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The Right To Counsel At Photographic Identifications

An objective test is used in cases where the issue is whether a true indebtedness has been created or advances to the corporation were contributions to capital. To determine that advances were contributions to capital, the opinion in *United States v. Henderson,*[59] pointed out that courts have looked for evidence of cash advances to commence corporate life, repayment subordinated to other indebtedness, absence of a fixed maturity date, agreement not to enforce collection, interest paid only from earnings, and the right to vote in management of the corporation by those making advances.[60]

However, the relation of a debt to taxpayer's trade or business does not readily lend itself to any totally objective test because some flexibility must be allowed in order to examine the reason why taxpayer created the indebtedness. Taxpayer's motivation cannot be evidenced as can a debt in a debenture or indenture agreement, but must be determined at least in part by subjective evaluation.

The significant motivation test fulfills the criteria for a proximate relation as set out in *Whipple* because it requires the taxpayer to prove that the creation of the indebtedness was essential to preserving his trade or business. The primary and dominant purpose test, however, requires not only proof that the indebtedness was essential to taxpayer's trade or business, but that whatever other considerations existed for its creation were only incidental. To require proof that motivation other than preservation of taxpayer's trade or business was incidental is to require the taxpayer to show that he did not care as much about his capital input as he did about his job. A shareholder-employee in a close corporation is probably very much concerned with both. The result is that the primary and dominant purpose test almost precludes a business bad debt deduction for a shareholder-employee, while the significant motivation test allows more flexibility.

JAMES W. JENNINGS, JR.

THE RIGHT TO COUNSEL AT PHOTOGRAPHIC IDENTIFICATIONS

The sixth amendment guarantees a defendant the right to have the assistance of counsel in any criminal prosecution.[1] In *United States v. Wade,* the Supreme Court held that a post-indictment line-up was a

[59] 375 F.2d 36 (5th Cir. 1967).

[60] 375 F.2d at 40.

[1] The right to counsel at a criminal prosecution is set forth in the sixth amendment as follows: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

"critical confrontation", such that the right to counsel became an indispensable safeguard to protect an accused's right to a fair trial.[2] Implicit in the Court's decision was the recognition that there are serious dangers of misidentification inherent in eyewitness identifications.[3] Although it has been suggested that the *Wade* rationale should be construed so as to allow counsel at photographic identifications,[4] courts have hesitated to grasp the apparent analogy.[5] It is therefore significant that in *United States v. Zeiler*,[6] the court invoked the *Wade* rule so as to allow the assistance of counsel at a post-custody photographic identification.

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[2]United States v. Wade, 388 U.S. 218, 226-27 (1967). Examples of critical stages are the arraignment, *Hamilton v. Alabama*, 368 U.S. 52 (1961); certain preliminary hearings, *White v. Maryland*, 373 U.S. 59 (1963); interrogation while the suspect is in custody, *Escobedo v. Illinois*, 378 U.S. 478 (1964); the trial, *Gideon v. Wainwright*, 372 U.S. 335 (1963); and the appeal, *Douglas v. California*, 372 U.S. 353 (1963). The Supreme Court defined "critical confrontation" or "critical stage" to mean any point at which counsel's assistance is necessary to assure a meaningful defense. United States v. Wade, 388 U.S. 218, 225 (1967).

In reference to the right to counsel at a pretrial line-up, the Supreme Court stated:

> It is central to that principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial. The security of that right is as much the aim of the right to Counsel as it is of the other guarantees of the Sixth Amendment—the right of the accused to a speedy and public trial by an impartial jury, his right to be informed of the nature and cause of the accusation, and his right to be confronted with the witnesses against him and to have compulsory process for obtaining witnesses in his favor. The presence of counsel at such critical confrontations, as at the trial itself, operates to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution. (Footnotes omitted).

388 U.S. at 226-27.

[3]388 U.S. 218 (1967). *See generally* P. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES (1965) (hereinafter referred to as WALL). For an interesting study of cases in which convictions were erroneously arrived at because of misidentifications, see E. BORCHARD, CONVICTING THE INNOCENT (1932).

[4]United States v. Marson, 408 F.2d 644 (4th Cir. 1968). *But see, e.g.*, United States v. Ballard, 423 F.2d 127 (5th Cir. 1970); Rech v. United States, 410 F.2d 1131 (10th Cir. 1969); United States v. Bennett, 409 F.2d 888 (2d Cir. 1969); United States v. Robinson, 406 F.2d 64 (7th Cir. 1969); McGee v. United States, 402 F.2d 434 (10th Cir. 1968), *cert. denied*, 394 U.S. 908 (1969).

[5]Courts have consistently held until recently that there was no right to counsel at a photographic identification. *See* cases cited note 4 *supra*. Very recently, courts have held, however, that there is a right to counsel at a photographic indentification. United States v. Zeiler, 427 F.2d 1305 (3d Cir. 1970); Thompson v. State, — Nev. —, 451 P.2d 704 (1969), *cert. denied*, 396 U.S. 893 (1969); Commonwealth v. Whiting, 439 Pa. 205, 266 A.2d 738 (1970).

[6]427 F.2d 1305 (3d Cir. 1970).

In *Zeiler,* the Pittsburgh area had been plagued for several years by a series of bank robberies, all thought to have been the work of the "Commuter Bandit".[7] For sometime after Zeiler's arrest, newspapers and television stations showed pictures of the composite sketches of the "Commuter Bandit", comparing them with photographs of Zeiler. Three days after Zeiler's arrest, counsel was appointed to defend him. Such counsel represented Zeiler at a subsequently conducted line-up involving about fifty witnesses. However, before the line-up, the F.B.I. privately confronted each witness with a series of photographs, and Zeiler contended that these confrontations violated his sixth amendment rights, or, at the very least, rendered the witnesses in question incompetent for the purposes of in-court identification.

Citing a noted authority, the court in *Zeiler* stated that the dangers of suggestion in a photographic identification are perhaps even stronger than the danger of suggestion inherent in a line-up.[8] Furthermore, the court noted that the constitutional safeguards of *Wade* could easily be circumvented if police could privately confront witnesses with suggestive photographs prior to line-ups.[9] At least one judge has expressed a fear that the absence of the requirement of counsel at photographic "confrontations" might encourage police to abuse the identification process.[10]

A brief discussion of *Wade* is a prerequisite to understanding the significance of *Zeiler.* In *Wade,* the accused was also indicted for bank robbery.[11] After counsel had been appointed, a line-up was conducted without notice to such counsel. Two bank employees identified Wade at the line-up, and again in court. The defense attorney objected to the in-court identifications as they were based on line-ups which violated the sixth amendment guarantee of the right to counsel. The Supreme Court, in a five to four decision, agreed that the sixth amendment requires the presence of counsel at a line-up.[12] The Court vacated the judgment and remanded the case for a finding of whether the in-court identifications had independent origins, in which case they should be admissable in court regardless of the improperly conducted line-up.[13]

In reaching its conclusion, the Supreme Court noted that "the

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[7]*Id.* at 1306.
[8]*Id.* at 1307. *See* WALL at 66-89.
[9]427 F.2d at 1307.
[10]United States v. Marson, 408 F.2d 644, 653 (4th Cir. 1968) (Winter, J., concurring and dissenting).
[11]388 U.S. at 220.
[12]*Id.* at 236-37.
[13]*Id.* at 242.

Framers of the Bill of Rights envisaged a broader role for counsel than under the practice then prevailing in England of merely advising his client in 'matters of law,' and eschewing any responsibility for 'matters of fact'."[14] Further, at the time the Bill of Rights was adopted, organized police forces did not exist.[15] Years ago, the confrontations between the defendant and the witnesses against him occurred at the trial itself.[16] Today's criminal prosecution procedure entails confrontations of an accused at pretrial proceedings, with the result that very often an accused's fate is decided out of court.[17] With these present realities in mind, the Court in *Wade* construed the sixth amendment so as to allow "counsel's assistance whenever necessary to assure a meaningful 'defence' (sic)."[18] In concluding which principles would be guiding in disposing of the issue respecting right to counsel, the Court stated that in light of *Powell v. Alabama*,[19] and the succeeding cases,[20] each pretrial confrontation of the accused must be scrutinized to determine whether the presence of counsel is indispensable to assuring the accused's right to a fair trial at which the opposing witnesses may be meaningfully cross-examined.[21] The majority commented that they 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."[22]

Having decided that the right to counsel attaches at critical confrontations, the Court proceeded to consider whether a line-up is a critical confrontation.[23] The work of a noted authority received heavy consideration as the Court remarked that great miscarriages of justice often result from mistaken identifications.[24] Recognizing that improper suggestion at pretrial identification procedures accounted for many misidentifications,[25] the Court enumerated some of the dangers of suggestion inherent in a line-up.[26]

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[14]*Id.* at 224.
[15]*Id.*
[16]*Id.*
[17]*Id.*
[18]*Id.* at 225.
[19]287 U.S. 45, 60-65 (1932), cited at 388 U.S. 225.
[20]Hamilton v. Alabama, 368 U.S. 52 (1961); White v. Maryland, 373 U.S. 59 (1963); Massiah v. United States, 377 U.S. 201 (1964); Escobedo v. Illinois, 378 U.S. 478 (1964); Miranda v. Arizona, 384 U.S. 436 (1965).
[21]388 U.S. at 227.
[22]*Id.*
[23]*Id.* at 227-37.
[24]388 U.S. at 224, 229-32, 234. *See* WALL at 41-65. *See generally*, E. BORCHARD, CONVICTING THE INNOCENT (1932); 3 WIGMORE, EVIDENCE § 786a (3d Ed. 1940).
[25]388 U.S. at 228.
[26]*Id.* at 229-35.

One extreme example of an improper suggestion in a line-up occurred in a Canadian case.[27] The defendant had been identified from a line-up of six men, in which he was the only Oriental. In other cases, witnesses had known all the participants in a line-up except for the suspect,[28] the other participants were vastly unlike the suspect in appearance,[29] and only the suspect was required to wear distinctive clothing similar to that worn by the criminal.[30] In *Gilbert v. California*,[31] prejudicial suggestion occurred since the witnesses viewed the suspect while in the presence of other witnesses.[32] The vice of suggestion created in *Stovall v. Denno*[33] was the presentation to the witness of a single suspect who was handcuffed to a police officer. The improper suggestion in *Wade* was that the witnesses saw Wade standing in the hall immediately preceding the line-up.[34]

As early as 1923 the English courts recognized that a photographic identification presents an opportunity for police to unduly suggest that a certain photograph is of the guilty party.[35] In one case an English court termed as "indefensible" the use of a photographic display where a suspect was in custody.[36] However, no criticism was made of the showing of photographs to a witness when an accused was unavailable for a line-up.[37]

In *United States v. Simmons*,[38] which involved a pre-custody photographic identification, the Supreme Court held that each case must be considered on its own facts in determining whether the pretrial photographic identification procedure was fairly conducted. However, before considering the fairness question, the Court felt compelled to justify the use of the photographic identification procedure. The foundation of

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[27]Regina v. Armstrong, 29 West. Weekly R. (n.s.) 141 (B.C. 1959), as cited in WALL at 53.

[28]People v. James, 218 Cal. App. 2d 166, 170-71, 32 Cal. Rptr. 283, 286 (1963); People v. Boney, 28 Ill. App. 2d 505, 192 N.E.2d 920, 922 (1963).

[29]*See* Fredericksen v. United States, 266 F.2d 463 (D.C. Cir. 1959); State v. Hill, 193 Kan. 512, 394 P.2d 106 (1964); People v. Seppi, 221 N.Y. 62, 116 N.E. 793 (1917); State v. Duggan, 215 Ore. 151, 333 P.2d 907 (1958).

[30]*See generally* People v. Crenshaw, 15 Ill. 2d 458, 460, 155 N.E.2d 599, 602 (1959); Presley v. State, 224 Md. 550, 168 A.2d 510 (1961); State v. Ramirez, 76 N.M. 72, 412 P.2d 246 (1966); State v. Bazemore, 193 N.C. 336, 137 S.E. 172 (1927); Barrett v. State, 190 Tenn. 366, 229 S.W.2d 516 (1950).

[31]388 U.S. 263 (1967).

[32]*Id.* at 270.

[33]388 U.S. 293, 295 (1967).

[34]388 U.S. at 234.

[35]Rex v. Goss, 17 Crim. App. R. 196, 197 (1923), cited in WALL at 69. *See* Williams, *Identification Parades*, [1955] CRIM. L. REV. (Eng.) 525, 530-31.

[36]Rex v. Haslam, 19 Crim. App. R. 59, 60 (1925), cited in WALL. at 71.

[37]*Id.*

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

this justification was that Simmons was not in custody and not available for a line-up.[39] Perhaps without realizing it, the Court practically embraced the English view that photographic identifications are justified where the suspect is unavailable for a line-up, and not justified where the suspect is available. Only by implication did the Court adopt the view that photographic identifications are not warranted where a suspect is available to stand in a line-up. However, as the Court paralleled the philosophy of the English courts[40] in deciding that the procedure was justified in *Simmons,* if the occasion had presented itself the Court might have also applied the English rationale and held that where a suspect is in custody a photographic identification would not be justified.

Satisfied that the type of identification procedure used in *Simmons* was permissable, the Court proceeded to give numerous examples of the ways in which suggestiveness may arise at photographic identification sessions.[41] Even absent any improper suggestion, there is an immediate danger that a witness, who caught only a brief view of a criminal, or saw him under poor visibility conditions, may make an incorrect identification.[42] However, if the police display pictures only of the suspect,[43] or present a group of pictures in which a suspect's photograph recurs or is somehow emphasized, the danger of misidentification increases markedly.[44] Suggestion may also occur whenever the police indicate to a witness in any manner that a particular photograph is that of the guilty party.[45] To make matters worse, once the initial misidentification occurs, a witness is likely to remember the image of the photograph, making the results of a subsequent line-up or in-court identification less reliable.[46]

Having counsel at a photographic identification would serve the same function as allowing counsel's presence at a line-up, since in either, an attorney's presence might keep the police from suggesting in some manner the guilt of a certain suspect.[47] A lawyer might wish to protest the use of a particular procedure before or during the identification session, or he might care to save his observations for the trial so as

[39]*Id.* at 383.
[40]*See* text accompanying note 36.
[41]390 U.S. at 383-84.
[42]*Id.* at 383.
[43]*Id.*
[44]*Id.*
[45]*Id.*
[46]*Id.* at 383-84. Note 79 *infra.*
[47]United States v. Marson, 408 F.2d 644, 653 (4th Cir. 1968) (Winter, J., concurring and dissenting).

to possibly taint an in-court identification.[48] If counsel were at a photographic identification, he would know whether attacking an out-of-court identification would prove fruitful, therefore allowing him to minimize the risks of unnecessarily revealing to the jury that his client's photographs appeared in a police mug-shot book.[49] A further reason for allowing counsel's presence is that in the case of a line-up, counsel could discover the fairness of the procedure,[50] while in a photographic identification, counsel cannot discern possible improprieties simply by viewing the photographs used in the procedure.[51] Indeed, if the police purposely use a suggestive procedure, they may resist counsel's efforts to obtain the photographs used in the display. In fact, counsel might not be able to see any photographs at all.[52] Perhaps the most valid reason for allowing counsel at a photographic identification is that police might rely on that method alone for identifying a suspect, a simple way to circumvent the rule in *Wade* and subject the suspect to the very same danger of misidentification that *Wade* sought to eliminate.[53]

On the other hand, there may be valid reasons for denying the right to counsel at a photographic identification. At a line-up, witnesses are typically brought to a police station. However, at a photographic identification, the police often take the photographs to the witnesses, who might be some distance from where the suspect is being held in custody. It is readily apparent that if counsel is required at photographic identifications taking place some distance from the location of the suspect, attorneys might find themselves spending long hours traveling. The best example of the type of functional problems which would arise if attorneys were privileged to be present at photographic identifications would be a situation where a crime is committed in one state, the witnesses are in another state, and the suspect is arrested and being

[48]For a discussion of what lawyers might do at extrajudicial identification procedures, see Note, *Lawyers and Lineups*, 77 YALE L.J. 390 (1967).

[49]WALL at 67-68. *Cf.* United States v. Reed, 376 F.2d 226 (7th Cir. 1967); Barnes v. United States, 365 F.2d 509 (D.C. Cir. 1966). *But see* Bever v. State, 4 Md. App. 436, 243 A.2d 634 (1968); State v. Tyler, 454 S.W.2d 564 (Mo. 1970).

[50]Counsel may do so because it is common practice for the police to photograph a line-up. Interview with Technician J. H. Jones, Washington Metropolitan Police Department in Washington, D.C., October 2, 1970. *See also* United States v. Eustace, 423 F.2d 569, 572 (2d Cir. 1970).

[51]*See* United States v. Marson, 408 F.2d 644, 653 (4th Cir. 1968) (Winter, J., concurring and dissenting).

[52]If the police do not preserve the photographic display, quite obviously counsel will not be able to see the same photographs the witnesses saw.

[53]That this might indeed happen led the court in *Zeiler* to extend the *Wade* rationale so as to allow counsel's presence at photographic identifications. *See* United States v. Marson, 408 F.2d 644, 654 (4th Cir. 1968) (Winter, J., concurring and dissenting).

held in a third state. In *Wade,* the Supreme Court rejected the argument that allowing the right to counsel would complicate line-ups and prolong the prosecutor's efforts to gather evidence.[54] The Court suggested that substitute counsel could be used to alleviate problems of delay and inconvenience.[55]

There is a further reason for not allowing counsel at a photographic identification. While *Zeiler* is predicated upon the theory that photographic identifications are subject to the same dangers of suggestion as are line-ups, in the vast majority of cases in which the right to counsel issue has arisen, the distinctions between photographic and physical line-ups have been emphasized more than the similarities.[56] The major distinction would appear to center on the fact that in the line-up, the accused himself is confronted by the witnesses, while in a photographic identification it is the witness who is confronted. In answer to the obvious argument that this is a distinction without a difference, "confrontation", as used in *Wade,* refers to situations in which the suspect himself is present.[57] However, *Zeiler* seemed to apply the term "confrontation" to situations other than those involving a confrontation of the accused, since the court spoke of the witnesses being "confronted" by the prosecution with the photographs of the accused.[58] As further indication of the validity of the distinction, in *United States v. Ballard,*[59] and numerous other recent decisions in which the courts have refused to apply the *Wade* rationale in the same manner as *Zeiler,*[60] great emphasis has been placed on the fact that *Wade* limited the right to counsel to cases involving a "critical confrontation".

In *United States v. Bennett,*[61] Judge Friendly explicitly rejected the contention that the right to counsel be allowed at any out-of-court proceeding where the defendant himself is not present.[62] He noted that none of the classical analyses of the assistance to be given by counsel even suggest that counsel be present at an interrogation of a witness when the defendant is not present. Judge Friendly's argument emphasized that a photographic identification is not a confrontation of the accused, and for that reason could not fall within the ambit of *Wade.* The true purpose of the assistance of counsel, he pointed out, is

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[54]388 U.S. at 237.
[55]*Id.*
[56]*See* cases cited note 4 *supra.*
[57]388 U.S. at 227, 228.
[58]427 F.2d at 1306, 1307.
[59]423 F.2d 127 (5th Cir. 1970).
[60]*See* cases cited note 4 *supra.*
[61]409 F.2d 888 (2d Cir. 1969).
[62]*Id.* at 899-900.

to prevent the defendant himself from falling into traps devised by the prosecution.

Because of the inherent limitations of photography, in that it presents two dimensions rather than three, and a "frozen" image which is often rather unlike the living subject, a photographic identification is inferior to a line-up and the results are less reliable.[63] Police officials maintain that often a witness will be hesitant to identify the suspect's photograph but will immediately pick out the suspect at a line-up where his mannerisms can be more fully observed.[64] To the extent that a photographic identification is unlike a line-up, the same protection should not be afforded to both.

Apart from the *Zeiler* court's possible oversight in construing *Wade,* there are other bases on which the court might have reached the decision that the photographic identification was invalid. In *Wade,* the Supreme Court indicated that the fact that counsel had not been present at a pretrial line-up would be irrelevant if it could be shown that an in-court identification by the witness was based on observing the defendant independent of the line-up.[65] To determine whether there is an independent basis for an in-court identification, the Court considered the following to be critical: the prior opportunity to observe the alleged criminal; the existence of a discrepancy between any pre-line-up description and the defendant's actual description; any identification of another person prior to a line-up; the identification of a defendant by picture before a line-up; failure to identify the defendant on a prior occasion; and a lapse of time between the alleged act and the line-up.[66]

It should be noted that in *Zeiler* there was much to suggest that there could not have been independent bases for the in-court identification. Apparently some fifty witnesses had observed the various robberies perpetuated by the "Commuter Bandit", and it is not clear whether any of them had an opportunity to closely observe the criminal. At any rate, none of the witnesses had longer than a few minutes to observe him.[67] The court noted that Zeiler's features were not the kind a person might easily remember. The time lapse between the crime and the identifications was such that it was unlikely that a witness would remember much of anything about the criminal. Further,

[63]WALL at 70. *See* United States v. Marson, 408 F.2d 644, 654 (4th Cir. 1968) (Winter, J., concurring and dissenting).

[64]Interview with Technician J. H. Jones, Washington Metropolitan Police Department, in Washington, D.C., October 2, 1970.

[65]388 U.S. at 240. *Cf.* Gilbert v. California, 388 U.S. 263, 272 (1967).

[66]388 U.S. at 241.

[67]427 F.2d at 1308.

the fact that the line-up was conducted after the photographic identification cast doubt on the validity of the results of the line-up.[68]

In *United States v. Ballard,*[69] however, the witnesses had an exceptionally long time to carefully observe the defendants.[70] The time lapse between the crime and the photographic identification was only three weeks, as opposed to over three years for some of the wtinesses in *Zeiler.*[71] Also, in *Ballard,* the witnesses actually stated that they could have identified the defendants at the trial without ever having seen the photographs.[72]

Ostensibly, the court in *Zeiler* could not have resolved its dilemma without addressing itself to the right to counsel issue, since there were no bases for the in-court identifications independent of the line-up of photographs. In *Ballard,* however, the court did not have to resolve the right-to-counsel issue because there apparently were independent bases for the in-court identifications.

The most logical ground on which the *Zeiler* court could have based its decision that the photographic identification procedure was invalid is implicit in the *Simmons* decision. In *Simmons,* the Supreme Court held that the photographic identification procedure was justified, since the criminal was unknown and at large, and a dangerous felony had been committed.[73] The use of the word "justified" distinctly implies that perhaps in another situation, a photographic identification would not be justified. In *Zeiler,* the suspect and the witnesses were all available to participate in a line-up.[74] There was no apparent reason for the police to use an inferior identification method when a line-up could have been just as conveniently used. The court could have seized upon this perfect opportunity to adopt the English rule, which allows photographic identifications only where line-ups cannot possibly be had without great inconvenience.[75]

Because it was conducted in the absence of counsel, an obvious consequence of the *Zeiler* court's invalidation of the photographic identification is that the purpose of the sixth amendment is distorted.[76] That purpose was to allow the defendant the assistance of counsel whenever necessary to prepare a meaningful defense.[77] As Judge Friendly indi-

[68]WALL at 84. *Cf.* United States v. Sutherland, 428 F.2d 1152 (5th Cir. 1970).
[69]423 F.2d 127 (5th Cir. 1970).
[70]*Id.* at 132.
[71]427 F.2d at 1308.
[72]423 F.2d at 129.
[73]390 U.S. at 384.
[74]427 F.2d at 1307, n.3.
[75]Cases cited note 35 *supra; see* WALL at 71.
[76]*See* note 21 *supra.*
[77]*Id.*

cated in *Bennett,* any interview by the prosecution of a victim or witness affords just as much opportunity for undue suggestion as does a photographic identification procedure.[78] To extend the right to counsel to photographic identifications would pave the way for a similar extension of the right to all situations involving the prosecution's attempts to gather evidence, a result which would hopelessly complicate our already overburdened criminal justice system.

The real danger of the *Zeiler* court basing its decision on *Wade* rather than on the implicit suggestion in *Simmons* is that even though a defendant's attorney is present at a photographic identification procedure, prejudicial suggestion may still occur. Having seen a photograph, a witness might base a subsequent line-up or in-court identification on his memory of the photograph and not of the actual criminal.[79] Thus, no matter how fairly a photographic identification may be conducted, the very procedure itself is inherently suggestive, and should be used only when warranted by society's paramount interest in apprehending unknown criminals.[80]

It would appear that the court in *Zeiler* erred in construing *Wade* to allow the right to counsel at a photographic identification. There is no logical way to avoid the fact that the *Wade* rationale applies only to confrontations of the accused himself. Although the decision reached in *Zeiler* was correct, it should have been based either on the *Simmons* rule in that the procedure used was unduly suggestive,[81] or more logically, on the fact that since the defendant was in custody, the proper method of identification was the line-up and not a photographic identification.

THOMAS HARNEY MCLACHLEN

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[78]408 F.2d at 900.

[79]Sir Richard Muir, a great English prosecutor, expressed this view, believing that "however honest a witness might be, he could not shut out from his mind the features of the man he had seen in the photograph." FELSTEAD, SIR RICHARD MUIR 312 (1927), cited in WALL at 68.

[80]That society has a paramount interest in apprehending dangerous criminals is apparent in the defense of the use of photographs for identification purposes found in *Simmons. See* 390 U.S. at 377.

[81]The rule is that the photographic procedure will be examined for fairness, and where there is such suggestion as might lead to irreparable misidentification, the photographic identification cannot be allowed to stand. 390 U.S. at 384. In *Zeiler,* the court could have invalidated the photographic identifications for violating the *Simmons* rule. The witnesses were confronted with eight photographs, three being of Zeiler. This repetition alone was highly suggestive. Also, the five other photographs were mugshots, while Zeiler's pictures were ordinary snapshots, which again was suggestive in that the witnesses knew that Zeiler had been recently apprehended. The most suggestive flaw in the procedure, however, was the fact that while the actual robber was known to have worn glasses, only Zeiler was pictured in the display as wearing glasses. 427 F.2d at 1308.