatly prejudicial to the defendant, and the specific circumstances of the prejudice may be lost without presence of counsel. By contrast, in a photographic identification the possibilities of prejudice are necessarily more limited and more predictable, and it is far more likely that the oft-noted safeguard of cross examination of eyewitnesses will suffice to bring them to light.

But does the fact that the prejudicial possibilities are less varied in a photographic identification necessarily mean that they are insignificant? The majority of the state and federal courts seem to have embraced this logic either expressly or impliedly in their adamant refusals to extend *Wade*. Yet the logic of *Zeiler* and *Ash* seems by no means so clearly erroneous as

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[50] Some cases have recognized this difficulty and attempted to attain some degree of specificity. *E.g.*, United States v. Allen, 408 F.2d 1287, 1289 (D.C. Cir. 1969). For a detailed discussion of the problem, *see* Read, *Lawyers at Lineups: Constitutional Necessity or Avoidable Extravagance?*, 17 U.C.L.A. L. REV. 339 (1969).

[51] United States v. Ash, No. 22,340 at 30, n. 7, (D.C. Cir. March 1, 1972) (Wilkey, J., dissenting):

> Because so much more takes place at a lineup than at a photographic identification, I disagree with the assertion of the majority that "the same may be said of the opportunity to examine the participants as to what went on in the course of the identification, whether at lineup or on photograph." . . . The little drama of a lineup seems to me much more difficult of reconstruction by examination of participants than does the photographic identification. Thus I see a greater need for the participation of counsel in the case of the lineup than in the case of the photographic identification.

to justify such treatment, and one is left with the conclusion that the vast majority of courts in refusing to extend *Wade* are motivated not so much by an extension of the *Wade* rationale to a logical extreme, as by an unyielding refusal to extend the constitutional criteria delineated in *Wade* beyond the point the Supreme Court has made mandatory. While this may result in some rather bizarre graspings at straws and seeming non sequiturs, it is not necessarily an exhibition of a frustrating purblindness on the part of the courts. *Wade* is, as earlier noted, a case of extreme open-endedness, the logical extremes of which boggle the imagination. *Wade* makes the criterion for presence of counsel not simply whether the stage in the criminal investigatory proceedings in question is critical insofar as it offers legal complexities completely foreign to the average layman, (which complexities require presence of one schooled in the law to interpret), but broadens the test for presence of counsel by embracing a stage of investigation where there are no legal complexities. Rather, the investigative process itself is suspect, in that various possibilities of prejudice are inherent within it. This is the door that *Wade* opens, and through which *Zeiler* and *Ash* were among the few willing to pass. Indeed, if the courts were to follow *Wade* en masse to its logical extremes, the result would be the presence of a very harried and disgruntled attorney at every stage of criminal investigation wherein the slightest taint of prejudice to the defendant might inhere.[52]

Are *Zeiler* and *Ash* correct? Yes and no.

IV. Conclusion

Yes, *Zeiler* and *Ash* are correct insofar as they logically extend the *Wade* rationale; no, they are not correct insofar as they do not derive from any workable, limiting criteria that would realistically focus the *Wade* rationale. The fault lies more with *Wade* than with *Zeiler* or *Ash*, for the Supreme Court should have foreseen the sweep of its resort to the sixth amendment sanction, and defined its conclusion in terms of the specific safeguards it hoped the lawyer would implement at the lineup. By its failure to do so, the lower courts face a difficult dilemma from which they must extricate themselves in the best manner possible. It is not surprising then to find resort made to standards and arguments with only the most superficial applicability, such as the *Simmons* test earlier noted.

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[52] *See id.* at 79 (MacKinnon, J., dissenting):

> Under the majority opinion, after defendant's arrest the defense counsel would have to be notified every time a new or old witness was shown any photographs of the defendant or other suspects. This will constitute an unreasonable interference with post-arrest investigations and would require defense counsel to be present wherever such photographs may be shown by police or FBI personnel to any witness anywhere in the country.

It is submitted that while the *Simmons* test, reflective of the expediency of photographic identifications before an arrest has been made, is not the correct one in considering whether to extend *Wade* to photographic identifications made after an arrest; some sort of limiting test is needed. Such a test should be more specific than the *Simmons* test and should require a showing of derogation of the defendant's rights in some way that presence of counsel could remedy. This is more in keeping with the classic analyses of the lawyer's function as well as more likely to result in a meaningful application of *Wade*. It is important to note that *Wade* is not a case which calls for a per se exclusionary rule in reference to evidence obtained in contravention of its constitutional mandate, but rather allows identification testimony derivative from a lineup without counsel present to be used whenever an independent origin for such identification is shown.[53] This is a flexible standard and one of utmost importance to keep in mind in light of the lack of specificity in the decision as a whole. The attorney is not an end in himself but rather a means to an end. It is but common sense that if the identification in question had independent origin the lineup could not have been a critical stage, and the presence of defendant's counsel could have had no significance. This is equally true of a photographic identification and should be equally noted as the courts debate the extension of *Wade* into the photographic realm.[54]

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[53] 388 U.S. 218, 241-42 (1967).

[54] It seems that neither *Ash* nor *Zeiler* would have come out as they did with the conscientious application of a test such as advocated here. In *Zeiler*, defense counsel was able to reconstruct at trial the circumstances under which the pretrial identification had been conducted as well as produce the actual photographs used. United States v. Zeiler, 278 F. Supp. 112 (W.D. Pa. 1968). The defense, of course, had strong argument in *Zeiler* that the showing of photographs destroyed the effectiveness of the subsequent lineup held as per *Wade*. On remand, however, the court deemed Zeiler's identification to have independent origin other than any photographic showings outside the presence of Zeiler's counsel. United States v. Zeiler, 447 F.2d 993 (3d Cir. 1971).

In *Ash* the argument is also strong that the very completeness of the majority's justification for extending *Wade* indicates no extension is needed.