In the

Supreme Court of the United States

THOMAS KIRBY, etc.,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

No. 70-5061

Washington, D. C.
November 11, 1971

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Thursday, November 11, 1971.

The above-entitled matter came on for argument at 11:35 o'clock, a.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

APPEARANCES:

MICHAEL P. SENG, ESQ., Jenner & Block, 135 So. LaSalle Street, Chicago, Illinois 60603, for the Petitioner.

JAMES B. ZAGEL, ESQ., Assistant Attorney General of Illinois, 188 West Randolph Street, Suite 2200, Chicago, Illinoia 60601, for the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 5061, Kirby against Illinois.

Mr. Seng, you may proceed.

ORAL ARGUMENT OF MICHAEL P.SENG, ESQ.,

ON BEHALF OF THE PETITIONER

MR. SENG: Thank you, Mr. Chief Justice, and may it please the Court:

The issue presented in this case is a narrow one. This Court granted cert on whether due process requires that an accused be advised of his Sixth Amendment right to counsel prior to a pre-indictment show-up held at a police station several hours after the accused's arrest and some 48 hours after the alleged crime occurred.

Illinois has held that counsel is not required at any pre-indictment show-up. We subject that this rule is too broad and that under the narrow facts of this case counsel should have been provided.

The facts in this case are not complicated.

On February 20th, 1968, at about 4:30 in the afternoon, Willie Shard was walking down a street in Chicago, when he noticed two men following about 15 feet behind him. He, however, paid no particular attention to them. As he turned to enter a restaurant, a man grabbed him from behind, while another man took from his pockets $30 or $35 in cash, $145 in traveler's

checks, his wallet, and all his identification papers.

The men then went one way, and Shard went another. It was not until the next day that Shard notified the police and gave them a general description of the height, weight, and complexion of the two men.

Two days later, on February 22nd, at about 11:00 in the morning, Thomas Kirby, the petitioner in this action, and Ralph Bean were walking down a street in Chicago. At the same time, two Chicago police officers, Biaggio Panepinto and James Rizzi, were cruising in an unmarked squad car. Officer Panepinto remarked to his partner that Kirby resembled Alphonzo Hampton, a man supposedly wanted by the Chicago police for perpetrating a con game. The officers then stopped the two men.

When asked for his identification, Kirby pulled out his wallet, and as he pulled out his wallet the officers noticed traveler's checks bearing the name Willie Shard. When asked to whom these checks belonged, Kirby responded that they were play money, or that he had won them in a crap game.

The officers then searched Bean and found identification papers bearing the name Willie Shard.

Q Did these arresting officers, at the time of the arrest, know about the Willie Shard robbery?

MR. SENG: No, they didn't, Your Honor. It was not until after they returned to the police station and had checked

police records that the officers first learned of this robbery, and that fact I think is uncontested in this matter.

Q So that finding the traveler's checks of Willie Shard wasn't in any way incriminating from -- in view of the officers' then knowledge; is that -- well, I'm just trying to piece together this thing. I mean, one of these people arrested, the petitioner, might have been named Willie Shard; is that correct?

MR. SENG: That's possible, Your Honor.

We argued probable cause for arrest in the Illinois appellate court, and that --

Q That's not here to be argued.

MR. SENG: -- court decided against us.

Q Right.

MR. SENG: Right.

When the men were taken to the police station, the officers, after learning that Willie Shard had been robbed, telephoned Shard and told him that they had two suspects whom they wanted him to look at. Another officer was sent to pick up Shard.

When Shard arrived at the police station, Kirby and Bean, who happened to be black, were seated between Officers Panepinto and Rizzi in a large squad room.

When Shard entered the room, the officers asked him if these were the two men. Shard responded affirmatively.

No lineup was ever held in this case, this was the only identification that took place before trial.

At no time prior to this identification show-up was either Kirby or Bean advised of his right to counsel. In fact, the Public Defender was not appointed until approximately seven weeks after their arrest, and eight days after an indictment was returned.

Prior to trial, Kirby's counsel filed a pretrial motion to suppress the identification testimony. This motion was denied.

At trial, Shard testified that the men in the courtroom on that date were the men whom he identified at the police station.

Bean waived his privilege against self-incrimination, and took the stand and testified that he and Kirby found the traveler's checks strewn in an alleyway several hours prior to the time of their arrest.

We respectfully submit that this case is directly controlled by this Court's decision in United States vs. Wade, and Gilbert vs. California. The State, at least in its brief, appears to recognize no meaningful distinction between these decisions in the case at bar, and therefore urge that Wade and Gilbert be overruled.

It is certainly our position that Wade and Gilbert were rightly decided.

Petitioner should have been advised of his right to counsel in this case. He had been at the police station several hours. The alleged crime had occurred two days previously. The State points to no evidence or to no prejudice that it would have suffered had counsel been appointed. Indeed, Illinois statute provides that an accused is entitled to counsel, to consult with counsel immediately after being arrested.

Beginning with Powell vs. Alabama, this Court has consistently held that counsel is required at all critical stages in the criminal process.

In Wade, this Court reviewed the history of the Sixth Amendment and found that counsel is necessary to assure the accused a meaningful defense so that the accused shall not be required to stand alone at any critical stage in the criminal process.

Recognizing the vagaries of identification testimony, the Court realized that for all practical purposes, that an accused's guilt may be determined prior to trial. The Court therefore held that an identification confrontation is a critical stage and that the accused is as much entitled to counsel at that stage as he is at the trial itself.

Now, the Supreme Court of Illinois has held that counsel is only required at post-indictment lineups. We submit that this rule exalts form over substance and makes an accused's

rights depend upon the timing of the identification confrontation.

Furthermore, we think the Illinois rule allows the police to circumvent Wade by holding all identification confrontations prior to indictment. I think this Court would probably be in good company if it decided to overrule the Illinois rule, in fact all the federal courts, lower federal courts, and the majority, except five, of the State courts have held that the pre-indictment/post-indictment distinction is meaningless.

This Court recognized that identification confrontations may be surrounded with suggested influences. And we submit that these suggested influences may occur either prior or after indictment, but the return of an indictment has really no relationship to the problems with which this Court was involved with in Wade.

Q What Illinois wants us to overrule is Wade vs. The United States. [sic]

MR. SENG: That's right, Your Honor. The State makes no argument, so far as I can see, that Wade is impossible to apply; it makes -- its argument basically is the fact that counsel performs no meaningful function at the identification confrontation. This Court held in Wade that counsel's presence will avert prejudice and will assure a meaningful confrontation at trial.

I think just taking the facts of this case, one can readily see that counsel would have had a function. First of all, counsel probably would have objected to the fact that these men were seated between two police officers, that when the victim came into the room, that he was directly asked to point out the accused.

Q The accused were Negroes?

MR. SENG: Yes, that's right, Your Honor.

Q Were the police officers Caucasians?

MR. SENG: Yes, Your Honor.

Q And in uniform?

MR. SENG: I am not sure that the record --

Q Doesn't have to be.

MR. SENG: -- states that exactly, but I think that they --

Q I meant Gilbert v. California is the applicable case here?

MR. SENG: Right. This is a State --

Q Right. Yes.

MR. SENG: Counsel probably, had he been there, would have requested that the men be put in a lineup. Now, the State argues that the police will not cooperate with counsel, or that even if counsel is present the police will employ suggestive procedures outside the presence of counsel.

It is our position that, after all the police have

no interest in convicting an innocent man, but if counsel is present and suggests fair procedures, that the police probably will cooperate. Even if counsel's presence is restricted to a passive role, we think that his mere presence will induce the police to be more careful, and especially in this case there was some conflicting testimony at the trial as to what actually happened, whether, indeed, Shard even recognized the man when he first entered the room.

Q And these were all Chicago police officers?

MR. SENG: That's right, Your Honor.

Q Has that police department adopted any regulations governing lineup procedures?

MR. SENG: No, Your Honor.

The State, in its brief at least, seems to argument that this Court should concentrate on procedures than on the right to counsel, but Illinois has adopted no procedures which bring your statements in Wade into effect, I think.

Q Is this a Gilbert or a Wade case?

Q Gilbert, I believe.

MR. SENG: This is a Gilbert; it's a State case.

Q Where there was reference to the prior identification at the trial?

MR. SENG: Right. In fact, in the direct testimony the witness was directly asked by the prosecutor: "Are these the men you identified at the police station?"

Q So it wouldn't be a question of taint or anything, it'd just be exclusion?

MR. SENG: Right, Your Honor.

Q Per se.

MR. SENG: Right.

Q And I gather the only ground on which Gilbert was not applied was that this was a pre-indictment showup or whatever it was?

MR. SENG: That is the only ground, Your Honor.

And before this case was argued in the --

Q Was there any suggestion in the Illinois courts that but for that fact Gilbert would have been applied?

MR. SENG: Well, this case was decided by the Illinois Appellate Court, and prior to this case the Illinois Supreme Court had ruled on People vs. Palmer that counsel is not required at the pre-indictment lineup. So that the Illinois Appellate Court mainly relied upon the Illinois Supreme Court's judgment. The Illinois Supreme Court's opinion is very brief in this case, it just simply states that they are going to hold Wade and Gilbert to its narrow respects, and that is to a post-indictment situation.

Q What's the procedure in Illinois? You arrest someone, do you file a charge against them?

MR. SENG: Normally -- yes, the complaint is --

Q The compalint is filed, and then there is an

indictment later.

MR. SENG: Right.

Q And this was post-arrest, in-custody, post-charge?

MR. SENG: Yes. Well, I don't think, from the record, there would probably be a complaint -- a complaint had been filed yet. There is no evidence in the record.

Q But it was post-arrest, and there is no challenge by anyone that there was a probable cause to arrest?

MR. SENG: This was argued in the Illinois Appellate Court. No, I think it's significant that in the State's brief in this Court, the State, for the first time, states that Kirby was arrested on suspicion. Now, it was our position in the Illinois Appellate Court that if he was arrested on suspicion that that would not be probable cause. And I think if the State had taken that position in the Illinois Appellate Court, the appellate court might have done the same thing that it did in the companion case of Bean, where it was held that there was no probable cause for the arrest and suppressed the identification on that ground.

It is our position that the function of counsel at the identification will aid in the administration of justice. If the accused is innocent, it will aid in establishing his innocence; if he's guilty, by having counsel at the identification, at the earliest opportunity, it will, I think as this Court

recognized in Wade, it will help remove the taint from the prosecution's evidence, and maybe foreclose many of the arguments at trial and posttrial motions that were brought up in this case.

Furthermore, I don't think requiring counsel at pre-indictment showup in any way will delay the confrontation. The State points to no empirical evidence that this is so in any of the majority of jurisdictions which require counsel.

Q You aren't urging the rule that goes prior to arrest and custody, are you?

MR. SENG: That is not involved in this case, Your Honor.

Q But are you urging the rule that would?

MR. SENG: No. The majority of States have recognized an exception for immediate on-the-scene confrontations, but that really isn't involved in this case, because --

Q Then you are not uring the rule that would reach those?

MR. SENG: Not -- not on the facts of this case, Your Honor, no. I don't want to preclude an argument in another case. The distinction the majority of courts have made is the pre -- immediate on-the-scene confrontation; counsel may be excused in that situation. But beyond that, then counsel is required --

Q For ex ample, if the police here had picked these

follows up five minutes after --

MR. SENG: Right.

Q -- the theft, and had brought them back and said to Shard, "Are these they?" and that's the thing you're saying, isn't it?

MR. SENG: Yes.

Q In the case at bar.

MR. SENG: In this case they had been arrested, they were at the police station, the crime had occurred two days previously --

Q Or if there hadn't been any arrest and they had taken the witness around to where Shard was working, and walk in --

MR. SENG: I think in this case that that would be improper, too, where the crime had occurred several days previously, and where there were not compelling circumstances, you know, in --

Q But he hasn't been arrested. Assume he hasn't been arrested, and he's just at work. They're trying to find out who did it. They take the witness around to that location.

MR. SENG: That would create some problems in my mind. I think you would still have a suggestive --

Q So you really are pressing for a rule that would reach these pre-custody cases, then?

MR. SENG: Well, I don't think that has to be

decided in this case, but I think -- my own feeling is that if the police had done this, that this would be a situation where probably they should call the man to the police station and give him the procedures, Your Honor.

Q In other words, you're going to require him to have a lawyer.

Let's take not the case at the police station, but take it just the way Justice White gave it to you. They ask the witness to go out with a plainclothesman and view this man while he's cutting his lawn or shopping in the supermarket, whatever. Have to go up to him and say, "Sir, we're about to have some witnesses look at you, and it's our duty to warn you that you are entitled to counsel before they look at you." Is that the procedure?

MR. SENG: I don't really see a great deal of difficulty in a procedure like that, unless there are, you know, compelling circumstances or something like that. I think very possibly that the police could inform the accused that he had a right to counsel in that situation.

The Court in Wade seems to indicate that an accused can waive the right to counsel, too. And I would imagine that would be a question under State procedure, as to how he would waive the right. I'm not sure, but --

Q I suggest to you that most innocent people would resent the idea of a policeman approaching them while

they're cutting their lawn or at their work or in some other such place. You're telling them to get a lawyer before they have some witnesses look at them.

MR. SENG: Well, I don't think the rule would go, you know, that they'd be required to get a lawyer or anything like that. I think it's just a --

Q Or a warning.

MR. SENG: -- you know --

Q When a policeman gives a warning to anyone, this puts him in a rather special kind of class, doesn't it?

MR. SENG: Yes, Your Honor. But I think the Court --

Q I submit a suspect class. In the sense that we use that term here.

Q Well, Mr. Seng, in the Chief Justice's case, you come up with the two witnesses and they say, they give them all the Miranda, and all of the other warnings, and he says, "I won't do anything until I see my lawyer." Could those two witnesses forget that they saw him?

The man's out mowing his lawn --

MR. SENG: Right.

Q -- and three people come up, the detective and the two witnesses, and the detective says, "I have two witnesses that I would like to identify you or not identify you, or what-have-you; but you don't have to submit to this unless you have a lawyer." And he says, "Well, I won't submit to it."

Now what happens?

Those two witnesses can't testify?

MR. SENG: Well, I would suggest that probably in a situation like that, that maybe the police shouldn't have taken the witnesses right to that man initially. There is --

Q So they get two demerits; what else?

MR. SENG: Your -- under this Court's ruling in Wade, if direct evidence of the confrontation was not admitted in trial, I think there'd have to be a hearing that this identification confrontation was, you know, given by independent evidence at the identification --

Q The reason I raise it, because in this case they were under arrest.

MR. SENG: That's right, Your Honor.

Q For what?

Is there anything in the record to show what they were arrested for?

MR. SENG: Not really, Your Honor. They were stopped because they resembled another man. Between the time that they were stopped and the time that they were taken to the police station, the officers found these traveler's checks and identification papers.

Q But they weren't -- he wasn't the other man that they were looking for.

Q Not the con man?

MR. SENG: No. No, and that -- there's no issue made of that in this case, that --

Q There's nothing in the record to show what they were arrested for?

MR. SENG: No.

Q But the record does show clearly that they were in custody and were carried to the station?

MR. SENG: That's right, Your Honor.

And I think that's really all that this Court has to decide in this case, really, is that they were in custody, they had been there for several hours, and the crime had occurred two days previously.

I would just like to summarize by stating that it is our position that Wade is rightly decided, that these are very -- the right to counsel is a fundamental right; that the Illinois pre-indictment/post-indictment distinction really is not a meaningful rule when you're considering the rationale for this Court's decision in Wade.

And therefore, we would respectfully urge that this decision be reversed.

MR. CHIEF JUSTICE BURGER: Well, thank you, Mr. Seng.

Mr. Zagel, we will not ask you to start now before lunch.

[Announcement made re another case.]

[Whereupon, at 12:00 noon, the Court was recessed.]

AFTERNOON SESSION

[1:00 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Zagel, you may proceed.

ORAL ARGUMENT OF JAMES B. ZAGEL, ESQ.,

ON BEHALF OF THE RESPONDENT

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

Before discussing the merits on the legal principles involved, I'd like to clarify two or three of the factual situations involved in this case.

The arrest occurred, as counsel for the petitioner indicated, because two police officers thought that the petitioner here looked like a man wanted for a con game, a man named Hampton.

The two police officers stopped the two people, the petitioner and his partner. They asked the petitioner if he was Hampton, he said no, he was not Hampton. The police asked if he had any identification. When the petitioner pulled out his wallet, the officer noted traveler's checks in the petitioner's wallet. He said, "Who do the checks belong to?" At which time the petitioner said, "Oh, that's play money."

After that, the officer said, "Let me see them." And the petitioner handed the wallet to the officer, who looked at the traveler's checks which had the name Willie Shard on them, and said, "Who is Willie Shard?" To which the petitioner

responded, "I won them in a crap game."

The appellate court of Illinois upheld that initial arrest on the grounds that the contradictory explanations for the possession of the property plus the absence of any identification that this man was in fact Willie Shard.

Now, during the course of our brief, we discuss several rules of application for Wade, United States vs. Wade, and when I refer to United States vs. Wade, I of course include Gilbert vs. California; but for convenience I referred in the brief and will refer in the argument to Wade.

We point out that there is one exception, at least the Second Circuit has recognized that for investigatory showups or investigatory confrontations. When that argument was advanced, the petitioner replied that: well, this means that my client, the petitioner, was arrested on grounds of sucpicion; that an investigatory estop of this nature was not based on probable cause, and if that position had been taken below then this case would not be here today.

I have to differ with petitioner's counsel. It seems to me that Hoffa vs. United States, in 385 U.S., definitely rejected the proposition that investigatory -- investigative steps cannot be said to occur after probable cause existed. I think in this case that there was probable cause, and that, as far as this showup was concerned, that it still constituted an investigatory showup.

I'd also point out with respect to this case, we raise two points: the first is that we do defend, despite the petitioner's assertion to the contrary, the limitation of Wade to post-indictment cases, that is Point 1 of our brief. We also attack, as is our right since we are defending a judgment; we also raise the broader ground of the overruling of Wade.

I'd address myself first to the question of overruling. I'd also point out that when we asked for the overruling of Wade, we are not asking for the overruling of Stovall vs. Denno, which recognized explicitly a due process, a right under the due process clause to attack unnecessarily suggestive pretrial confrontation.

If Wade, United States vs. Wade, is overruled by this Court, it does not put out of the reach of the federal court and of this Court questions of suggestive confrontation. Those, of course, can still be reviewed under the due process clause insofar as that right was recognized under Stovall vs. Denno.

Q You're really asking, or more precisely asking for the overruling of Gilbert v. California, aren't you?

MR. ZAGEL: Yes, more precisely.

The reason I said Wade, of course, is that --

Q It was the first case.

MR. ZAGEL: -- it was the first case.

Q Yes.

MR. ZAGEL: And if United States vs. Wade is -- the right to counsel is to be continued as a federal requirement under the supervisory powers of the court, of course there is no standing.

Q Wade was based directly on the Sixth Amendment, I guess, and --

MR. ZAGEL: Yes.

Q -- Gilbert v. California was necessarily based on the Fourteenth Amendment?

MR. ZAGEL: Yes. Yes, it was.

But it incorporated the requirements of Wade.

In essence, I'm asking --

Q But Wade established the right to counsel, didn't it?

MR. ZAGEL: Yes.

Q At the lineup?

MR. ZAGEL: Yes; yes, it did.

Q And Gilbert attached a consequence to it?

MR. ZAGEL: Yes, it did.

Q Do you want Gideon overruled also?

MR. ZAGEL: No. I do not.

And, in any event, it would be not the position of the State of Illinois to ask for the overruling of Gideon, since long prior to Gideon --

Q Yes.

MR. ZAGEL: -- Illinois provided counsel in the --

Q Well, that was a matter of State law, wasn't it?

MR. ZAGEL: Yes. And of course the State requires that i wouldn't be in a position to ask.

Q I was wondering where you draw the line under the Sixth Amendment, as applicable by the Fourteenth?

MR. ZAGEL: Well, I would -- it is at that point, Mr. Justice Douglas, that I wish to express myself directly. The Wade case, the Wade-Gilbert doctrine, adopted the right to counsel at lineups under a critical-stage theory, which of course is familiar, at least the language is familiar. The essential basis of the opinion was that, where the action of counsel might affect the reliability of the fact-finding procedure. That is a critical stage, and the right to counsel attaches.

Now, my first submission is that that is entirely too broad a standard. Because the presence of counsel, at least if you assume that counsel's interest is in a fair investigation, and I think there is some doubt of it. But even if you assume that, the presence of counsel reduces the danger of unreliable evidence at every stage in which evidence is gathered, and all of the well-recognized exceptions to -- lower court exceptions to the application of Wade would come under this reason. The prompt identification immediatiely

occurring, shortly after the crime. Photographic identification. Non-custodial identification procedures. Interviews by police with eye-witnesses. Appearance of witnesses before a grand jury.

All of these cases present instances in which the presence of counsel might reduce dangers to the fact-finding process. And I think that counsel for the petitioner is quite correct in his reluctance to state that he would not contend that the right to counsel attaches to these points. He does not wish to reach these issues, because, frankly, under the critical stage reasoning of Wade he would have to concede that the right to counsel attaches at all these points.

Yet, nearly every court that has ruled on these questions has held no, there is no right to counsel.

The further --

Q That is, these questions: photographic identification and immediately after the offense identification?

MR. ZAGEL: Yes.

Q What were the others, if any?

MR. ZAGEL: Non-custodial identification cases, which were the hypotheticals.

Q That is to see a man at his work?

MR. ZAGEL: Yes. And the one California case which holds that there is a right to have counsel present when the police interview eye-witnesses.

Q The Supreme Court of California?

MR. ZAGEL: The Supreme Court of California. A very narrow holding. It was a holding in which the lineup was conducted with the presence of counsel, the witnesses then left the lineup room to state their impressions of the lineup; counsel asked could he go along at that time, and the police said, "No, you can't," and the California Supreme Court said, "Well, since counsel was there, and it wouldn't have caused any disruption or any inconvenience, counsel can sit there while the police ask witnesses the question."

However, --

Q Did they reverse a conviction on that basis?

MR. ZAGEL: The court, I believe, remanded the cause.

Q Yes. And was it based on the United States Constitution?

MR. ZAGEL: It was based on the United States Constitution.

Q Mr. Kirby, when -- not Mr. Kirby, excuse me. Mr. Zagel, when you do state Kirby reached the "critical stage"?

MR. ZAGEL: Well, in my opinion, for purposes of right to counsel, eye-witness identification never presents a critical stage. I think that the right to counsel at a lineup is an inappropriate right, and that's why I'm asking for the overruling of -- there's a secondary position I take.

Q When do you think Kirby was entitled to counsel?

MR. ZAGEL: I think Kirby was entitled to counsel, under Coleman vs. Alabama, at the time of his preliminary hearing.

Q That was how many days later?

MR. ZAGEL: I don't know how many days later it was, but it was after the identification.

Q When was he charged with robbery?

MR. ZAGEL: I think he was charged with robbery after the identification by Shard. I don't think there was a formal charge entered, and it --

Q Well, what were you holding him on?

MR. ZAGEL: I think they were holding him because they had probable cause to believe that he had stolen the traveler's checks. But of course they didn't know until Shard made the identification.

Q So, so far as this record is concerned, we don't know why he was arrested?

MR. ZAGEL: Well, we do know why, Mr. Justice Marshall. We know --

Q What does the record show?

MR. ZAGEL: -- that -- well, we know that he had traveler's checks in a name which he did not prove to be his own, and we know that he gave two totally inconsistent explanations for his possession of those checks.

Q And what crime was that?

MR. ZAGEL: Well, I think it gives probable cause to believe that he may have stolen those checks.

Q He may have?

MR. ZAGEL: Yes. But you don't have to --

Q Probable cause that he may have.

MR. ZAGEL: No, it is probable cause to believe that he --

Q That he may have?

MR. ZAGEL: Well, in a sense, yes. Of course, you do not have to establish guilt beyond a reasonable doubt.

Q And then he's arrested?

MR. ZAGEL: Yes.

Q And assume nobody could identify the traveler's checks, what would happen to him then?

MR. ZAGEL: I --

Q In Illinois?

MR. ZAGEL: I think that he would probably have been released, although, unless he could show that he was Willie Shard, and the traveler's checks were his, the police might keep the traveler's checks.

Q On what basis?

MR. ZAGEL: That seems to be a police practice, I don't -- when a man can't prove the property is his, and especially when he gives conflicting explanations. I mean, his

responses were rather incredible. The first response was, "Oh, it's play money." And the second response, "I won it in a crap game."

Q Well, was he charged with giving misinformation?

MR. ZAGEL: I don't think he was charged at all, --

Q You don't know anything.

MR. ZAGEL: -- until -- I don't think he was charged at all.

Q You don't know what he was arrested for, do you?

MR. ZAGEL: I would assume that he was arrested --

Q Well, I mean, your word "assume" means you don't know, doesn't it?

MR. ZAGEL: There is nothing in the record to indicate.

Q And there's nothing in the record that tells me what charge he was being held on when he was subjected to being identified by a witness. I don't know, do I?

MR. ZAGEL: No, although --

Q All I know is --

MR. ZAGEL: -- I think you can make reasonable assumptions based on the record.

Q But I do know that he was under arrest?

MR. ZAGEL: Yes, he was under arrest.

Q And so the cases you give about immediately after the crime, they don't apply -- wasn't it two days after the crime?

MR. ZAGEL: Well, except my point is that I don't think you can draw a distinction based on the fact that the man is under arrest.

Q I see.

MR. ZAGEL: If it is possible, if identifying a man who is under arrest, in a single showup, standing with two police officers standing on either side of him, is critical, has potentiality for suggestiveness, which requires the right to counsel, it's no different if it occurs shortly after the crime. It's no different -- the same potential for suggestion exists. The same potential for suggestion exists when a man, who is not in custody, say a man is working at a gas station and the police suspect him of the crime and bring a couple of witnesses by and point him out.

Now, I'm not saying that it's important --

Q But isn't it true they didn't have the slightest idea about the crime when they arrested him?

MR. ZAGEL: In a sense. They did not know that Willie Shard had been robbed, but it would be a very dense police officer who, faced with this -- these two conflicting explanations plus the lack of any identification of the person in possession of the checks as Willie Shard, it would be a very dense police officer who would not have pretty good reasons, at least legally sufficient reasons to suspect that this man had stolen that property. Or at least was in the possesion of

stolen property.

Now, I don't know, perhaps if only one of the explanations had been given -- although the "play money" one seems incredible -- that maybe the officer might not have had probable cause.

Q Petitioner hasn't challenged the arrest here, has he?

MR. ZAGEL: He has not challenged the arrest here.

Now, I point out also that in Wade the court was concerned with the potential for deliberate police suggestion, deliberate police misconduct. But yet the court in Wade said that: We're not going to hold that the taking of a blood test or the taking of handwriting exemplars as a critical stage.

I would point that there is almost, although not quite the same potential for abuse in those cases, requiring the presence of counsel as there is in the eye-witness identification cases. It's at least theoretically possible that the police, if they were mailicious, might use improper methods of taking blood, or they might just say that the blood taken from -- that they testify was taken from the defendant was never taken from the defendant. And counsel, of course, had he witnessed the taking of blood, would be in a position to insure the reliability of the fact-finding procedure.

The final point made, I think, with respect to the rationale within Wade, is that the petitioner in a lineup, when

he challenges the lineup, has a terrible problem reconstructing what occurred.

Now, I don't know that the problem exists. For example, there didn't seem to be a great deal of difficulty in reconstructing what occurred in Wade or what occurred in Gilbert or what occurred in Stovall. There doesn't seem to have been, although there is minor disagreement, there doesn't seem to have been much difficulty reconstructing what occurred in this case.

And furthermore, that problem of reconstruction exists in every one of the excepted cases under Wade. The same problem of reconstruction of prompt identification, the same problem of reconstruction of photographic identification, all exist.

The theory, the critical-stage theory of Wade, I submit, is without rational limitations.

Q You don't suggest that we overrule Schmerber, do you?

MR. ZAGEL: No, I do not suggest that you overrule --

Q I didn't think you would.

MR. ZAGEL: Well, I would -- as I recall Schmerber, I am not, incidentally, suggesting that this Court overrule that aspect of Gilbert and Schmerber that dealt with the Fifth Amendment. I am dealing with --

Q I didn't think you would.

MR. ZAGEL: No, I am dealing solely with that -- those portions of the case that dealt with the --

Q Sixth?

MR. ZAGEL: -- Sixth.

Q Of course.

MR. ZAGEL: The more important, and I think it is --

Q It seems to me one possible reason for construing the Sixth and Fourteenth Amendments as requiring the presence of counsel at a lineup is the sort of preventive -- preventive reasons. With counsel there, even though he may never have to testify or never have to say anything about the lineup or that may never come up, but just his very presence may serve to assure a fair lineup. Isn't that -- could that possibility be --

MR. ZAGEL: Yes.

Q I didn't notice that in your brief.

MR. ZAGEL: No, we have considered that. We have considered that --

Q But now in your oral argument you are agreeing that that could be.

MR. ZAGEL: Yes. We considered that expressly in the brief, and our concern with that point is that you have a difficult problem if you assume that -- if either assumption is taken, in fact, that counsel is present and he doesn't effectuate a fair lineup, or if counsel is present and he does.

If he doesn't effectuate a fair lineup, he's in a position where he must testify as a witness, which may disqualify him from representing the defendant as counsel. Furthermore, as Professor Read points out in his article, there's really no reason to believe that the attorney, on behalf of the defendant, is likely to be viewed as any more impartial when he testifies than the defendant himself is. So I think that --

Q Well, I'm assuming in my question that he never will testify, he'll never need to testify, and he'll never need to refer to the lineup, because the lineup was fairly conducted because of his presence.

MR. ZAGEL: Well, that is the -- that is the alternative, which is to say that the remedy is effective. The problem with that is that he may still have to testify. Not as the defendant's witness, but the prosecution's.

Because what he sees at that lineup is not privileged. It's -- it does not involve communications from his client. He may be called by the prosecution.

Q What's wrong with him testifying to the truth?

MR. ZAGEL: Well, that brings the next point: if he's successful and he either has to testify against his client or he says to his client: No, I'm not going to challenge the identification; no, I'm not going to cross-examine these witnesses because I was there and it was a fair lineup.

You create a serious breach in his relationship with his client. Not only that, you're undoubtedly going to subject him to attack for being unfaithful to his client. The client is going to say, when the lawyer says, "No, we're not going to attack this lineup" --

Q Well, I assume that Kirby doesn't care about that point. Or he wouldn't be here.

MR. ZAGEL: Well, I don't know that that is a fair assumption. I tend to think that if Mr. Kirby's counsel --

Q Well, you've asked me to make all other kinds of assumptions, why can't I make that one?

MR. ZAGEL: Well, I would ask you to make a different assumption. I would ask you to assume that if Mr. Kirby had counsel and Mr. Kirby's counsel insured that there was a fair lineup -- although that's not his job, to insure that there's a fair lineup -- it's his job to insure that there's a lineup weighted in favor of his client; assume that he succeeded --

Q I don't agree with that at all.

MR. ZAGEL: Well, I think that maybe, Mr. Justice Marshall, that --

Q I thought that both sides were looking for the truth.

MR. ZAGEL: I very much disagree with that role of defense counsel. I was defense counsel myself, and my role is to see within the law if I can get an acquittal, for my

client. And it's not in my interest if I'm representing a guilty client to see that there's a perfectly fair lineup. In fact, I would, if I were defense counsel, I would find it difficult to make a decision whether to object to an unfair lineup.

Q Well, I assume, sir, that since you say when you were defense counsel you only wanted to get your man acquitted, even if he was guilty, that as prosecutor you want him convicted even though he's innocent?

MR. ZAGEL: No.

Q Certainly you don't mean that.

MR. ZAGEL: No, I don't. But there's a different standard of duty on prosecutors than there is on defense counsel. There is no equivalent to Brady v. Maryland for defense counsel. But it's an obligation --

Q Except the canons.

MR. ZAGEL: Except the canons, which are, in most extents, unenforcible, and I don't know that the canons --

Q Well, even the canons, the newest standards of the American Bar require defense counsel to protect all the constitutionality of his client.

MR. ZAGEL: That is correct. That is correct, Mr. Chief Justice.

Q True.

MR. ZAGEL: But if counsel succeeds by his presence in

securing a fair identification, he's going to have difficulties with his client. Because he's in a position -- he's not -- he's supposed to defend his client's interest, he's supposed to advocate his client's cause; he's not supposed to be a witness. He's not supposed to assume the role of an impartial witness.

It's not a mere technicality that the canons say that a man should not be both lawyer and witness. There's a very sound reason. And the sound reason is, as witness, his testimony may damage his client's case. And that is why I think counsel is a particularly inappropriate vehicle for the regulation of lineup procedures.

We point out that the regulation of lineups can be accomplished under the due process clause under Stovall, if it is thought that there is a sufficient danger of improper identification procedure.

But counsel is not the appropriate technique to use.

Q But you didn't have to -- you wouldn't have to call him, would you?

MR. ZAGEL: Would you repeat your question, Mr. Justice Marshall?

Q You wouldn't have to call defense counsel as a witness, would you? You are so interested in protecting the defendant's rights. He could only be a witness if the prosecutor calls him, right?

MR. ZAGEL: Yes. Yes.

Q And the prosecutor might not call him.

MR. ZAGEL: Yes, that's true, the prosecutor might not call him. But the risk exists.

And that risk might influence defense counsel's tactic. It may very well be that a defense counsel would be present at a lineup. He'll think that the lineup is fair; he'll tell his client: No, I'm not going to raise any question as to the lineup.

And the trial will go on smooth and calm, and nothing will happen except later, in a State or federal proceeding, the defendant is going to say --

Q Ineffective assistance of counsel.

MR. ZAGEL: -- ineffective assistance of counsel.

Or, to put it in the vernacular of a client, as he once addressed it to me when I said I wasn't going to raise a search-and seizure question, he said, "Whose side are you on?"

And that is not going to benefit the administration of criminal justice. I might also add that this has to be viewed in context of the fact that there is very little in the way of legal resources, that is to say, lawyers to meet the problem of counsel at lineup.

In fact, in one case, the Randolph case which is cited in our brief, the District of Columbia which has a provision, the Legal Aid Agency apparently provides counsel. Counsel was

called to testify at a motion to suppress, and his testimony, he could not remember whether he represented the defendant Randolph. He came back the next day and said, Well, he had thought it over very carefully and he had a vague recollection that he represented Randolph. And then they said, "What happened?" He said, "Well, I'll have to look at my notes."

In effect, what counsel did is that he testified from his notes. Now, I don't know why his notes are going to be better than a photograph at the lineup.

Q Well, isn't the photograph of a lineup a practical way of assuring the fairness?

MR. ZAGEL: I think it is a practical way of assuring all of the fairness that the presence of counsel is supposed to assure. There are some questions of fairness that admittedly not even counsel can assure. For example, before the lineup the police can say to a man, to the witness, "The man who's the third one from the left, we found your stolen property in his house, and he's got a record as long as your arm, and he's done it many times, and several people who saw him come out of your house have identified him."

Now, that's a clearly suggestive practice, but that's not something that is reached under the right to counsel in any event; that's reached under the due process aspect of Stovall v. Denno.

Q I was merely going to ask is photography of

lineups in practice in many places, to your knowledge?

MR. ZAGEL: No, it is not. There is a -- there was language in the opinion in Wade that suggested that perhaps administrative regulation would obviate the necessity for counsel. The problem with that language, and the problem with asking States to rely on that language, is that three of the Justices who concurred with the majority opinion explicitly rejected that; the fourth Justice who concurred said nothing on the point. And so far as I know the only case which has dealt with administrative regulations is the Fowler case in the Supreme Court of California, where they just simply said that the regulations would have to be so strong as to insure that there is no suggestiveness.

Q Tell me, has the police department adopted any kind of regulations to assure fairness of lineup?

MR. ZAGEL: Yes. But there's an existing regulation which existed before the time of Wade, Gilbert, or Stovall, which prescribed certain procedures for lineups. Strangely enough, defense counsel have not used that. I don't know why they haven't. They have never called the police in and used the regulations in cross-examining police officers. I don't know why.

Q Some police departments, after the decisions in Wade and Gilbert, notably in the New York City Police Department, promulgated regulations --

MR. ZAGEL: Yes.

Q -- elaborate regulations, which have been given wide publicity and which, under the regulations themselves, provide methods for assuring that the regulations are provided. But Chicago hasn't done anything on that?

MR. ZAGEL: No. No, there was, prior to the time of the Palmer decision, there were some draft regulations concerning right to counsel, and many police officers, of course, were aware of the decision; and there are a fair number of cases involving warnings, as to right to counsel, and even a few in which counsel was present at the lineup. But there have been no formal regulations promulgated as a result of those decisions.

I point out that --

Q But I think the opinion in Wade suggested that the prescriptions of that opinion might be supplanted by equally effective regulations.

MR. ZAGEL: Yes, but I would submit that it would be difficult for me, for example, advising the police, to say that that aspect of the opinion was holding the court. So far as I could infer, Mr. Justice Brennan, you were the only Justice of the Court who definitely committed himself to that proposition, although perhaps Mr. Justice Clark did, as well.

But three of us who joined with you in the opinion did not adhere to that. That is why, if it had been a little more

clearcut, perhaps, we might be arguing a different issue today. And that, I think, is responsible for the reluctance of the California Supreme Court to approve the regulations in the Fowler case.

Q Mr. Zagel, do you draw any -- am I right that this identification as more for the purpose of arrest -- I mean I'm trying to get to my problem with the two arrests -- was for the purpose of holding him on this robbery charge, not for the purpose of convicting him. Do you make any point of that?

MR. ZAGEL: No. I think that it was investigatory in the sense that I think if Shard had said, "No, that's not the man", they would have been released.

Q That's what I mean.

MR. ZAGEL: It was -- I think it was investigatory in nature.

Q And that takes it out of Wade and Gilbert?

MR. ZAGEL: I think that that is an additional reason for taking it out of Wade and Gilbert, if Wade and Gilbert is the stance.

Q I see.

MR. ZAGEL: In conclusion, I simply state that as far as Wade is concerned, and Gilbert involves the insertion of counsel into a role in which he has neither the capacity, authority, or ethical obligation to fulfill and fulfill

adequately. And that insertion of counsel into that situation ought to end, and Wade and Gilbert, to the extent that they require it, ought to be overruled.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Zagel.

Mr. Seng, you have about nine minutes.

REBUTTAL ARGUMENT OF MICHAEL P. SENG, ESQ.,

ON BEHALF OF THE PETITIONER

MR. SENG: Thank you, Your Honor.

I just want to make several points in my closing, and that is that this case is a very narrow case. The identification occurred several hours after the arrest. The accused was in custody. The crime had occurred two days previously.

There is no contention in this case but that the police had plenty of time to advise the petitioner of his rights, and to secure counsel for him.

Now, the sole factor in Illinois, which makes the right to counsel attach is the presence of an indictment. I do not think that this is a proper rule. Now, counsel for the State has cited several rules in other jurisdictions. The immediate on-the-scene confrontation; the leading decision in that area, I think, is Russell vs. United States, in the D. C. Circuit, where the court distinguishes that situation from a later confrontation on the grounds that in that case the witness's memory is fresh and that makes the identification at

that stage very critical and very necessary.

In this case, I think in reading the record you have to say that the focus of guilt has attached to the accused. He was under arrest. The police had searched police records; learned of the robbery. They called Shard to come down to the police station.

I think it has passed from the investigatory stage into a specific focus of guilt upon these two men if they commit this robbery, and I think that's the reason by Shard was called down to the police station.

Q What if, as your friend has suggested, Shard had said, "No, these are not the men"?

MR. SENG: Well, Your Honor, I think that points to the critical nature of the identification in this case, that that was really what the State was relying upon to convict these men. And if Shard had been unable to identify them, I don't think --

Q Are you getting ahead of yourself? They were doing it to determine whether he should be charged.

MR. SENG: I think in this case, Your Honor, --

Q What would have happened if Shard had said, "No, these are not the men"? Your friend said they would have been released. Do you agree that that's a likely result?

MR. SENG: It's hard to speculate, Your Honor. But they did have the, you know, identification papers, the traveler's

checks on their person. Now, whether the police would have immediately released them, I really don't know.

Q Would they probably or possibly have been subject to a charge for possession of recently stolen property?

MR. SENG: It's possible that the police might have charged with some other crime.

I think in this case, where they were being held down there, where the police had checked the records, learned of the robbery, specifically telephone Shard, told him to come down to identify two suspects, that I think the focus is definitely attached to these individuals there at that time.

Q What about the Illinois claim that the two-day period is not that important, it would be much the same if it had been the same day?

MR. SENG: I think just on the basis of human memory, human frailties as to observation, that -- now, I am not, myself, not arguing really specifically, I can give my personal impressions on the immediate on-the-scene confrontation; but it seems to me that in that situation, that where you see somebody a few minutes after the robbery that your memory is pretty fresh: this is the man.

Q Well, would you have any complaint if they had picked Kirby up two days before, under the exact same circumstances; would you make the same argument?

MR. SENG: Two days before?

Q Yes, the day he was robbed.

MR. SENG: I think that -- now, to a certain extent, that that would make a difference as to where he was picked up, whether it was in the vicinity --

Q Under the exact same circumstances.

MR. SENG: I think under the exact same circumstances, the way I see them, that probably they should have taken him down to the police station and advised him of his right to counsel.

Assuming that it wasn't immediately after the robbery, and he was found, say, within a block or so, running away, or something like that.

I don't think this Court has to reach this issue in this case, though. He was under arrest. He was at the police station. And a crime, in fact, had occurred two days previously.

The State has not adopted alternatives to Wade. The mention was made of photographs. There's no indication in this case that the police had made photographs.

I think that under this Court's decision in Wade and Gilbert, that counsel should have been provided in this case, under the narrow facts given here.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Seng.

Thank you, Mr. Zagel.

The case is submitted.

[Whereupon, at 1:35 p.m., the case was submitted.]