10-1971

Kirby v. Illinois

Lewis F. Powell Jr.

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Mr. Justice White, concurring in the result:

United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967), govern this case and compel reversal of the judgment of the Illinois Supreme Court. The State requests that we reconsider and overrule Wade and Gilbert. I am not at this time persuaded that those cases should be overruled, and I would prefer not to consider taking that step without reargument to a full Court.
January 17, 1972

Dear Chief:

I have your memorandum suggesting reargument in No. 70-5061, Kirby v. Illinois, No. 70-26, Gooding v. Wilson and No. 70-45, United States v. Brewster.

You indicate that you thought the votes in each of these cases was 4 to 3. My record shows that Gooding v. Wilson was 5 to 2 to affirm. The votes to affirm were Thurgood, Byron, Potter, Bill Douglas and I. The votes to reverse were yours and Harry's. I've circulated a proposed opinion for the Court on that premise.

My records do show that the votes in Kirby and Brewster were both 4 to 3. In Kirby I've circulated an opinion which Bill Douglas and Thurgood have joined. Byron has filed a separate opinion concurring in the judgment.

In Brewster, my record indicates that Potter, Thurgood and Harry have joined your opinion and Bill Douglas has joined my dissent. Byron also voted to affirm.

You'll remember that my view on reargument of 4 to 3 cases is that this is a matter for conference discussion. Certainly, as in the case of S & E Contractors, if at least four of seven vote reargument then there should be reargument. I would suppose someone would have to make the motion and then a vote be taken as we did Friday in S & E Contractors. In any event, I see no reason for rearguing Gooding v. Wilson if the five who voted to affirm remain of that view and join my proposed opinion.

W. J. B. Jr.

cc: The Conference
January 17, 1972

Dear Chief:

I vote against putting down for reargument the following cases:

No. 70-26 - Gooding v. Wilson
No. 70-45 - U. S. v. Brewster
No. 70-5061 - Kirby v. Illinois

William O. Douglas

The Chief Justice

CC: The Conference
MEMORANDUM TO THE CONFERENCE:

We have now set two cases for reargument and there are others that seem to me should be similarly treated.

The following are my "nominations" for reargument.

No. 70-5061 -- Kirby v. Illinois
No. 70-26 -- Gooding v. Wilson
No. 70-45 -- U.S. v. Brewster

I previously indicated my willingness to have S. & E. Contractors v. U.S., and Lego v. Twomey reargued. The former is now scheduled for reargument and the latter has come down. There may be others, and generally I will vote to reargue any 4-3 case unless it is a "JMH pewee."

To facilitate filing problems, I am sending individual memos on each of the above.

Regards,

[Signature]
January 18, 1972

Dear Chief:

This is in response to your memorandum of January 17 concerning rearguments.

I nominate for reargument the two abortion cases, No. 70-18, Roe v. Wade, and No. 70-40, Doe v. Bolton. It seems to me that the importance of the issues is such that the cases merit full bench treatment.

I think another candidate is No. 70-58, Fein v. Selective Service System.

So far as your nominations are concerned, my reaction is that No. 70-45, United States v. Brewster, because of its fundamental importance and precedent, deserves reargument, and that No. 70-5061, Kirby v. Illinois, should also be reconsidered. Justice White's separate concurrence certainly so indicates.

In summary, I vote to set down for reargument Nos. 70-18 and 70-40, No. 70-45 and No. 70-5061. I shall abide by the Conference's reaction as to No. 70-58.

Sincerely,

The Chief Justice

cc: The Conference
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KIRBY

vs.

ILLINOIS

Conf. 2/25/72

No. 70-5061

KIRBY

vs.

ILLINOIS

RELIST

(Vote 5 to 4)
### KIRBY

**vs.**

**ILLINOIS**

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QUESTIONS PRESENTED:

(1) Does the Wade-Gilbert rule that pretrial line-ups are critical stages of the prosecution at which the accused is entitled to counsel apply to pre-indictment line-ups?

(2) If so, should Wade and Gilbert be overruled?

FACTS

Petr and another man were charged with the day-light robbery of a man walking along the street in Chicago. Two days after the robbery, police officers stopped the two men and questioned them about an unrelated offense. Upon examining their identification, the officers noticed that each possessed papers indicating that he was Willie Shard, the robbery victim. Although the police were unaware of the robbery, they thought it

suspicious that each would possess the same ID. Upon questioning, the police officers decided that the two should be taken downtown. In the meantime, Shard had reported the robbery and the arresting officers checked the police records and discovered that a Willie Shard had been victimized. They called Shard and told him that they had picked up two suspects and asked him to come to the station to identify them. A police officer was sent to Shard's residence to pick him up and bring him to the station. Shard was brought into a squad room where the two defendants and two police officers were seated. Shard immediately stated that the two were the men who had robbed him.

Petr was tried by a jury and found guilty of the robbery for which he received a 5 to 12-year sentence. His conviction was aff'd on appeal.

DISCUSSION

(1) Question # 1

The Illinois SC held that Petr's 14th Amendment right to due process (right to counsel) had not been violated by the show-up after arrest in the absence of counsel. The State ct read Wade and Gilbert as requiring counsel only at post-indictment line-ups. This is the minority view, accepted by 5 states and no federal courts. The majority view, that the rationale of Wade applies with equal applicability to pre- and post-indictment showings, is accepted by 12 states and 7 of the Circuits.

When the case was argued originally, there were three opinions issued. Justice Brennan, joined by Justices Douglas and Marshall, held that Wade and Gilbert contemplated no
limitation to post-indictment line-ups. Justice White stated that Wade and Gilbert govern the instant case and that the only real question is whether those cases should be overruled. That he is unwilling to do without reargument by the full Court. Justice Stewart, joined by the Chief Justice and Justice Blackmun, dissented on the ground that Wade and Gilbert applied only to cases in which the show-up occurred after the defendant was indicted. The judgment of the Court, then, prior to this reargument was 4-3, with Justice White apparently willing to reconsider after hearing argument anew. Therefore, it is apparent that you and Justice Rehnquist are likely to cast the "swing" votes in this case.

The first question, whether Wade-Gilbert applies only to post-indictment lineups, is, for me, a rather easy question. There is language at two points in the Opinion for the Court (Brennan, J.) in which he states the holding to be that "there can be little doubt that for Wade the post-indictment lineup was a critical stage of the prosecution . . ." Id. at 237. Also, when stating the question, Brennan states that it is "whether courtroom identifications of an accused at trial are to be excluded from evidence because the accused was exhibited to the witnesses before trial at a post-indictment lineup . . ." Id. at 219. The only other grain of text indicating that Wade could be properly limited to its facts is the brief discussion concerning the absence of "counter-vailing policy considerations against the requirement of the presence of counsel." Id. at 237. On this score the Court points out that prompt identifications will not be forestalled since attorneys for Wade and Gilbert had already
been appointed and were available. The Court goes on, however, to point out that "we leave open the question whether the presence of substitute counsel might suffice where notification and presence of the suspect's own counsel would result in prejudicial delay." Id. Finally, it may be noted that in the facts of each case the defendants were both already under indictment. This is the extent of the textual support for the proposition that Wade-Gilbert may be read restrictively.

The evidence on the other side is overpowering. The thesis of the Wade and Gilbert opinions is that the right to counsel guaranteed by the 6th Amendment, through the 14th, extends outside the courtroom and into the pretrial area to those points in the criminal process where "critical confrontations of the accused by the prosecutor" occur and "where the result might well settle the accused's fate and reduce the trial itself to a mere formality." Id. at 224. At other points the Court makes clear that the right to counsel contemplates the right to "meaningfully cross-examine" witnesses against him. Id. at 223-24. The Court also states,

"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." Id. at 226.

Without belaboring the point further, I think a fair reading of the Brennan opinion undercuts pretty thoroughly the notion that its principle applies in cases of post-indictment confrontations only.
Secondly, the other opinions concurring in the judgment that the right to counsel applies at the lineup stage (Clark, Black, Fortas) each agree separately that the right exists but none of those opinions even intimates that the ruling is restricted to post-indictment lineups. Clark's short opinion would seem, most clearly of the three, to contemplate application of the rule to pre-indictment lineups. His thesis is that when Miranda held that an accused had a right to an attorney at a "custodial interrogation" he surely had the same right for all lineups.

Thirdly, the dissenting Justices make a point of pointing out the breadth of the majority's opinion:

"The rule applies to all lineups . . . regardless of when the identification occurs, in time or place, and whether before or after indictment or information." Id. at 251.

The majority chose not to counter this assertion in the dissent although Justice Brennan did feel compelled to respond to other broad assertions in the same paragraph of the dissent. See, footnote 33, Pp 241-42, in which the majority counters the contention that the rule applies regardless of the circumstances of the case.

If this case were merely one of parsing the language of Wade and Gilbert to determine what its scope is, I think this case would present no problems. If one goes beyond the terms of the opinions and asks whether there is any rational basis for drawing a line at the indictment stage, I still think the problem is not a difficult one. If counsel serves a valuable function at any lineup, he serves that same purpose whether the accused has been indicted or not. I think this
is the teaching of Escobedo and Miranda. The former recognized a right to counsel at a stage in which the investigation has "focused" on the accused. Miranda, in footnote 4 of the majority opinion, says that "focusing" has occurred whenever the accused is interrogated while in custody, i.e., custodial interrogation.

Illinois argues that the showing in this case was purely investigatory and that the case had not yet sufficiently focused on the defendants to constitute an accusatory stage of the case. That argument has little force on this record. The police had in custody two men who had in their possession articles of identification and travelers checks with the name of the victim on them. The victim has recently reported being robbed by two men. The police immediately called Shard and asked him to come to the station. There was little room for doubt that the police thought they had the perpetrators of the robbery. Even if they were not sure, it is almost uncontroversial that they had significantly focused on the accused. The importance of the showing on these facts cannot be underestimated. The identification of the two my the victim was predictably the key element in the case. Petr and his friend had attempted to explain that they stumbled across the IDs in an alley. A positive identification would seal their fate, a negative investigation might have lead to their release.

There is the argument, on the other side, that a requirement of counsel at this stage will unnecessarily delay investigations and will impose an administrative burden on the states. A burden there is. But it is no more cumbersome
than the burden imposed by Miranda. The state must provide
the accused with the opportunity to state whether he wishes to
have counsel at the lineup. If he so desires, a lineup must
be postponed until counsel is available. The procedure would
be precisely the same, and the interference with the investi-
gative process no more difficult, as the case of an in-cus-
tody interrogation. Of course, exceptions might still be
allowed for exigent circumstances, such as on-the-scene
show-ups. Several courts have held since Wade was decided
that in the exigent circumstance in which a suspect is appre-
hended shortly after a crime, the police would be justified
in taking the arrestee back to the scene of the crime and
showing him to the victim or other eyewitnesses. This is
justified by the dual interests in obtaining a quick affirmation
that they have the right man so the investigation may cease
(or continue, depending on the result of the showing). Also
the witness's memory is likely to be freshest immediately
after the incident; details which fade with time may still be
fresh several minutes or hours after the commission of a
crime. While those interests of the law enforcement personnel
may justify a counsel-less showup under exigent circumstances,
they do not justify the broadscale use of counsel-less lineups
prior to indictment.

One final note. The California amicus brief states, at
page 12, that "the innocent suspect in particular has a
common, nonadversary interest with the police; the expeditious
conduct of an identification procedure which may bring about
his release from custody." Since it is the prospect of mis-
identification which is the wellspring for all of the Court's
concern in this area, I think it crucial to examine whether
the potential victim of a misidentification would sensibly prefer to have an immediate counsel-less show-up. I think that if I were arrested because I matched the description someone had given of a robber or other criminal, I would most certainly want the aid of an attorney in a hurry. Once I am identified--mistakenly--in a lineup I may never be able to undo that damage. The California statement is the product of the basic assumption, shared by many who look upon constitutional-procedural protections as nothing but impediments to law enforcement designed to cuddle and coddle, that the innocent have nothing to fear from the law. The criminal justice system is built on the notion that it is hard for the government to convict, and the central purpose of the whole complicated system is that it is better that a few guilty go free than that one innocent man be wrongly convicted. It may be the balance swings too far in one direction or the other, but the underlying assumption seems to me to be unassailable.

The dissenting opinion of Justice Stewart's takes the tack that the lineup-counsel requirement only comes into play after indictment. The formal charge marks, so the dissent argues, the moment when the "criminal investigation has ended and adversary proceedings have commenced." This, in any practical sense, simply is not so. In many cases the police have focused attention on one prime target and have made the decision that this is the man whom they will seek to indict--it is no longer the broad-based investigation into an unsolved crime. Again, it seems to me that Miranda and Escobedo effectively recognized the fallacy of attempting
to find some mechanical point in the process to invoke the constitutional right to counsel. Justice Stewart also makes the argument that the state is more likely to have already provided an indicted man with an attorney, i.e., a post-indictment rule would be administratively easier to operate. Finally, he indicates that in pre-indictment cases, there is the rule of Stovall v. Denno applying the due process to void any lineups which are shown to be unnecessarily suggestive and conducive of irreparable misidentification. This, it would seem, begs the question. One of the reasons for having counsel after an indictment is to guard against misidentification. The mere additional judicial argument does not explain why the line should be drawn at the indictment stage. The dissent is unpersuasive. Even Justice White who wrote the dissents in Wade and Gilbert was unwilling to join Stewart's opinion here. Either the Court must go all the way and repudiate these cases or it must find some more logical cutoff point for the right to counsel (the point which I find most logical is the exigent circumstances test discussed briefly above).

(2) Question # 2

Assuming that the Court is unable to draw a line at the indictment stage, then it may wish to consider reversing its prior decisions. This course is urged on the Court by both the Respondent, State of Illinois, and the amicus from California. That step would obviously be a giant one for the Court and will be trumpeted throughout the country as the harbinger of a new era on the Court—it will stand as one
of the first indicia of the impact of the Nixon appointments on Warren Court precedents. Therefore, the decision will necessarily be one that will be long and carefully considered by any Justices voting to overrule Wade-Gilbert. At this point in time, it would probably not be terribly helpful to write either a defense or an attack on the lineup-counsel rule. Rather, it may be beneficial to look briefly at the underpinnings of Wade to determine what basis might be available for justifying rejection of that ruling less than 5 years after it was announced.

The notion that an accused is entitled to counsel at a lineup is apparently premised on two considerations. First, the presence of the accused's lawyer is likely to assure to a greater degree that the lineup will be conducted in an environment relatively free of suggestive circumstances. The potential for the police to "tip-off" the witness which person in the lineup is the desired choice will be minimized. Indeed, it may have been contemplated that an attorney might make suggestions to assure a fair lineup in a spirit of cooperation with the police. Second, an attorney who was present at the confrontation will be better able to cross-examine the identifying witness at trial as to the circumstances of his out-of-court identification. One of the problems which existed before Wade, much like the problem before Miranda, was that there was never any reliable manner for determining what actually occurred at the police-accused confrontation. Too frequently the courts were presented with two stories which differed dramatically in their account of a particular confrontation. In such testimonial deadlocks, judges, understandably,
often chose to believe the testimony of the police, who generally had less reason to lie and a better track record for reliability than the ordinary defendant. While introducing an attorney into the confrontation might not have completely put to rest the "lying match" aspects of many pretrial meetings, it probably did narrow the limits of fabrication on each side. The police are less likely to lie when they know that on cross-examination they may not be able to withstand a searching inquiry. Likewise, the defendant's attorney is likely to be much less willing to embellish the facts of the pretrial confrontation than is an accused who might feel that he has nothing to lose.

Neither of the briefs (California or Illinois) persuades me that the Court was in error in finding these interests sufficient to justify a holding calling for expansion of the right to counsel. The primary attack of both briefs is centered on the argument that counsel is ineffective at the lineup. He has no mandatory power to tell the police how the lineups are to be run. He cannot advise his client to refuse to stand for the lineup. Furthermore, it is even suggested that the nature of the adversary process is such that an attorney will strive for a suggestive lineup in order to provide a basis for reversal at a later point.

Several points should be made in rebuttal to these assertions. First, while the attorney has no power to compel a nonsuggestive lineup, his mere presence is likely to assure a more acceptable attempt on the part of the police. Even if he does not say a word in his client's behalf, his watchful presence must certainly have an effect on the manner
in which the array is presented and on the extent to which the officers make suggestive comments.

It is, secondly, unfortunate that the Court does not have the opportunity to perform some empirical experiments of its own. Or, at the least, to view a representative sample of lineups. Last year many of the CADC law clerks were permitted to attend local lineups to see how they progress. On one occasion Judge Wilkey went along to gain some firsthand experience himself. My impression was that the police and the attorneys present (mostly court-appointed) cooperated cordially in preparing the array for the identification. The attorney could tell his client where to stand, could instruct him to walk and talk normally, could suggest that one or another person be added to or deleted from the array, could suggest that his client either take off or put on an article of clothing to assure that he did not stick out because of his clothes, etc. There appeared to be none of the expected adversariness about the procedure; the two sides seemed able to work fluidly together. The attorney was routinely provided with the description of his client given by the witness to the police. Also, a photo of the array was routinely taken and preserved by the Government to introduce at trial to show that the lineup was free of suggestivity. This entire procedure has, in the District, been codified into police regulations drafted by the Department's Legal Counsel Office. With the procedure this highly developed it is not surprising that attorneys no longer find it of as great value to be present at the confrontation as they might have at some former time (see citation to Read Study. pp 33-39).
The argument has also been made that the attorney's presence is not valuable because the attorney may not take the stand to testify about the circumstances of the lineup. But, as I view the utility of cross-examination, he need not testify. Rather he asks the witness to describe the circumstances of the identification and has a basis to impeach if the witness deviates from the facts as he knows them.

The briefs in this case suffer somewhat because Petr has not undertaken to defend in any detail the Wade principle. We have not been cited to any law review or other authorities which defend the side of the coin opposite to the tact taken by the two states arguing in this case. Before any serious decision to reverse Wade is undertaken—at least on the basis of the practical considerations proffered by Respondent and amicus—a thorough search of the authorities should be undertaken.

One final point, this particular case would seem to be a poor one in which to repudiate Wade and Gilbert. The facts in the case are not very sympathetic to the government. This was the sort of one-on-one showup which is likely to lead to misidentification. The Illinois Supreme Court held that in light of the totality of the circumstances the showup was not impermissibly suggestive. That question is not now, strictly speaking, before the Court since the grant of cert was limited to the pre-indictment counsel question. Nevertheless, the fact that the lineup did not comport with what the Court could refer to as good police practice, this might be a poor case in which to announce that the counsel requirement has been demonstrated to be no longer
of practical utility.

CONCLUSION

Because of the importance of the problem, and because the Petr does not persuasively defend the Wade rule, I have written more than I intended to write. While I have indicated a clear position on this case, I do not know that, were I writing this memo 5 years ago before Wade was decided, I would have made the same recommendation. But, that point has been passed and the burden has shifted to those who wish to wipe away what the Court has already done. On the question whether Wade may be restricted in its appliability to post-indictment lineups, I think that the burden has clearly not been met. Justice Stewart's attempt does not succeed. On the more fundamental question whether the case should be thrown out, the evidence gathered to date is not compelling enough to justify repudiation of Wade on the ground that the Court erred as a matter of empirical knowledge. That leaves the Court only with the choice of stating that the change in the judicial philosophy of new members on the Court since 1967 (5 of those on the Wade are gone, replaced by Justice Marshall and the 4 Nixon appointees). That is a step which I doubt the Court is prepared to take at this early date.

I would, therefore, reverse in a short opinion, indicating while Wade-Gilbert, like all other precedents, will continue to be the subject of close scrutiny, so long as it survives no distinction may be drawn between the pre and post-indictment lineups. Conceivably, in dicta, the Court might lay down a dividing line, as the Brennan opinion appears to do
in his draft (arrest, absent exigent circumstances).
My Comment - I might agree that this type of identification is inherently
unfair under Stovall v. Denno.

Solove (for Kirby)

Issue is 6th Amend. Pt to Counsel
& not 5th Amend. Privilege v. Immunity
v. Denno only.
No Stovall issue here because of
limitation of our grant. But Stovall was
relied upon in 7th Ct (see A53) & rejected
by 7th Ct. (The "showup" was inherently
suggestive).

Zagel (for Def)

Request overruling Wade & Gilbert
Denies that a Stovall issue may be
considered in this case - not an equal or equal.
Shard had not been advised that
Travelers' checks had been found on suspect.
No function of counsel at showup or
any effort except as a "witness" - which is not
a role of counsel.

As was under arrest - for "exercising
unauthorized control over the property of another" under the law.
Kirby gave conflicting test. as to why he
had none of the Travelers' checks.
Douglas indicated there is a decline in his mental capacity, not just a mental state identification.

Suggesting that under the "immunity protection" (6th Amend) his trial commenced.

We do not need to over-rule Wade unless maj. of ct. conclude there is no difference bet. pre- and post und. trial up.

George (Calif.)

- Calif. ct extended Wade & Gilbert to pre-indictment stage.

Will rely on Calif. cases to illustrate what happens.

Extended by Calif. ct to pre-arrest/stage.

Waiver of Miranda rights held not effective to a show-up on same day.

Alley v. Duren's right to be present for witness unk.
(People v. Williams 478 P. 2d 84)

Consider effect on innocent suspects.

* Believer Stowell v. Duren in answer to this problem.
Case is covered by Wade/Gilbert because an "accusatory" stage had been reached — there was probable cause for arrest; thus a "retrospect" stage had been reached, & rationale of Wade/Gilbert applies here. Thus, we either have to over-rule W/G or reverse this case.

With or without a lawyer — this show-up was unfair (thus J. Stewart commented that Smith applies)
Tentative Impressions*

See the notes of my views on the bench memo, prepared by Larry.

Tentative Views:

1. Wade, 388 U.S. 218 and Gilbert, 388 U.S. 263 establish "a per se exclusionary rule" as to testimony with respect to identification at a line-up where the suspect does not have counsel. The majority opinions give two reasons: (i) that such a rule is necessary as a sanction for law enforcement; and (ii) that it promotes fairness in criminal trials. On the first point, in Gilbert the Court said:

"Only a per se exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical line-up." 388 U.S. 273

If I had been on the Court, I would have joined with Justices White, Stewart and Harlan in dissenting.

*These impressions are dictated on the afternoon following argument to record my initial and tentative impressions. I will have read, in preparation for the arguments, the principal briefs, some of the cases and the bench memo. I hope to do further study before the conference. My views are subject to change and to the discussion at the Conference.
2. Wade and Gilbert involved post-indictment line-ups. This case (Kirby) involved a pre-indictment "show-up". In the two earlier cases it was held that a "line-up" is a "critical stage" in a criminal prosecution, requiring counsel under the Sixth Amendment.

I suppose we could hold - as Justice Stewart's tentative draft opinion does - that there is a valid distinction between a post-indictment and a pre-indictment identification. Although I may be willing to accept this view, I doubt that such a distinction is necessarily sound.

It is true that an indictment usually follows a preliminary hearing, and the Court has held that counsel is required at such a hearing. Thus, an accused person would then have counsel representing him. Moreover the stage is somewhat more "critical" than the pre-indictment "show-up". The latter can be quite preliminary, and can benefit the innocent who might otherwise be detained.

But facts and circumstances vary quite widely, and - for reasons stated by Mr. Justice White in his dissent in Wade - I am not sure that a distinction is justified on principle.

3. I am opposed to "per se exclusionary rules" for the purpose of disciplining police officers unless the Constitution clearly mandates them. The Constitution does require the right to counsel, but only "in criminal prosecutions". I do not think it can be said that every
identification of a suspect, or even of a person indicted, is a part of "a criminal prosecution".

We have already encrusted the criminal trial with a number of "per se exclusionary rules". No other country has imposed such a straight-jacket on its criminal system and on law enforcement.

4. It is far wiser, if one takes the long view, to apply the Stovall v. Denno, 388 U.S. 293 concept that an identification always can be excluded if it was unduly suggestive or otherwise violated fundamental fairness. In Stovall, the Court refused to make Wade and Gilbert retroactive for several reasons. One of these was because - in the Wade-Gilbert type of situation:

"It remains open to all persons to allege and prove, as Stovall attempts to do in this case, that the confrontation resulted in such unfairness that it infringed his right to due process of law. See Palmer v. Peyton, 359 F. 2d 199 (CA 4 1966)."

I think it is wiser long range.
**KIRBY**

**vs.**

**ILLINOIS**

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**Appendix**

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Douglas, J.  

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Brennan, J.  

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draft opinion.

Blackmun, J.  

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Stewart, J.  

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Powell, J.  

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White, J.  

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[Chief Justice]  

Can distinguishing between pre-indictment & post-indictment conditions.
Attached you will find: (1) the 3d draft of Justice Brennan's dissent in this pre-accusation lineup case; and (2) Justice White's separate statement dissenting because of the binding influence of Wade and Gilbert.

Justice Brennan's dissent is changed only in that he has examined the briefs in three cases dealing with the Wade-Gilbert problem--Fosrer, Coleman, and Stovall--and has demonstrated that the Court entirely ignored the rationale suggested in Justice Stewart's opinion.

LAH
Kirby v. Illinois, No. 70-5061

PROPOSED ADDENDUM TO SUGGESTED ALTERNATIVE THEORY

My note yesterday failed to make clear the thesis I am suggesting. I will, therefore, restate it here.

Wade-Gilbert, like all rules extending the right to counsel to new areas, was written in the face of serious practical problems. Whenever the procedural protections accorded the accused are expanded they, necessarily, make the prosecutor’s task more difficult. Sometimes the problem is simply a financial one for the states—breathing more lawyers into the system. In other cases, however, the primary difficulty of a new right to counsel rule might be its impact on the fluid administration of justice. This is such a case.

The interests in this case—itemized in Justice White’s Wade dissent—inhere in the efficient investigation of unsolved crime. Immediately upon apprehending a suspect it is in the interest of the police to obtain a positive or negative investigation. If the police can hold a lineup immediately they may determine whether they have the right man or the wrong man. If they have the wrong man it will signal the police that their investigation must continue. Moreover, there is a substantial interest in promptitude because, as any investigator knows, the memories of victims and witnesses fades rapidly after a crime. If the police are forced to hold the suspect until such time as counsel can be appointed and a convenient time arranged for a showing (remember that the witnesses, the accused, the prosecutor, and his attorney must all meet at the same time—conceivably this might entail a delay of several days). Additionally, it is in the best interests of the accused—if he is innocent—
to have a quick showing in order that he can be released, rather than languishing in jail awaiting an identification.

How did Wade address these practical problems with a rule that counsel is required at every lineup? By indirection, it dodged the tough questions. It focused on the problem as if the accused already had counsel and it was simply a matter of giving him a call. Or, if time did not permit contacting the accused's attorney, substitute counsel might be permissible. This answer clearly assumes that counsel has already been appointed. In fact, the majority specifically noted that both Wade and Gilbert already had counsel appointed to represent them. With this response of the majority's in mind, and emphasizing that the Court was clearly presented with both a request to extend the counsel right to every lineup and a listing of the practical impediments, the several statements that the cases held lineups essential for 'post-indictment showings takes on added significance.

You are on record, in Arzorsinger, as doubting the efficacy at the lineup stage of prophylactic rules. Because counsel/may be necessary to assure a fair trial in some cases, the Court in Wade mandated that counsel be present in every post-indictment case. To enforce the prophylactic rule the Court imposed a per se exclusionary rule which operates to render inadmissible post-indictment every/pretrial lineup in which counsel was not provided, irrespective how professionally the lineup was conducted. You may wonder whether either the rigid prophylaxis or the per se exclusionary rule are justified under the fundamental fairness test of due process. And, if this case squarely presented the need to re-examine those precepts, you might
join the dissenters in that case. But this case, does not require re-examination of the basic premise since it raises a question which is beyond the scope of Wade. The most fundamental of restraintist notions compel that Justices not reach out to overrule constitutional decisions where to so so is not necessary to an appropriate disposition of the case before the Court.

The Court has been shown no reason to do today what it refused to do in 1967 when Wade was written. The practical barriers to the total extension of the prophylactic & exclusionary rules are as formidable today as they were then. You could register your vote to affirm on the basis that you are content to leave matters where you understand them to have been left in Wade. The critical line which was drawn in Wade is whether or not the investigation has sufficiently progressed to the point at which counsel has already been appointed. Usually this is the indictment stage. But, often, as Justice Stewart notes, formal accusation and appointment of counsel precede indictment and you can agree with Justice Stewart that Wade was written to apply at that stage since, like after an indictment, counsel is available.

You might close by reminding the dissenters that you approve of the rationale of Stovall that the due process clause renders inadmissible any identification which takes place under circumstances which lead to the possibility of an irreparably mistaken identification. This rule operates whether or not the accused has counsel at the showing, and it stands to assure that the rights of the accused will not go begging.
NOTE: This is not the approach followed by Justice Stewart. His effort is to distinguish Wade in terms of the language of the opinion and the constitutional principles on which the case is based. That effort totally fails as Justice Brennan illustrates.

One of the arguments which will be made is that drawing a line at the formal accusation stage will permit easy subversion. Police will simply embark upon the practice of holding all lineups before counsel is appointed. There are at least two answers to this assertion. First, it presupposes a level of disingenuousness on the part of federal and state prosecutorial officials which is not warranted by anything other than bald assertion. Second, we know that some jurisdictions, notably the District of Columbia, have established an enviable set of police regulations governing lineups. Those regulations are written and available and can be cited as a model of regularized procedure. Lineups are held in virtually every case and the lineup occurs very shortly after arraignment and appointment of counsel. Counsel and prosecutor cooperate to place the accused in a lineup which will not allow him to stand out. There is no real likelihood that the DC police are going to throw out their well established and fluid procedure.

I urge you to consider a short opinion along these lines.

LAH
(1) Focus on following language in Wade:

"No substantial countervailing policy considerations have been advanced against the requirement of presence of counsel. Concern is expressed that the requirement will forestall prompt identifications and result in obstruction of the confrontations. As for the first, we note that in the two cases in which the right to counsel is today held to apply, counsel has already been appointed and no argument is made in either case that notice to counsel would have prejudicially delayed the confrontations. Moreover, we leave open the question whether the presence of substitute counsel might not suffice where notification and presence of the suspect's own counsel would result in prejudicial delay.

A footnote appended to the above discussion repeats the salient point:

"Although the right to counsel usually means a right to the suspect's own counsel, provision for substitute counsel may be justified on the ground that the substitute counsel's presence may eliminate the hazards which render the lineup a critical stage for the presence of the suspect's own counsel."

(2) Justice White's dissent may have been the force causing the majority to note the practical aspects of their opinion. He speaks of the state's "valid interests" in the "prompt and efficient enforcement of its criminal laws."

"Identifications frequently take place after the arrest but before an indictment is returned or an information is filed. The police may have arrested a suspect on probable cause but may still have the wrong man. Both the suspect and the State have every interest in the prompt and early identification at that stage . . . . Unavoidably, however, the absolute rule requiring the presence of counsel will cause significant delay and it may very well result in no pretrial identification at all."
"Counsel must be appointed and a time arranged convenient for him and the witness. . . ."

(3) A look at the briefs in Wade—especially the SG's brief—it is by bet will indicate that one of the arguments raised was that there were significant practical problems with counsel at lineups. And, it is also my bet, that they will indicate that the gravest practical problems arise where the accused has not yet been appointed counsel.

(4) The majority's indirect to the arguments of the SG and the dissenters was simply to limit the decision to post-indictment confrontations, since the accused will already have been appointed counsel. That is certainly the import of the language quoted in (1) above referring to the fact that he already has counsel.

(5) Viewed in this light, the holding requested in Kirby is an extension that the Court was unwilling to make at that time. You may agree with the dissenters in this case that a good lawyer would read the Wade thesis as equally applicable to all lineups, whether pre or post-indictment. While you have reservations about the Court's power to write exclusionary rules to effectuate Constitutional decisions, you need not take issue with Wade in this case because—at least in terms of the practical application of the Wade rule—Kirby marks an extension.

(6) If this case is a test of "principled constitutional adjudication" it might be well to point out that any lack of principle is attributable directly to Wade itself. It is strange that the dissenters can now accuse the majority of being unprincipled because they refuse to do what the majority in Wade itself refused to do.
(7) While you are unwilling to extend Wade, you may note that the constitutional protection at which Wade was primarily aimed--protection against suggestive showings which might lead to irreparable misidentification--is still protected under the due process clause. That clause is preferable at any rate since it requires no per se rules but asks only a case-by-case application.

I think a separate concurrence along these lines would have the benefit of honesty. It has the disadvantage of tacitly recognizing that the line drawn (indictment) is not one derived from the Constitution itself. If this view commends itself to you, I can write a two or three page opinion in a matter of hours. If this view does not commend itself to you, I recommend that you simply concur in the result without stating anything at all.

LAH
Supreme Court of the United States
Washington, D.C. 20543

May 2, 1972

Re: 70-5061 - Kirby v. Illinois

Dear Potter:

Please join me in your opinion for the Court in this case.

Sincerely,

Mr. Justice Stewart

Copies to the Conference
RE: No. 70-5061 - Kirby v. Illinois

Dear Potter:

In due course I shall circulate a dissent in the above.

Sincerely,

Mr. Justice Stewart

cc: The Conference
May 5, 1972

Re: No. 70-5061 - Kirby v. Illinois

Dear Potter:

Please join me.

Sincerely,

Mr. Justice Stewart

cc: The Conference
Dear Bill:

In No. 70-5061 - Kirby v. Illinois, please join me in your dissent.

William O. Douglas

Mr. Justice Brennan

CC: The Conference
MEMORANDUM

TO: Mr. Larry A. Hammond        DATE: May 8, 1972
FROM: Lewis F. Powell, Jr.

No. 70-5061 Kirby v. Illinois

In accord with our discussion, I would appreciate your drafting a very brief concurring opinion along the lines of my "tentative views".

If we had more time, I would like to elaborate a good deal on these - which, in essence, are in accord with your "exigent circumstances" view.

But it seems to me that already we are behind with our opinions (with 5 court opinions still not yet drafted, plus concurrences and dissents), and accordingly I am thinking in Kirby primarily of keeping my options open for the future. I will do this by refraining from joining rule in a new "per se". Unfortunately, as I view it, the Court over the years has converted our Constitution from a great document of principle into an inflexible criminal code. This was never intended, and is contrary to the basic concept of an enduring constitution.

L. F. P., Jr.
May 8, 1972

Re: No. 70-5061 Kirby v. Illinois

Dear Potter:

I will concur with the affirmance in your opinion, but may express separately - if I can articulate them - the views I stated at the Conference.

Sincerely,

Mr. Justice Stewart

cc: The Conference
5/8/72--LAH

Re: Kirby v. Illinois, 70-5061

Judge:

Attached you will find Justice Stewart's proposed opinion for the Ct in Kirby, involving the question whether the Wade counsel requirement applies to pre-indictment lineups. This draft, although somewhat longer than his former dissent for the 7-man Ct, is largely unchanged. He does make one noteworthy modification. Rather than drawing the line at the indictment, he now draws the line, "initiation of adversary judicial criminal proceedings--whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." (p. 7)

I am attaching, from the file on this case, my bench memo and your "Tentative views." As my memo reflects, I think that Justice Stewart's view is clearly unacceptable. (See pp. 2-9 of my bench memo.) Rather than restating the reasons for my disagreement, I will refer you to the remarks in my memo. Your tentative notes, as I read them, indicate that your vote is bottomed on a disagreement with the per se exclusionary rule of Wade-Gilbert. As I said in my memo, that may be a reason to vote to overrule Wade but it does not serve as a solid basis for distinguishing Wade here. Is there really any serious doubt that the showup in this case was any less a critical stage than the lineup in Wade? Is the defendant's interest in assuring a fair showing or in preserving the facts of the showing for cross-examination at trial at all diminished?

Your views suggest an alternative, which to me, seems much more sensible. It is true that there are a wide range of unforeseeable cases in which lineups or showups occur.
Some occur shortly after the commission of the crime when a suspect is picked up near the scene of the crime and is returned to be viewed by the victim. In such a case the delay involved in obtaining an attorney for the accused suspect might well cause hurtful lag in the investigation. If the wrong man has been apprehended, the police need to know that fact so that the investigation may be resumed. Moreover, the witness's memory is likely to be freshest immediately after the crime. There might be other circumstances as well in which one or both of two considerations occur: (1) some exigent circumstance makes an immediate lineup essential to the criminal investigation without the delay attendant upon appointing an attorney to assist with a formal lineup; or (2) in a rare case conceivably the case has not focused upon any one suspect but still a broadbased investigation (for instance, a case might arise in which a woman is mugged on the grounds of a state hospital and the police take her to a room in the hospital and allow her to see all of the patients who were conceivably in the area at the time of the crime—in this case it would be silly to require counsel for each inmate). I would urge you to think seriously about adopting an "exigent circumstances" rule rather than any rigid artificial rule.

I think Justice White has the soundest view in this case. While he has no love for Wade & Gilbert, he recognizes that unless they are to be overruled they control the instant case.

LAH
Attached is the first draft of Justice Brennan's dissent in this pre-indictment lineup case. Effectively, I think, it obliterates Justice Stewart's efforts to distinguish Wade-Gilbert. I can add nothing to his discussion on the discussion of these precedents. Any intelligent lawyer reading Wade and Gilbert and the other cases cited by Justice Brennan (Stovall and Foster) I think would come to the conclusion that there is no rational basis for drawing a line of constitutional significance at the artificial stage of "formal accusation."

I would like to reiterate that Wade is written in such a fashion that it has little practical effect in terms of the thing that seems to concern you—per se exclusion. If the petitioner was without counsel, the witness's testimony about the pretrial confrontation is per se excluded. But, if an "independent source" can be found—as it almost always can where the victim had any reasonable opportunity to view the criminal during the crime—the witness may then still be permitted to make an in-court identification. Moreover, even if a counselless lineup is introduced at trial, or even if the TC erred in finding an independent source, the harmless error doctrine still prevents reversal if, loosely speaking, the evidence of guilt was overwhelming. With those safety valves built into the system, I would think that the clearly guilty defendant rarely reaps any ultimate benefit from the rule.

LAH
Dear Potter:

Please amend my concurring statement to read as follows:

MR. CHIEF JUSTICE BURGER, concurring.

I agree that the right to counsel attaches as soon as criminal charges are formally made against an accused and he becomes the subject of a "criminal prosecution." Therefore I join in the Court's opinion and holding. Cf. Coleman v. Alabama, 399 U.S. 1, 21 (dissenting opinion).

Regards,

Mr. Justice Stewart

Copies to the Conference
Re: No. 70-5061 - Kirby v. Illinois

Dear Bill:

Please join me in your dissent.

Sincerely,

T.M.

Mr. Justice Brennan

cc: Conference
Attached is another draft of Justice Brennan's dissent in this case. The only addition is a footnote, beginning on page 14, which states that only 5 out of at least 18 states which have passed on this question have found a distinction between pre- and post-indictment lineups. It also points out that every federal CA has held that the Wade-Gilbert rule applies in the pre-indictment area. Finally, it cites the most recent opinion from the CA10 in which Judge Lewis states that the question is without doubt.
Attached is the most recent draft of Justice Stewart's opinion in *Kirby*. It adds your statement at the end of the opinion (p. 9). Upon seeing your notation on Friday, Mr. Putzel called and asked for clarification. He suggested, and I agree, that you change the words "I concur in the holding of the Court," to the following: "I concur in the result reached by the Court." Mr. Putzel says that words to the latter effect more clearly state that the author does not join in the content of the plurality opinion.

In order to effect this change, if you agree with Mr. Putzel's suggestion, you should write a memo to Justice Stewart asking him to change your statement. Since the opinion may well come down this week, you should act on this forthwith.

LAH

*Note: A copy of your memo should also go at Mr. P.'s office.*

LAH
June 5, 1972

Re: No. 70-5061 Kirby v. Illinois

Dear Potter:

The Reporter has suggested the following technical revision of my concurrence:

"As I would not extend the Wade-Gilbert per se exclusionary rule, I concur in the result reached by the Court."

Please make this change, if this meets with your approval.

Sincerely,

[Signature]

Mr. Justice Stewart

cc: The Conference
June 5, 1972

Re: No. 70-5061 Kirby v. Illinois

Dear Potter:

The Reporter has suggested the following technical revision of my concurrence:

"As I would not extend the Wade-Gilbert per se exclusionary rule, I concur in the result reached by the Court."

Please make this change, if this meets with your approval.

Sincerely,

Mr. Justice Stewart

cc: The Conference
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70-5061 Kirby v. Illinois