In the

Supreme Court of the United States

THOMAS KIRBY,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

No. 70-5061

Washington, D. C.
March 20 & 21, 1972

Pages 1 thru 71

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IN THE SUPREME COURT OF THE UNITED STATES

THOMAS KIRBY,

Petitioner,

v. No. 70-5061

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Washington, D. C.,

Monday, March 20, 1972.

The above-entitled matter came on for argument at 2:22 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

JEROLD S. SOLOVY, ESQ., Jenner & Block, 135 South LaSalle Street, Chicago, Illinois 60603; for the Petitioner.

JAMES B. ZAGEL, ESQ., Assistant Attorney General of Illinois, 118 West Randolph Street, Suite 2200, Chicago, Illinois 60601; for the Respondent.

RONALD M. GEORGE, ESQ., Deputy Attorney General of California, 500 State Building, 217 West First Street, Los Angeles, California 90012; for the Amicus Curiae State of California.

C O N T E N T S

[Second day - pg. 29]

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in No. 70-5061, Kirby against Illinois.

Mr. Solovy, you may proceed.

ORAL ARGUMENT OF JEROLD S. SOLOVY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. SOLOVY: Mr. Chief Justice, and may it please the Court:

This case is again heard, on reargument, and I think it's fair, after listening to the last argument, to say it involves more simplistic questions of criminal law. It involves the proper application of Gilbert and Wade to pre-indictment identification proceedings.

And I use the term "pre-indictment identification proceedings" because there was no lineup, as such, in this case.

We should also bear in mind that the facts of this case pertain to a case where the defendant has been arrested and he is in police custody, and the identification takes place at the police station.

I assume, for the purpose of my argument, that we are dealing with the petitioner's right to counsel under the Sixth Amendment, and that the identification process is not violative of the Fifth Amendment privilege against self-incrimination, because this Court decided in Wade and Gilbert

that such identification proceedings did not abridge the defendant's privilege against self-incrimination.

I will be restricting my argument to petitioner's right under the Sixth Amendment.

Q We also, Mr. Solovy, don't have here a question arising under the due process clause of the Fourteenth Amendment is implicit here, that, i.e., the Stovall case, simply because this Court limited the matter under certiorari, is that correct?

MR. SOLOVY: That is correct, Justice Stewart. But I think, as Illinois argues in its brief, that in deciding the case it would be within the discretion of the Court to say, if the Court were to say that we do not have to reach the Gilbert and Wade question, because this identification was so violative of due process that it comes within Stovall.

I think that clearly would be within the province and jurisdiction and quite proper within the grant of certiorari in this case to take that view.

Q You did have, or did you not have that as a separate question in your original petition?

MR. SOLOVY: No,we did not, I do not believe; I'll double-check, but I think our separate questions were dealing with the propriety of the arrest and the propriety of the search and seizure.

I will check our certiorari petition.

But I might point out that I believe in all the opinions of the Court in dealing with this question, this Court always ends up with the Stovall issue in any event. The Court may say, We will not apply Wade and Gilbert retroactively, or we will apply it retroactively; and the Court looks at the Stovall issue.

Now, I think that it would be proper for the Court in this case to look at the Stovall issue.

Now, Mr. Seng, my associate, points out that the first question in our petition was that the identification should have been by means of a lineup, and that there were no compelling circumstances justifying a showup.

Q Well, at least peripherally that is the Stovall claim?

MR. SOLOVY: Peripherally that is a Stovall claim. But it is my position, Mr. Justice Stewart, that this Court could, under the grant of certiorari, look at the Stovall issue.

Q And we did decline to accept that question under certiorari?

MR. SOLOVY: You did decline to accept that question as narrowly drawn.

Q Well, do I -- my recollection of the last argument is a little vague, but I thought Illinois suggested at the last argument that Illinois already, the Illinois

Supreme Court already has decided that it would apply the Stovall principle in provocation; is that right?

MR. SOLOVY: Well, I think, Mr. Justice Brennan, that in reading the decisions of the Illinois Supreme Court, they say two things. They say that, We will not apply Gilbert and Wade to pre-indictment identifications; and then they will look in a proper case to see whether Stovall vs. Denno is applicable, and they will look to the facts of a particular case.

Now, the Illinois Supreme Court refused to do that in this case by refusing to grant our petition for leave to appeal. This case comes before this Court from the decision of the Illinois Appellate Court.

In analyzing the facts of this case, it's also important to bear in mind that petitioner was an indigent person throughout the course of the Illinois proceedings, being represented in the criminal court by the Public Defender, and then in the Illinois Appellate Court by court-appointed counsel, Mr. Seng. And we have followed the case to this Court.

Q And here, just to go back again a little bit to the Stovall claim, you said that this case was not considered by the highest court in your State, but it was considered by the Appellate Court of Illinois, First District. And I gather that they rejected the Stovall claim, if I understand their

opinion correctly -- it appears on page 54 of the Appendix -- on the basis that there was an independent identification at the trial, is that it?

MR. SOLOVY: No, Your Honor, there can be no question, Mr. Justice Stewart, that there was a separate in-court identification, as I will get to in my argument. The in-court identification was wholly dependent upon the police station identification.

The view of the Illinois Appellate Court was, rather, that the victim in this case had a sufficient opportunity to observe his assailant. And I will go into those facts before this Court, because I think that that conclusion is not sustained by the record; that you cannot say that the victim in this case had an ample opportunity. He had never seen these gentlemen before in his life. At the most, he only had a few seconds to observe them. And that his whole identification came from the police station identification, which, as I will show, is rankly violative of Stovall.

But since, again, Mr. Justice Stewart, since you raise the question, Illinois assumes that that issue is before this Court, at least collaterally, by saying at page 42 of their brief that this Court can overrule Gilbert and Wade by looking to the holding in Stovall, and by applying to this case and all other cases the Stovall test of whether the identification is so rank and so crass as to violate due

process.

So, I submit that that issue, one way or another, has to be before the Court in deciding this case.

Now, to return --

Q Well, when you were using those terms, were you referring to an identification in the courtroom, or an identification some time prior to that, in whatever process?

MR. SOLOVY: The identification, Mr. Chief Justice, before the courtroom identification. The courtroom identification is always very dignified, and is also very rote.

You have to understand --

Q It's what?

MR. SOLOVY: It's made by rote.

Q Oh.

MR. SOLOVY: The witness has no, really, choice in the courtroom because of the geographic location of everybody. When you have a trial in the Criminal Court of Cook County, and the witness is on the stand, and the witness is asked, as he was asked in this case: Do you see your assailants? The witness looks around. He has the judge to his left, he has the jury to the right, --

Q Well, you're describing every courtroom in the United States, not just Cook County.

MR. SOLOVY: That is true.

Q Are you suggesting that there is something

inherently unreliable about the courtroom identification of a person under oath, on the stand, because he's quite sure that that's the man who stabbed him or shot him or cut him or whatever it is?

MR. SOLOVY: I am saying, Mr. Chief Justice, that from a very realistic point of view there is something unreliable because the witness on the stand sees the prosecutors, he sees the defense counsel, who's dressed in a nice suit, and he sees the defendant, and in 90 percent of the cases an indigent person; the defendant is not out on bail, he is surrounded by the bailiffs wearing a badge, they are sitting around him. And naturally he will pick out the defendant.

As a matter of fact, there was a case in Cook County about a year ago where the Public Defender brought into the courtroom, by some ruse, a different defendant from another case, and the witness picked out that defendant as his assailant.

Q Well, you wouldn't want us to decide a case on that hypothetical situation, would you?

MR. SOLOVY: No, I do not, Mr. Chief Justice. I only point out that because of that reality of any criminal case, that the pretrial identification is the crucial identification. That is the identification, as this Court said in Gilbert, as this Court said in Wade, will determine that fate

of the accused. If he is identified improperly in the police station, that identification is going to take all the way through to the trial.

Q Mr. Solovy.

MR. SOLOVY: Yes, Mr. Justice Rehnquist.

Q Without the benefit of any constitutional principle, defense counsel at the trial is always free to bring out on cross-examination, or to argue to the jury these very facts that you're talking about now, is he not?

MR. SOLOVY: Mr. Justice Rehnquist, you are entirely correct. Illinois has a patterned jury instruction, which we have for our criminal cases, which points out that the jury is entitled to consider the opportunity to observe the defendant in circumstances such as that. But the impartial, so to speak, identification of an accused by the victim on the stand is the most potent evidence that the prosecution has in its arsenal in convicting a defendant.

In my judgment, in my experience, which is limited to appointed cases -- but, in my experience, that type of evidence is much more lethal to the defendant than is a confession from his own mouth. When you have a witness who gets on the stand and says "That is the man who held me up; that is the man who robbed me", it is very difficult to get a jury to disbelieve that witness.

Q I suppose that's even more aggravated if a man

holds up a supermarket and eleven witnesses take the stand and say, "Yes, this is the man"?

MR. SOLOVY: It is much more aggravated.

Q Now, would you say all eleven of those people are subject to this infirmity of unreliability that you've been describing to us?

MR. SOLOVY: When I say it's an infirmity of unreliability, I'm not suggesting, Mr. Chief Justice, that during the course of the trial that you have a lineup, so to speak, although that would certainly -- if you're speaking about realities, Mr. Chief Justice, of a criminal trial, that would certainly be much more reliable than asking the witness does he or she see his assailant or her assailant in the courtroom, when there is only one person from whom the witness can pick out. He has to pick out the defendant. There is no one else there.

It would be much more reliable, I suppose, if you had a lineup in the courtroom, and then I would like to see, if the defendant was protected by not having the witnesses see their picture, how many victims could pick out their assailant. I think you would see an entirely different result.

But since we do not do that in the trial of our criminal cases, and I have seen very few judges who will allow you to do that, other than in preliminary hearings, I submit that it is particularly important that we protect the

pretrial identification proceeding, to make sure that that was not tainted.

Now, I jump ahead of my story for a second to point out that what happened in this case was that the defendant and his co-defendant were sitting in a squad room in the City of Chicago Police Station, between their two arresting officers. The complainant had said that the assailants were Negro, the two defendants were Negro; the two officers were white. And the victim was brought in and said, Point out your assailants.

Well, that is hardly a very fair way to conduct an identification proceeding. He could either pick amongst the two Negro defendants or the two white police officers. And when you have that type of identification in the absence of counsel, and that is what you will have in the absence of counsel, because these police officers were not raw rookies, they had been on the force eleven years, they knew better. And they conducted this type of identification proceeding, either because they were lazy, or because they were indifferent to the defendant's rights.

I don't really believe that these police officers were trying to railroad these defendants; this wasn't a hot case. This was just an ordinary robbery. They happened onto these defendants.

And unless you have counsel present, then you are not going to have a fair identification proceeding.

Now, to go back to the facts of the case. On February 20, 1966, at approximately 4:30 p.m., the victim in this case, Mr. Shard, had recently returned from a trip to New Orleans. It was late afternoon. He was walking down the street on the West Side of Chicago.

The record doesn't disclose, but from the neighborhood in which Mr. Shard lived in, I believe it's a fair assumption that he is also a Negro.

He stated that he noticed two men behind him at about 15 feet behind him, and that the next thing he knew, as he was about to cross the street to go to a restaurant, he was grabbed from behind. He did not know who grabbed him from behind. They held him. They took his wallet. His wallet contained $140 in traveler's checks, $30 to $35 in cash, and certain identification papers.

He went one direction, his assailants went the other direction.

The record does not disclose what time elapsed, but we can assume that since this happened on the street that it happened pretty rapidly.

Mr. Shard, the victim, did not report this occurrence to the City of Chicago Police until the next day. At that time he gave only the most general of descriptions to the police.

On the very next day, February 22nd, two City of

Chicago police officers were cruising in an unmarked car on the West Side of Chicago. They had no knowledge whatsoever of this crime. They were totally ignorant of the crime. And they happened to see the petitioner, Mr. Kirby, walking on the street with Mr. Bean, who was eventually to be his co-defendant.

Now, this was February 1968. And one officer had in his possession a flyer which said that one Alfonso Hampton was wanted for a confidence game. And he said to his partner, "Gee, that fellow looks like Hampton."

Now, the flyer described Hampton as being five-foot-two-inches tall, and the same officer testified in court that petitioner was five-foot-five-inches in height.

But, in any event, he stopped petitioner and Bean, and he said, "Are you Hampton?" And petitioner Kirby said, "No, I am not."

He said, "Let me see your identification papers." So petitioner took out his wallet and started to show the officer his identification papers -- and he did have identification papers identifying himself as Thomas Kirby. And the officer testified he saw some traveler's checks in his wallet, and he saw the name Willie, and he asked the petitioner what those traveler checks were, and petitioner responded that it was play money.

Now, the officer testified that he thereafter asked

petitioner to give him the checks. His partner testified that this officer took the checks himself out of the wallet. And there he saw the full name, Willie Shard.

Now, bear in mind he still did not know that a robbery had taken place.

But he said, "Where did you get the traveler's checks?" And petitioner said, "I won them in a crap game."

They searched the other co-defendant and they found some identification papers also bearing the name, Willie Shard. Petitioner had identification papers bearing the name, Willie Shard.

And they were taken to the police station, put under arrest.

I don't know whether they were arrested for a robbery of Mr. Shard, because the officers didn't know that this robbery had taken place, or whether they were arrested because the officer thought he was Hampton, wanted for the confidence game some nine months ago.

The record doesn't disclose what happened when they got to the police station, in terms of whether the police determined that Hampton was or was not still at large.

In any event, they checked the records, they found that Mr. Shard had been robbed, and they called up and contacted another officer, who proceeded to bring Mr. Shard to the police station.

Now, it took several hours to bring Mr. Shard to the police station. Under Illinois law, petitioner had the right to consult with counsel. If petitioner were a rich man, his lawyer would have been there within a matter of five or ten minutes. But he had no money, and he was not advised of his right to counsel; although that is his statutory right under Illinois law, to consult with counsel as soon as he is arrested for as many times as he wishes. He was not advised of this right.

Well, they waited several hours, and Mr. Shard came into the squad room, and there were the two white police officers, there were the two Negro defendants. Mr. Shard was asked if these were his assailants. He said yes. Whereupon the State -- not very rapidly -- proceeded to bring this matter to indictment.

There was a preliminary hearing held in this case some five weeks later, on March 25th. Again, in direct violation of Illinois law, counsel was not appointed to represent petitioner at this preliminary hearing. This isn't a matter of constitutional law, this is a matter of Illinois statute: that at a preliminary hearing the defendant shall have counsel appointed to represent him. No counsel was appointed.

Petitioner and Bean were indicted on April 8th. They were arraigned on April 16th, some eight weeks following

their arrest.

Q Was it the kind of preliminary hearing that, under Coleman v. Alabama, he would have been entitled to counsel?

MR. SOLOVY: Clearly, Mr. Justice Brennan, as I will develop in a minute, it was really crucial for their defense; and yet, even under the State's Attorney's examination we will see that damaging evidence was elicited from the complainant.

So, some eight weeks later, we finally have counsel appointed. Appointed counsel filed on behalf of both defendants a motion to suppress the evidence, a motion to suppress the station house identification. These were denied. The jury found the defendants guilty. They were given a term of five to twelve years.

I might point out, because it's significant in the case of Mr. Bean, that on appeal to the Illinois Appellate Court the State of Illinois conceded for the first time that his arrest was indeed illegal. And based upon that concession, the Illinois Appellate Court reversed the conviction outright, they said that they had no right to detain him, they had no right to identify him; therefore, there was no other evidence to convict Bean on, and they reversed the case outright.

Now, we should get some facts in clear focus. The State of Illinois and the State of California as amicus, in their briefs, contend, may it please the Court, that this

victim had a chance to have a clear view and a long time to observe his assailants; so that there could be no question as to the identification.

I want to point out in that connection that Mr. Shard's identification to the police, the very day after the robbery, was that he described both defendants in the same manner, identically, that they were both between five-foot-six and five-foot-seven, that they both weighed between 140 and 150 pounds, and that they were both dark brown-skinned.

No further description was given, according to this record, of these defendants.

And at the trial, Mr. Shard was asked -- I read from page 23 of the record -- "Did you tell the police what they were wearing or anything?"

Answer: "Well, no, I did not directly see what they was wearing, how they was dressed."

Question: "You did not observe what they were wearing, regarding their clothing, trousers or anything?"

Answer: "Right."

Question: "You did not see what they were wearing?"

Answer: "No."

So that the victim did not even have the opportunity to see anything about how his assailants were dressed. And bear in mind he first saw them 15 feet away, and did not pay any attention to them. And he was grabbed from behind, they

took his wallet, and then he went in one direction, his assailants went in another direction.

And yet the State argues, because they had Mr. Shard primed for the trial, that he had a good opportunity to observe his assailants.

Q In the trial of the case, was there an instruction given with respect to any inferences that can be drawn from the possession of recently stolen property? Having in mind the credit cards and money orders of Mr. Shard that were found in the possession of these two men.

MR. SOLOVY: Mr. Chief Justice, we do not have the full record here. Normally, --

Q Is that an instruction under Illinois law?

MR. SOLOVY: That instruction, to my knowledge, -- and I will check it overnight -- is not given in a robbery case; it's given in a burglary case, it's given in a theft case. I don't believe that that instruction is given in a robbery case. But I will check that, Mr. Chief Justice.

So that there would not, in any event, however, Mr. Chief Justice, be a sufficient record to convict either of these defendants if you did not have an identification.

In other words, under Illinois law, I'm sure the State of Illinois will concede, because there was an outright reversal by the Illinois Appellate Court as to defendant Bean, that the mere possession of stolen property might, unexplained,

support another charge. It certainly, Mr. Chief Justice, would not support in Illinois, absent any other proof, a charge of robbery. You need something further than the mere possession of stolen property in order to convict a man of robbery.

Q Mr. Solovy, take your argument in the Illinois Appellate Court in this case, on the evidence that was permitted to come in by the Trial Court; would you say there was a strong argument to be made as a matter of State law, given both the identification and the documents found on the defendants, that the evidence was insufficient as a matter of State law to convict them?

MR. SOLOVY: No. Once you have the admissibility, Mr. Justice Rehnquist, of the identification by the victim of his assailants, once you have that, then there certainly wasn't enough sufficient evidence to convict these defendants. If you knocked out, as should have been knocked out, the station house identification, upon which the in-court identification was based, then you would not have sufficient evidence to convict. Under no one's imagination would there be sufficient evidence.

The whole case hinged upon the station house identification. The whole case rose and fell on that identification. If that identification was out, as the Illinois Appellate Court held it should have been in Bean's case -- they reversed the case outright; they did not even send it back for a new trial. They just released Mr. Bean.

Q Yet that wasn't the only evidence of guilt, was it?

MR. SOLOVY: Yes, it was, Mr. Justice Rehnquist.

Q Well, how about the traveler's checks?

MR. SOLOVY: Well, I'm saying that the possession, the recent possession of the traveler's checks and the identification papers; that was one item of evidence. And the other item of evidence, the crucial item of evidence, was the station house identification, which was repeated in the courtroom.

But if you knock out the station house identification, and all you have is the possession of the traveler's checks and identification papers, then that is not sufficient to support a conviction of robbery.

Q But this wasn't just a swearing contest, where there was no corroboration on either side; there was corroboration of the complainant's testimony, to the extent that these documents were found on the person of the petitioner?

MR. SOLOVY: If you view that as corroboration, that is correct.

Q Well, don't you view it as corroboration?

MR. SOLOVY: Well, I don't know as in any case there can be, you know, an explanation. Mr. Bean gave an explanation. He said they found the traveler's checks and the identification

papers in an alley some two hours before they were arrested.

Q Well, I don't mean conclusive corroboration, but I just meant to ask whether or not, in your opinion, it was simply a question of two persons' uncorroborated views being judged by the jury, or whether there was additional evidence that a reasonable juror could find to be corroborative?

MR. SOLVOY: There was, if once you admit the legality ofthe identification; then there was sufficient basis for the conviction. If you knock out the identification, all you're left is the recent possession of the stolen property, and that, as the Illinois Appellate Court held, was not sufficient to sustain the conviction. And that's all the evidence there was in this case. This was a jury case that was started and completed in one day.

Q My recollection of the evidence was that one of the two co-defendants testified that he had won these money orders rolling dice?

MR. SOLOVY: My petitioner, Your Honor, stated -- gave two explanations to the police. That is, his first was, before the police officer saw the entire traveler's checks, that it was play money. He then said that it was won in a crap game.

Q Then what about the -- who said they were found in an alley?

MR. SOLOVY: That was the co-defendant, Mr. Bean.

Q I see.

MR. SOLOVY: Who was -- who the State of Illinois, before the Illinois Appellate Court, conceded was arrested illegally; and the Illinois Appellate Court reversed his conviction outright, Mr. Chief Justice. So that case is not before this Court. Mr. Bean's. Just this co-defendant is left.

Now, I want to point out what happened in the station house identification in this case, because I think all the ills that this Court perceived in Gilbert and Wade came true in this case. Mr. Shard was contacted by a third police officer. He was asked if he was robbed. He was asked if he could identify his assailants. He was told that they had two suspects in custody. And he was brought to the police station.

Now, the State of Illinois, and the State of California as amicus, would lead this Court to believe that Mr. Shard walked into the police station and made this spontaneous identification of his assailants; that he walked in and he said, "Those are the men."

Now, the record is quite to the contrary. Reading at page 24, this is what Mr. Shard testified at the trial, and running onto page 25:

Question: "Did the police officers say anything to you?"

Answer: They asked me to point them out and I

pointed them two guys out."

Question: "They asked you if these were the ones?"

Answer: "Right."

Question: "How many other people were sitting there?"

Answer: "I didn't pay much attention."

Question: "They asked you if these two, Kirby and Bean, were the ones?"

"Correct, yes."

Then a little later, because there were four people in the room, two white officers and two Negro defendants, the defense counsel said, "Did he ask you about the other ones?" To which Mr. Shard said, "No, they just asked me if Kirby and Bean were the ones; and I said they were."

So, I submit that there was no spontaneous identification, that the identification was based solely upon the fact that you had two white officers and two Negro defendants, and if that is a lineup, then if that is identification, then the criminal process in this country has come to a very sad state.

Q Was Shard a white man or a Negro?

MR. SOLOVY: They're both Negroes, Your Honor. Both -- oh, Shard?

Q Shard.

MR. SOLOVY: Shard is, as I stated at the beginning of my argument, Mr. Justice Stewart, the record doesn't disclose; but from the address in which he lives, and my

knowledge of the City of Chicago, I would say he was a Negro.

Q Did anyone -- does this record show whether Shard, when he came to the police station, was aware that Bean and Kirby had his money orders and his credit cards?

MR. SOLOVY: If it please the Court, Mr. Chief Justice, he didn't -- he'd never seen Bean and Kirby before.

Q Well, at the trial. At the trial, was it developed on cross-examination of Shard whether, when he made the original identification, he knew that these two men had his money orders?

MR. SOLOVY: I don't know. The record doesn't disclose that.

I do want to point out that there was no independent in-court identification in this case. The record, at page 21, shows that at the trial Shard was asked:

Question: "When you went to the police station, did you see the two defendants?"

Answer: "Yes, I did."

Question: "Do you see them in court today?"

Answer: "Yes, sir."

Question: "Point them out, please."

Answer: "Yes, that one and the other one [indicating Kirby and Bean]."

Question: "And you positively identified them at the police station, is that correct?"

Answer: "Yes."

So that you have a perfect case fitting within all fours of Gilbert.

I submit that the State of Illinois and the State of California impliedly concede that Gilbert and Wade apply to pre-indictment identification proceedings, since they ask that this Court overturn those decisions.

I do not believe that California and Illinois would take that position unless they really admitted, and really knew that Gilbert and Wade, by its force, by its language, by its rationale, by its philosophy, must by force apply to pre-indictment situations.

Q Mr. Solovy, that one question you read that the prosecutor asked Shard, "And you positively identified them at the station?" Wouldn't that be objectionable under Illinois law as leading? I mean, couldn't the defense counsel have put the prosecutor through a little more of a performance on that point, simply as a matter of State evidence law?

MR. SOLOVY: Certainly, Mr. Justice Rehnquist. But when you have a defense counsel, Public Defender, who is highly experienced and he's tried hundreds of these cases, more than I will try in a lifetime, he knows that as a matter of trial tactics, if he gets up and objects that the question is leading and what-have-you, that he will only be highlighting and exacerbating the problem. So that as a matter of trial

tactics, surely the question was leading; but as a matter of trial tactics he wanted to not object. I don't know the Public Defender who handled this case; that is only my supposition.

Q But the question, at least arguably, was objectionable, was it not?

MR. SOLOVY: The whole line of questioning was leading: "When you went to the police station, did you see the two defendants?"

Answer: "Yes, I did."

"Do you see them in the court?" and "You positively identify them?"

I agree, Mr. Justice Rehnquist. But, still, the poor defense counsel, he knows what the answer is going to be, he knows he's going to say yes, so maybe for trial tactics, you know, if he gets up and objects and the State's Attorney says, very complainingly, "All right," you know, and then he does it very painstakingly, this is all in front of the jury, so, in any event, -- I know it's time for the Court to adjourn -- I just want to make one point.

I would like the Court to consider why this case should not be summarily reversed, and to avoid the problem of even getting to Gilbert and Wade, and even Stovall, for the State's concession, what I consider to be a concession, and I'm sure they may have an answer tomorrow, but that is they concede,

in my mind, that the arrest as to petitioner was illegal. Because in order to avoid the force of Wade and Gilbert, they say, at page 6 of their brief, that this identification was not accusatory but was, rather, investigatory.

MR. CHIEF JUSTICE BURGER: We'll pick that up at that point in the morning.

[Whereupon, at 3:00 o'clock, p.m., the Court was recessed, to reconvene at 10:00 o'clock, a.m., Tuesday, March 21, 1972.]

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS KIRBY, ETC.,

Petitioner

v.

ILLINOIS,

Respondent

No. 70-5061

Washington, D.C.

Tuesday, March 21, 1972

The above-entitled matter came on for further argument at 10:13 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
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LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

(As heretofore noted.)

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume arguments in Kirby against Illinois.

You have eight minutes remaining.

MR. SOLOVY: Mr. Chief Justice, if it please the Court, if it is satisfactory for the Court, I would like to reserve the remainder of my time for response to the State of Illinois and the State of California.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Solovy.

ORAL ARGUMENT OF JAMES B. ZAGEL, ESQ.

ON BEHALF OF RESPONDENT STATE OF ILLINOIS

MR. ZAGEL: Mr. Chief Justice, may it please the Court:

We are here today to ask for the overruling of the United States versus Wade and Gilbert insofar as establishing a right to counsel at line ups. It should be made clear that we do not ask for the overruling of Stovall vs. Denno, insofar as it established or affirmed a due process right of an accused to have a fair and non-suggestive line up. We do not propose, therefore, that a person aggrieved by an unnecessarily suggestive line up should be deprived of all state and federal remedies.

With respect to the Petitioner's oral argument, there are at least four or five points that I would like to clarify briefly. Petitioner in his oral argument has claimed

that this particular case can be resolved on Stovall grounds. He assumed that we concede this. In fact, Point 1 of the certiorari petition directly raised the Stovall point, and that point of the certiorari petition was not taken by this Court. The Stovall issue was decided in the appellate court below. It is available on habeus corpus, if a Petitioner should fail in this court, but it is not available I think to be raised here and now. In fact, if you look at the appendix, you will note that the motion to suppress is tried. The only issue abstracted is the issue of denial of counsel. The only testimony abstracted is the statements of Bean and Kirby that they were not advised of the right to counsel.

The other point with respect to Stovall is that the witness Shard was not told of the fact that travelers checks had been recovered from Bean and Kirby. The appendix page 27 makes it quite clear.

It is also quite clear from the record at Appendix 31 and 36 that the identification by Shard was instantaneous and at the time thatShard was brought to the plice station, he was accompanied by an officer who knew nothing of the facts of the case, hadnot seen the suspects, and did not know who was suspect.

The last point that I want to make generally with respect to Petitioner's argument on eye witness

identification generally is that the petitioners argued the eye witness identification, the testimony in court is perhaps the most potent of all evidence. There is at least some element of iron in that argument. When the case was initially argued, it was argued on November 11, and it was immediately preceded by argument in another Illinois case, Leger (?) v. Toomey which involved the burden of proof voluntariness of a confession, and it concluded with Petitioner's counsel in that case pointing out that confessions were by far the most potent evidence, far outdistancing eye witness identification, and therefore subject to increasing safeguards. In fact, Petitioner's argument that the trial identification is so crucial and so inherently suggestive is essentially an argument that there is a constitutional right to have a line up in the court room. It has nothing to do with the constitutional right to have a counsel at a pretrail confrontation.

Petitioner also assumes and really assumes perhaps is too weak a word--I would say he reached for a supposed confession by the REspondent that the arrest in this case was illegal. Again, I want to point out that this issue, the legality of the arrest, was raised again at Point 3 of the certiorari petition and was not taken by this Court.

I would also point out that there seems to be a fundamental misconception in Petitioner's reasoning with

respect to this issue and that is that he assumes as soon as we say a confrontation was investigatory in nature, that represents a confession that probable cause did not exist.

Now this dichotomy that assumes probable cause exists, investigation must stop, or procedures can no longer be classified as investigative in nature, was raised once before and explicitly rejected by this Court in Hoffa vs. United States, 385 U.S. page 308 and 310, in which the Court clearly held there was no duty to call a halt to an investigation the moment the police have probable cause, a quantum of evidence which may fall far short of that necessary to convict.

Finally, as the last clarifying point, with respect to the reversal of the conviction of the co-defendant Bean, the reason there was an absolute reversal in that case was because since the arrest of Bean was thought to be illegal and thatit should be clear that Bean was not in possession of Shard's travelers checks and didnot give the patently false and contradictory explanations of how he came into possession of those travelers checks, since Bean's arrest being substantiallly different from Kirby's, since that arrest was declared illegal, not only was the resulting identification suppressed by the appellate court, but so too was that evidence of Shard's cards and

identification materials which were found on Bean's person, subsequent to the arres.

In effect, all of the evidence, both physical evidence and identification evidence, was suppressed in Bean's case, and that is substantially different from the case before the Court.

Now, it seems to me that Petitioner seeks to avoid the issue in this case, which is whether the admission of evidence at a pretrial confrontation without counsel violated the per se exclusion rule of Wade-Gilbert. Indeed, his oral argument thus far has been devoid of any defense of the Wade-Gilbert doctrine.

Our concern with the right to counsel at line ups, the Wade-Gilbert doctrine is two-pronged: first, we think that the theoretical underpinning in the decision is unsound. Wade and Gilbert held that the line up was a critical stage requiring counsel because the presence of counsel might serve to enhance the reliability of the line up procedure. The concept of counsel as surety of reliable investigation of crime represented a shift in the critical stage rationale previously used by this Court. This reliable investigation theory I think carries too far. If it were applied seriously, it would require the presence of counsel at every stage of investigation.

In our brief we discuss several common instances

in which the courts have routinely refused to apply right to counsel. Among these are non-custodial confrontations, a viewing of photographs of suspects, confrontations occurring shortly after the crime. It seems to me that counsel can be as useful in these cases as he can in the line ups involved in Wade-Gilbert.

In one area of particular interest to which I think the amicus curiae will also refer is that of the argument that counsel ought to be present when the police interview witnesses, and frankly, if Wade-Gilbert's premises are accepted, it seems to me a persuasive argument because that is the time when the police can presumably engage in suggestive practices which were definitely of concern evinced in the line up cases. That is the time when the suggestion and other evidence can be planted in the witness's minds and indeed one court, the California court, Supreme Court, has decided that counsel has to be present at interviews of eye witnesses.

Now I think that under Wade's rationale, the right to counsel probably could be extended to grand jury proceedings and even frankly to scientific testing. Now, it is true, for example, that in Wade-Gilbert, scientific testing was excepted. The court said we are not going to insist on the right to counsel to be present when scientific testing of evidence goes on, but the fact of the matter

is the court evinced concern in the line of cases with deliberate suggestion on the part of the police, deliberate suggestion that amounts to tampering with evidence, and that possibility exists in scientific testing as well.

Now, we have made this argument, frankly, call it the rationale, at great length in our brief, and I have no wish to belabor it here, since we would not ask this Court to overrule the decision merely because its rationale seems unpersuasive.

Our principal objection is that promulgating a right to counsel at line ups is singularly inappropriate as a solution to line up problems. So far as we have been able to discover in the reported decisions, the purpose of counsel at a line up is to act as a witness and by his presence to deter unfairness. The problems with his functioning in this manner are manifest, but the one point that I ought to make clear is that it seems to me obvious that no other function can be served by counsel at a line up other than that of witness. He cannot of course be placed in charge of the line up. Under the decisions in Wade-Gilbert, he cannot prevent the line up, and this incidentally is a significant difference between line up problems and those involving interrogation, in the sense that counsel can effectively prevent the police from interrogation.

He cannot prevent the line up. His sole purpose is

that as a witness. Indeed, I doubt that interest of counsel is such that he would want to promote a fair line up. It seems to me that the purpose of counsel is to secure a line up that is unfair, as unfair as possible in favor of his own client. His suggestions that he gives to the police need not be accepted. Police of course can, I think, have a just concern as to whether counsel is interested in fairness or interested in protecting his client, and I think the reason a police officer could conclude that the primary purpose of counsel's suggestions is not to secure fairness but to secure some advantage ofr his client, and of course counsel is in a terribly difficult tactical position. If his client is guilty, and I think it can be fairly stated this is the case in most situations, he will be slow to attempt to, if he sees, for example, deficiencies in the line up, he's going to be slow to attempt to clean this up.

I don't think counsel wants to elevate the police line up, which may be his only point, his only legal recourse to try and so far as we are aware, there is no contemporaneous objection with respect to what counsel has to do with a line up. We know of no court which has required counsel who is present at a line up to make objections to the line up at the time of the line up or forever waives objections.

It seems to me that the law is clear that even if counsel is at the line up, he can raise objections to its

fairness at trial.

So it is really verymuch not in the interst of counsel to make objections, to make suggestions.

First of all, or rather next, with respect to his effectiveness as a witness, it was thought, I think, in the opinion that counsel would be particularly effective and his client would not be particularly effective as a witness. I think perhaps it is somewhat of a misjudgment. I do not think that counsel for a party will be regarded by a jury or by a court as essentially more neutral than his client. He is not necessarily expert in line up procedure, in what is fair and what is not fair in a line up. Since all he does is witness the line up itself, he will not have the occasion, for example, to witness outside influence. He will not, for example, if you want to assume a horrible case, counsel may be present at the line up. As the police lead the witness in, the police might say before the witness ever gets into the line up room, that the man we think did it, or the man on whom the stolen property was found is the man standing second from the left.

Now, counsel will not witness that, and that kind of suggestion can be brought out only on cross-examination, and I assume that cross-examination will be effective. Indeed, it was not difficult for counsel in Wade or counsel in Gilbert or counsel in Stovall to recreate the circumstances

of the line up, even though counsel in none of those cases was present at the line up.

QUESTION: Is it the practice in Illinois or is it required to take photographs of line ups?

MR. ZAGEL: It is not required in Illinois to take photographs at line ups; it is a practice of varying prevalence. There are photographs of some line ups, there are not photographs of others. I have never been able to determine why photographs are taken in particular cases and not in others. It's been my experience that when line ups were at a central police headquarters or when line ups were conducted in a more deliberate fashion, that photographs have been taken. I would be extremely surprised if a routine station house line up led to a photograph, although I understand that there were some regulations under consideration. I really cannot speak with authority, and there are not a large number of cases involving photographs at line ups in Illinois.

QUESTION: Mr. Zagel, it was not a line up in this case?

MR. ZAGEL: No, it was not a line up; it was a show up. I again reiterate that in this case, particularly as an illustration, counsel for Kirby seemed to have no difficulty in reconstructing the circumstances of this particular show up.

QUESTION: If he did, he might have asked a very

simple question: are these two men under arrest or not? If so, for what?

MR. ZAGEL: Well, I don't think that would have had any bearing whatsoever on the line up.

QUESTION: But he could have asked it, couldn't he?

MR. ZAGEL: I am certain he could have.

QUESTION: He could have said, if you haven't got any charges, turn them loose or I'm going to get a writ, couldn't he?

MR. ZAGEL: He probably could have said that but I very much doubt that it would have been effective. This is a case in which the police could have arrested, in fact I think probably did arres andprobably could have charged--

QUESTION: you say could have. I mean we would at least have had that question settled. I don't know yet whether they were under arrest or not.

MR. ZAGEL: I think it is clear they were under arrest. They had not been formally charged.

QUESTION: This was an investigatory arrest?

MR. ZAGEL: I think they were properly arrested under Illinois law, exercising unauthorized control over the property of another.

QUESTION: Well, I thought you said it was an

investigatory?

MR. ZAGEL: It is my contention that investigatory steps are not inconsistent with post-arrest proceedings. In this case, you had a valid arrest for exercising unauthorized control over the property of another. You had an investigatory proceeding with respect to whether they should be charged with robbery.

QUESTION: Were they broke?

MR. ZAGEL: I don't know; it's not clear in the record.

QUESTION: I mean those are the problems.

MR. ZAGEL: Well, I would suggest that those problems and I don't mean to minimize them, are not particularly relevant to the issues before the Court. I think they have nothing to do with the question of the line up and of counsel's role at the line up.

QUESTION: Two police can just pick two men up, take them in and hold them without any--I hate to use the word--ceremony?

MR. ZAGEL: I think that--I would contend that that is the case, that police can do that, but I would say that is not the case here.

QUESTION: In point of time, Mr. Zagel, when did the police telephone Shard and find that travelers checks and credit cards had been stolen from him?

MR. ZAGEL: I think they brought the petitioner back to the police station. I don't know if they called Shard. They might have just gone through this, as Wade, and called the central files to find out if a crime had been reported, the travelers checks had been stolen, and that's what they did in this case I think.

QUESTION: Well, at that time would you say that they had a basis for arrest and custody for the possession of recently stolen property?

MR. ZAGEL: Yes, I think what they had at that time was the basis for arresting for what in Illinois is called exercising unauthorized control over the property of another. The reason they had that basis was because they had in this case a somewhat unusual clearly identifiable property. It had an owner whose name was Willy Shard and it was in the possession of a man named Kirby and the man named Kirby had given two conflicting explanations as to how he had come into possession of the property. I tend to think that might possibly be sufficient evidence to convict for exercise of unauthorized control over the property of another in Illinois.

QUESTION: I thought the Petitioner agreed it wasn't too long a time from the time he was picked up until the time they checked.

MR. ZAGEL: Oh, no, it wasn't a very long time.

It was perhaps I think maybe an hour or two before they knew that the property had been stolen from Shard, but of course they still didn't know that these men had committed the robbery. Even so, they would still only have the basis to believe that they were exercising unauthorized control over the property of another.

QUESTION: Well, so far, Mr. Zagel, you have indicated that in your view, your rule isn't very effective to solve the problem at which it was aimed, but is having counsel line up harmful to defendants or not?

MR. ZAGEL: Well, I think it is. If all it were, were ineffectiveness, I suppose it would survive. There are two problems that I have, two general areas of concern:

The first is of course that it does present a severe strain on legal resources; if you take counsel for this, you deprive other people of these legal resources. That may be the minor point.

The more significant one is that a study in the District of Columbia which was done by Professor Reed in the UCLA Law Review, indicated that there were incidents of intimidation of witnesses, there were incidents of altering of a suspect's appearance, once the counsel had entered the case, and more significantly, if counsel for example does attend the line up that is perfectly fair, he is going to be in the very difficult position of being subject to being

called as a witness, not on his own behalf, not on his client's behalf, but on the behalf of the prosecution when he says that a line up is not priviliged.

There is a fairly strong line of cases which are cited in our brief on that point.

QUESTION: Well, do you have any information about what impact Wade and Gilbert had in Illinois on police practices, identification practices? It may be true that counsel has a limited role at the line up, but he is there, and have the cases had an impact on the line up practices? Are there fewer show ups, are there more of what you would call fair line ups, or fewer of what somebody might claim are unfair line ups,or what?

MR. ZAGEL: There is no evidence on that. There are two things I can say on that; the first is that since the Illinois Supreme Court has given a relatively narrow interpretation for the applicability of Wade and Gilbert, that is to say, as confined to post-indictments and confrontations, I don't think there ever would be any great evidence as to their particular effect.

QUESTION: Are you taking that alternative ground that in any event, it isn't applicable to pre-indictment line ups?

MR. ZAGEL: That ground is argued fully in our brief.

QUESTION: And you stand on it?

MR. ZAGEL: And we stand on it as well. We stand on that as well.

It is I think, a very interesting example of what happens when counsel do attempt or the bar attempts to fulfill the mandate of Wade and Gilbert. It is illustrated of course in Professor Reed's article in which at least from his interviews with defense counsel, he found they felt kind of impotent and useless at line ups. I think what is even more significant is that a kind of an odd case, United States versus Randolph which is cited in our brief, in which a legal aid attorney was called to testify on his client's behalf and he was the man who was assigned at the police station to be present at the time that these line ups occurred. Not only could he not remember the circumstances of the line up, he had to go back to his notes to determine whether he had represented Randolph, and returned the next day and said that he had represented Randolph and then testified essentially from his notes. I think that that would be the general experience in any jurisdiction which has attempted to comply with Wade-Gilbert.

QUESTION: That probably would have been a pre-indictment line up?

MR. ZAGEL: It was.

QUESTION: After indictment an individual defendant presumably would have a lawyer.

MR. ZAGEL: Yes, after indictment, defendant now

today I suppose after preliminary hearing, a defendant would have an individual lawyer. One of the significant differences between the ordinary case such as this one and the post-indictment or post-preliminary hearing line up. It's usually at that stage, the later stage that you have counsel with some idea of what the case is about.

QUESTION: Because I remember the Sixth Amendment procedures for counsel in all criminal prosecutions, is that right?

MR. ZAGEL: Yes.

QUESTION: How can you say that post-indictment line-ups are not a part of criminal prosecutions?

MR. ZAGEL: I understand criminal prosecutions to mean the proceedings in court. That is my understanding of criminal prosecution.

QUESTION: Well, the Court has never so held, has it?

MR. ZAGEL: I think that's been a clear implication, and besides, if that rationale were to be extended further, or to be accepted, I think that you would be in a position of having a right to have counsel, for example, when a prosecutor interviews witnesses.

QUESTION: Well, you have to have the counsel before the trial so counsel can prepare.

MR. ZAGEL: I understand but still, even in the

ordinary context of a criminal trial, there are a large number of instances in which steps are taken toward a successful prosecution at which defense counsel is not present. Fingerprint comparisons, and if the witnesses are interviewed by prosecutors, evidence is sometimes discovered long after indictment. In none of these cases is defense counsel customarily present nor has this Court ever held he has to be present.

QUESTION: But it involves an important phase of the prosecution, arraignments; Wade and Gilbert are in that category

MR. ZAGEL: Yes, but I think Wade and Gilbert were wrongly decided as far as arraignments are concerned.

QUESTION: I don't see why you're worried about Wade and Gilbert here because this is all pre-indictment.

MR. ZAGEL: Well, I was merely being responsive to your question, Mr. Justice Douglas, as to what criminal prosecution meant after indictment.

QUESTION: Yes, but I don't see in this case why you bother with Wade and Gilbert.

MR. ZAGEL: Well, I think that Wade and Gilbert, in particular is, if anything, a barrier toward effective improvement in the process of criminal justice. I tend to think what Wade and Gilbert did and the thing that particularly concerns me, the right to counsel in Wade and Gilbert and right to counsel in line up seems to me more of a totem than an effective remedy. It's a way of saying, well, these are difficult problems, and

instead of attempting to regulate the process, we'll appoint counsel and he will regulate it.

QUESTION: Where a criminal prosecution has not even started, I don't see where you would get into the problems of the Sixth Amendment.

MR. ZAGEL: Well, I tend to think that that is what underlay the basis of the Illinois Supreme Court's holding which limited Wade and Gilbert to post-indictment line ups.

QUESTION: If that limitation were adopted it wouldn't satisfy--could this Court uphold your position without overruling Wade and Gilbert?

MR. ZAGEL: This Court could. This Court could.

QUESTION: Well, why do we have to get to it?

MR. ZAGEL: You do not have to get to it.

QUESTION: Well, if the majority of the Court felt that Wade and Gilbert applied to pre-indictment line ups, then we do have to reach your position that Wade and Gilbert should be reconsidered?

MR. ZAGEL: Yes, you would. Yes, you would.

QUESTION: Not otherwise?

MR. ZAGEL: Not otherwise. If the pre-indictment, post-indictment distinction in the Illinois Supreme Court were considered correct, then Wade and Gilbert would not have to be reached in this case. If it was considered incorrect, it would have to be reached.

The net effect I think of forcing counsel into a role as witness or impartial arbiter of the fairness of the line up is essentially to put counsel into the position that he cannot successfully within the canons of ethics sustain. He is no more qualified in the court to solve these problems, and to solve them he has to depart from the accepted roles of counsel.

Now, the one final major point that I would like to raise is that it might be contended in reply that the State of Illinois could have solved these problems by providing for administrative procedures to regulate line ups in accordance with the opinion in Wade. I point out that that opinion and the language as contained in the majority opinion is dissolved (?) by four of the six justices who joined in the opinion that it is hardly reasonable to expect the states to tell the police department yes, adopt administrative regulations, deny a man the right to counsel, and then wait two or three years to determine whether what has been done is constitutional or not.

The one existing case in which that was attempted is a California case, People versus Fowler, in which a California police department attempted to adopt regulation and the California Supreme Court said, yes, administrative regulations might render line ups non-critical but only when such regulations were of such a nature to ensure that a line up would be as accurate as ballistics or fingerprint identification. Under

that standard, I doubt that anybody could ever draft administrative regulation sufficient to make the line up a non-critical state.

We ask that Wade and Gilbert be overruled. We ask the judgment herein be found.

MR. CHIEF JUSTICE BURGER: Mr. George.

ORAL ARGUMENT OF RONALD M. GEORGE, ESQ.

DEPUTY ATTORNEY GENERAL OF CALIFORNIA

MR. GEORGE: Mr. Chief Justice, and may it please the Court:

California wholeheartedly supports the State of Illinois in its contentions in this case that the rules established by the Wade and Gilbert decision should be reconsidered and if not reconsidered, these decisions should at least be limited to post-indictment, post-information stage, such as was involved in the Wade and Gilbert cases themselves.

Now, the California Supreme Court in People versus Fowler did in fact extend the Wade and Gilbert rules to the pre-indictment, pre-information stage as a great many states have done so, and that's why we have a particularly acute interest in urging that Wade and Gilbert be reconsidered.

Now rather than reiterate all of the arguments so forcefully made by the State of Illinois, we're going to undertake to support these arguments by references to various decisions of the California Supreme Court which illustrates

the problems inherent in the application of the Wade and Gilbert rules to the post-indictment or pre-indictment stage, and citations to these California cases are given in our amicus curiae brief.

At the outset we want to make it clear, too, that we do not in any way question or urge any reconsideration of the Stovall decision which affords basic due process protection for a defendant regardless of the time of line up, and California in fact has its own decisions establishing those very same safeguards.

QUESTION: Well, Stovall isn't within the scope of the grant of certiorari.

MR. GEORGE: It's my understanding that Stovall was raised in the petition for writ of certiorari and was not granted but we want to make it clear, the limited nature of our attack on existing law.

In the People versus Fowler case, as previously indicated, the California Supreme Court did extend the Wade Gilbert rules to the pre-indictment, pre-information state and did so despite the following circumstances: the defendant had surrendered himself to the police upon hearing of an outstanding warrant for his arrest, the line up took place on the same day as the arrest. It wasn't a situation such as Wade and Gilbert where you have a line up maybe 12 or 15 days after appointment of counsel. The defendant had been asked prior to

the line up whether or not he had an attorney, although he was not told that he could have an attorney appointed and the line up was fair. There is no question of that. All of the persons in the line up were male Negroes of approximately the same age and height and there was also identification by voice. But perhaps also significantly the line up was conducted in complete compliance with a six-page set of regulations developed by the Oakland Police Department to ensure fair line ups, and that six-page set of regulations is set forth as one of the appendices to the UCLA Law Review article which we cite and which Respondent State of Illinois cites.

QUESTION: Has there been any arraignment or preliminary hearing of any kind in the Fowler case?

MR. GEORGE: No.

QUESTION: He is not up here before a magistrate?

MR. GEORGE: No, nothing at all. And the court there mainly rejected Mr. Justice Brennan's suggestion in Wade that certain regulations could ensure a fair line up, that there was no constitutional strait jacket, that this was just a method of implementing the constitutional rights of the defendant. They said in effect that the only thing that would substitute would be something such as a video tape that would be a complete reproduction of the line up.

Now, in People versus Martin, the Wade-Gilbert rules were extended by the California Supreme Court to the pre-arrest

stage and it was a voluntary pre-arrest show up. The defendant was stopped and voluntarily accompanied the police to the station for the express purpose of a viewing by the robbery victim, and there the victim viewed the defendant, along with an officer through a one-way mirror, made an identification and then after that, the defendant was arrested and despite that, Wade-Gilbert was held to apply.

QUESTION: Well, that sounds more like a Stovall situation, not a line up but a show up.

MR. GEORGE: Well, yes, but there the rules were applied as far as the right to counsel rather than a mere attack on unfairness. The court held there was a need of advice and waiver of counsel, and in regard to that problem of waiver, there are some interesting decisions from the California Supreme Court which to me did not appear entirely consistent.

QUESTION: In the Martin and Fowler California decisions, were those grounded on the Federal Constitution?

MR. GEORGE: Yes, all of the decisions that I will call to the Court's attention are grounded squarely on the Sixth Amendment.

QUESTION: Were Martin and Fowler unanimous decisions?

MR. GEORGE: No, it was not. Most of these decisions were divided decisions but not always closely divided. I don't think any of them were unanimous.

In this problem of waiver, we have the People versus Banks decision where the California Supreme Court held that an effective waiver of Miranda rights upon interrogation did not waive the right to counsel at a line up that was conducted the same day, even though at that line up the defendant was told that he had the right to an attorney but he wasn't given a full Miranda type warning at that line up the same day. He wasn't told an attorney would be appointed at the line up but he was given the Miranda warning earlier and told that he had the right to an attorney at the line up, but that wasn't sufficient. Yet in the People versus Tribble, the California Supreme Court held that in order for a waiver to be effective, the defendant need not be informed that the purpose of the line up is positive identification by the victim.

QUESTION: Did the court suggest any hypothesis as to what other purpose the line up was supposed to be for?

MR. GEORGE: No, it did not suggest. We were not favored with any sort of guidance from the Court on that. In fact, that is the most striking thing in the Fowler opinion and some of these other decisions, that the Court explicitly states there are so many troubling and vague areas under Wade and Gilbert, but it's for some future time for us to know what to do, and they don't give you any guidance. That's the problem and I think that is symptomatic of a lot of the uncertainty which Wade and Gilbert have caused upon the lower courts, and

this is upon the California Supreme Court--one can imagine it on the trial court level a fortiori.

But most troubling of all is this problem of the role of an effective attorney at the line up, and as Mr. Zagel indicated, this People versus Williams case is a graphic illustration. There the attorney did take the stand and testified that the line up was arranged fairly and with no suggestiveness as to the identity of the suspect; however the attorney wanted to accompany the police officers into the interrogation room at which time the witnesses to the crime would be further interrogated as to identification and the defendant was not to be present at that confrontation. But the California Supreme Court said that notwithstanding this admittedly fair line up, the police failure to allow the attorney into the interrogation room required reversal of the judgment because of right to counsel being denied.

QUESTION: Which of the cases was that?

MR. GEORGE: People versus Williams. That is fully cited in our brief.

QUESTION: Now, did they rely on the Wade and Gilbert holding?

MR. GEORGE: Yes, they did.

QUESTION: You mean counsel was not allowed in to listen to what the witnesses said after they looked at the line up?

MR. GEORGE: That's right. The attorney saw the line up which he testified was completely fair and then the witnesses were taken into a room and about to be questioned by the officer about various things, including the identification of the suspect. The attorney felt that he had the right to be in there and that was the basis for the reversal of the judgment the fact that that request was denied.

QUESTION: Do you think Wade and Gilbert says that?

MR. GEORGE: Do I think Wade and Gilbert says that he has the right to go in there? I certainly would argue that he doesn't, but the point is that the decisions frankly provide so little guidance that the courts are free to reach--

QUESTION: Well, suppose we say that Wade and Gilbert doesn't involve the right of the man to go in the interrogation room, would you be satisfied?

MR. GEORGE: I would be pleased for it. I wouldn't be satisfied--

QUESTION: You wouldn't be satisfied unless Wade and Gilbert is overruled in a case which doesn't involve the line up?

MR. GEORGE: Well, I think that there is an appropriate time for the court--

QUESTION: This case does not involve a line up?

MR. GEORGE: But if Wade and Gilbert don't apply to the pre-indictment or post-indictment level, then of course--

QUESTION: But this isn't a line up case?

MR. GEORGE: Well, the show up though -- there have been instances where Wade and Gilbert are applied by lower courts to show ups. It doesn't have to be five men in a row, apparently, for lower courts to feel that Wade and Gilbert must be invoked and I don't think those decisions expressly limit themselves to any particular for the matter of line up or show up or other identification, and what I think is so important to ask is what would the presence of the attorney do to ensure fairness of the trial that would not be accomplished by effective cross-examination of the witnesses at the trial? You can imagine the next extension of this Williams rationale is to have the attorney in the squad car or at the on-the-scene confrontation, hindering possible police investigation.

QUESTION: Mr. George, in Williams, had the prosecuting witness made some statement as to identification at the time of the line up and then statements were to be taken afterwards?

MR. GEORGE: I believe there was no such identification. In fact, most of the commentators who suggest rules of fairness, suggest that the witness not make an identification in the presence of other witnesses and that this be left to later.

I think what is so important here is to realize the vast difference between the function of counsel at a line up and his function in an interrogation. In a Miranda situation

at least the attorney can do something effective with respect to the defendant's rights. He can tell him to be quiet. You have a privilege against self-incrimination. He can't do anything of that sort at a line up because, as Gilbert and Wade teach us there is no right to withhold oneself from display for identification purposes, and if that were not to be so, then indeed one would have to think that counsel would have to be present at a blood test, at all sorts of various pre-identification procedures.

Now, counsel has no right to assume the role of a stage director in casting the parts to be made or the stances to be assumed, or the phrases to be uttered in this line up production. He can't stop the condition of an unfair line up. All he can do is be an observer and a very poor witness, contrary to professional ethics which indicate he should not be a witness for his client.

QUESTION: It wouldn't violate professional ethics if he retired from the case, would it?

MR. GEORGE: No, but of course this would cause great complication. What if it's a positive identity line up? He is representing his client. He may have to hire somebody else to be there. It certainly is a cumbersome method I think, without any great advantage to the defendant and if Mr. Williams, the attorney did have to take the stand, and as Mr. Zagel indicated, what can counsel do to effectively serve the purpose

of obtaining his client's acquittal by preventing identification? He can urge the defendant to alter his physical appearance. The UCLA article there indicates instances in which a moustache was shaved off, the hair was cut, voice disguised. He can do these things which are suggestive as far as other persons in the line up and which may in fact be unfair to the other persons by representing his client, and he can intimidate other witnesses who have appeared to identify the defendant and this of course uses up a lot of time and energy of the police havint an attorney there without really doing anything for the defendant.

Now what I'd like to indicate, too, is we have talked about the effect of the Wade-Gilbert rules on guilty suspects, but let's consider the effect on innocent suspects. The innocent suspect in particular has a common adversary interest with the police; he wants to have an expeditiously conducted line up which may bring about his release from custody, and if somebody has to delay a line up like here, it was one or two hours after the arrest, well, where are they going to get a lawyer, so it will mean perhaps the innocent suspect kept in custody another day or two while they hunt around for a lawyer, and then he's released when he's not identified.

QUESTION: What procedures have the police and law enforcement authorities in California worked out in response to these Supreme Court of California decisions, first primarily in response

to the holdings that Wade and Gilbert are applicable to pre-indictment situations? Do they have just legal aid lawyers on duty always at the station houses or what do they do?

MR. GEORGE: Well, there is some movement in Los Angeles to have public defenders available on call, but this is a thing that varies very much from city to city. This isn't any state-wide policy. In fact, I don't think you could have a state-wide policy. It's a matter of each jurisdiction.

QUESTION: It varies, but what are some of the devices that have been worked out?

MR. GEORGE: They have some attorneys who will show up at the line up and see that perhaps certain procedures are followed and if they're not, they might then take the witness stand.

QUESTION: No lawyer has been appointed to represent anybody in that line up so far. He is just a lawyer operating at large, so to speak?

MR. GEORGE: Yes, that's my understanding. They're there sort of as an observer which points out of course the curious role of counsel, a very uncustomary role.

QUESTION: I suppose he is there representing all 12 people in the line up if there are 12 of them?

MR. GEORGE: Yes, he would in that sense. I haven't heard of instances where they will send somebody to represent each person in a line up.

Question: The practice is not to have more than one lawyer?

MR. GEORGE: That's my understanding.

QUESTION: In the line up?

MR. GEORGE: That's been my understanding but I just have this from what I have been told.

QUESTION: Presumably just inherently the people in the line up would have adversary interests to each other?

MR. GEORGE: Yes.

QUESTION: Assuming--

MR. GEORGE: Certainly and one can imagine if the Court remembers the Gilbert case where there was an auditorium full and there was parade after parade, if there had to be one attorney for every man put on the stage there, it would be a mammoth production indeed which would drain the resources of the county bar and public defenders' office.

QUESTION: Well, the way you describe that one situation, the counsel would be a quasi magistrate, would he not?

MR. GEORGE: Yes, in effect he would. He would not be performing his traditional task of representing one client, but he would be trying to perhaps evaluate the competing interests of the various persons under suspicion at that time, and while all of this is being arranged of course, counsel is there, the guilty suspect might be putting more time and distance between himself and the police, when they think they have a probable

suspect.

QUESTION: I have one little problem. You keep saying it's not the usual duty of a lawyer. What about paid lawyers? Aren't they there, Mr. George, paid lawyers?

MR. GEORGE: Yes. Well, paid lawyers might be there but--

QUESTION: Well, you don't mean it is never done?

MR. GEORGE: No, there are paid lawyers but I think in this situation you so often have the man who is indigent and who does not have an attorney.

QUESTION: And your point would be the paid lawyers couldn't do any more than the public defender?

MR. GEORGE: Nobody could do very much,I think.

QUESTION: That's what I thought.

MR. GEORGE: And certainly this isn't the type of thing--few people find it easy to employ an attorney for their trial as it is, and if you have to hire your attorney to sit around at a big show up all day, there are going to be more people who will meet standards of indigency, I think.

MR. CHIEF JUSTICE BURGER: Your time is up, Mr. George.

MR. GEORGE: May I have an extra minute or two to wrap this up?

MR. CHIEF JUSTICE BURGER: Well, we'll give you two minutes and enlarge your friend's time the same amount.

MR. GEORGE: Thank you.

I would like to indicate too, that what can't attorneys present accomplish that cannot be accomplished as well or better by cross-examination, in conjunction with a photograph, perhaps with a tape recording or video tape of the whole proceedings. In the People versus Lawrence, the California Supreme Court did uphold the showing of a photograph in a line up to the victim in the absence of counsel, even though the defendant had previously retained counsel on the theory that had the police cut out the faces from this photograph of the line up, that these mug shots could have been used but here there was no confrontation between the suspect directly and his accuser so this shows some of the conflicts because if confrontation is really the basic issue then why did the court in Williams say that the attorney had the right to go into the squad room when the defendant wasn't even there with the witness?

Now, basically, if petitioner Kirby had the right to have appointed counsel at the show up a couple hours after his arrest, I think trial courts and appellate courts in the states would be very hard pressed to decide to draw any reasonable distinction as to when counsel can be had and when it cannot be had, on-the-scene confrontation or whenever, and while perhaps attractive on a purely theoretical level, the rules requiring counsel at identification confrontations have presented these numerous practical difficulties in their

applications, difficulties which were perhaps unforseeable at the time that Wade and Gilbert came down, and in light of the present experience, we submit that this court should overrule its experiment of four years, the Wade and Gilbert rules.

You have to ask in the end, what could counsel have done for Kirby? What difference would there have been? I think when you ask those questions it's clear that counsel accomplished nothing so we urge the overruling of Wade and Gilbert, on those grounds.

CHIEF JUSTICE BURGER: Thank you, Mr. George.

Mr. Solovy.

REBUTTAL ARGUMENT OF JEROLD S. SOLOVY,ESQ.,

ON BEHALF OF THE PETITIONER

MR. SOLOVY: Mr. Chief Justice, may it please the Court:

Mr. George makes the argument that if there were counsel present, the four innocent suspects would have to stay in custody for an extra few hours. Now, bear in mind that in this case, Mr. Kirby received a sentence of 5 to 10 years so that when you weigh that as against a possible delay of an hour in order to obtain counsel, that is hardly a prejudice.

Further, in this case, Mr. Kirby and Mr. Bean were in custody for a period of several hours while they waited for the arrival of Mr. Shard, so that there were no compelling circumstances in this case--

MR. CHIEF JUSTICE BURGER: Would you think that at the time police learned that the travelers checks and credit cards of the complaining witness had been stolen and were in possession of these two men, that they had probable cause to arrest them?

MR. SOLOVY: Mr. Chief Justice, I am very confused as to why these people were arrested in the first place. Once they got to the police station they found that these checks were stolen. They did have probable cause in my judgment, clearly, and that is why at that stage, they had probable cause to arrest them, they had probable cause to charge them and they did charge them and that is why for the state of Illinois to argue to this court that this was in the investigatory stage is preposterous. This stage because they had the probable cause was at a political stage. It's just as Justice Brennen said in his decision, the prosecution had focused on these two defendants and at that juncture.

CHIEF JUSTICE BURGER: Prosecution? You mean the investigation?

MR. SOLOVY: I do not mean the investigation, Mr. Chief Justice, I mean the prosecution, because they had probable cause to arrest them. They had probable cause to believe that they had committed a crime. Therefore, it was no longer investigatory, it was accusatory. They were bringing Mr. Shard in to nail down their case.

CHIEF JUSTICE BURGER: What about the police out on the beat when he found these travelers checks in the name of another person and got conflicting answers as to how they happened to be in possession? Do you say that that was not reasonable grounds on which to think that a crime had been committed, that perhaps he had committed it ?

MR. SOLOVY: I think he had reasonable grounds--if you believe the police in this case, they had reasonable grounds to arrest Mr. Kirby because he thought he was Alphonso Hampton, wanted for a confidence game so if you believe that, he had reasonable grounds to arrest him.

He also had reasonable grounds to arrest him as the Illinois Appellate Court found, because of the conflicting stories. Therefore, when he got to the police station and found in fact a robbery had been committed, this case is fully covered by Wade and Gilbert because the focus of the police had shifted from investigatory to accusatory. This was now in the critical stage and this whole trial was going to be determined not in the courtroom but when Mr. Shard was brought into the squad room.

CHIEF JUSTICE BURGER: Then do you say that we could not affirm this conviction of Kirby without overruling Wade and Gilbert?

MR. SOLOVY: I do. I do, Mr. Chief Justice, as the State of Illinois does, the State of California does. Otherwise,

they wouldn't be establishing before this Court and arguing that this Court should overrule a decision only four years old.

QUESTION: The Supreme Court of Illinois does not agree with you. In this very case it thought it was following Wade and Gilbert and affirming a conviction in this case, did it not?

MR. SOLOVY: That is correct, Mr. Justice Stewart, but in answer to Mr. Justice Rehnquist's question, the State of California does not agree in a six to one decision.

QUESTION: Well, we have an Illinois case here and we're reviewing the judgment of the Supreme Court of Illinois which was very aware of Wade and Gilbert and thought it was following Wade and Gilbert in affirming their conviction.

MR. SOLOVY: Well yes, but Mr. Justice Stewart, all the Federal Courts which have considered this question, the majority of the states which have considered this question --

QUESTION: There's a conflict of tort and that presumably may have been why we granted a petition of certiorari in this case.

MR. SOLOVY: And it is our petition, Mr. Justice Stewart, that when you look at the philosophy of Wade and Gilbert, that clearly Wade and Gilbert must cover pre-indictment situations, that those are critical stages of the prosecution and that the defendant cannot be allowed to stand alone with the deck stacked against him without counsel.

QUESTION: Mr. Solovy, it's my understanding that Mr. Zagel answered a question of Mr. Justice White, said that although Illinois wanted the Wade decision overruled, they also took the position that it could be limited to the post-indictment situation which as I understand were the facts of the Wade case.

MR. SOLOVY: That's correct, Mr. Justice Rehnquist, and it's our position that when Illinois and California retreat from an overrule of Wade and Gilbert and state that Wade and Gilbert should be limited to post-indictment cases, that we say that the State of California Supreme Court decision six to one in Fowler applying Wade and Gilbert to pre-indictment situations is correct, that all of the Federal Courts have considered this case applying Wade and Gilbert to pre-indictment situations are correct because after all, 99.9 percent of the line up cases happen prior to indictment.

Now, you take this case for example. These men were not appointed counsel for eight weeks. Their right to counsel at a preliminary hearing was violated. Let us assume there was a line up right before or after the preliminary hearing with still no indictment. Now under the rationale of California and Illinois, Mr. Kirby would not have the protection of Wade and Gilbert. In this case, the men were arrested. You had them waiting in the police station for several hours. The State of Illinois can show no prejudice to having an attorney present

They say an attorney would be harmful. I don't believe that. The attorney would help in the search for the truth.

Now, these two gentlemen, two Negroes were seated in the squad room between two white police officers and the State of Illinois says this was an instantaneous identification when the record says they asked if the two Negroes were their assailants and Mr. Wall, in his book on identification which the Court cites in Wade says this is the most grossly suggestive procedure now known or ever known to the police.

Now, what could a lawyer have done in this case? He could have said to the police, please have a line up. Please let's get at least the four or five other Negroes into the room and let him try to pick from five or six Negroes, not from two white police officers and two Negroes. What type of justice is that?

QUESTION: Well, you are getting into a different argument. You're getting into the Stovall argument. That is, you are telling us that with or without a lawyer, that this particular identification procedure was fundamentally unfair and that is a different question, is it not?

It's a question other than the one on which we granted certiorari in this case.

MR. SOLOVY: Well, Mr. Justice Stewart, it seems to me without complaining that I would be unfairly treated, that is Mr. Kirby would be unfairly treated for the State of Illinois

and the State of California to say, you do not need Wade and Gilbert to protect the defendant because you have Stovall but Mr. Kirby doesn't have the benefit of Stovall because the grants of certiorari did not carry that far. That would indeed be an anomolous result. If you do not apply Wade and Gilbert and say give the gentleman an attorney because there were no compelling circumstances here to deny him an attorney, then at the very least the court must apply Stovall, otherwise it would be the most rank form of injustice.

QUESTION: When you talked about Wade and Gilbert and Stovall before, I didn't understand you to argue that Wade and Stovall literally required this result but only that the philosophy underlying those cases called for an extension to the pre-indictment period.

MR. SOLOVY: Mr. Chief Justice, the strict holding as he learned in law school, of Wade and Gilbert are limited to post-indictment cases because that was the fact of the case. My position, Mr. Chief Justice, is that when you read the broad language of Wade and Gilbert, the rationale for the decision, the reasons underlying the decision, and the language itself, logically brings you to the conclusion that the Supreme Court of California reached and all Federal Courts have reached, and that is that the philosophy of that decision is that it applies to pre-indictment cases.

Thank you very much.

CHIEF JUSTICE BURGER: Thank you, Mr. Solovy. Thank you, gentlemen. The case is submitted.

(Whereupon, at 11:14 o'clock, a.m. the case was submitted.)