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In the

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

vs.

CHARLES J. ASH, JR.,

Respondent.

No. 71-1255

Washington, D. C.
January 10, 1973

Pages 1 thru 41

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UNITED STATES OF AMERICA, Petitioner,	:	
v.	:	No. 71-1255
CHARLES J. ASH, JR., Respondent.	:	

Washington, D. C.
Wednesday, January 10, 1973

The above-entitled matter came on for argument at 1:38 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:

EDWARD R. KORMAN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530; for the Petitioner

SHERMAN L. COHN, ESQ., 600 New Jersey Avenue, N.W., Washington, D. C. 20001; for the Respondent

C O N T E N T S

* * *

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-1255, United States against Ash.

Mr. Korman, you may proceed whenever you are ready.

ORAL ARGUMENT OF EDWARD R. KORMAN, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case is here on a writ of certiorari to the United States Court of Appeals for the District of Columbia to review a five to four en banc decision of that court which held that under the Sixth Amendment a defendant in a criminal case is entitled to the presence of counsel at a pre-trial showing of photographs to witnesses to the crime which he is accused of committing.

This case arises out of an armed bank robbery of the branch office of the American Security and Trust Company in the District of Columbia on the 25th day of August, 1965. A lone gunman entered the bank, put a stocking mask over a portion of his face, announced his intentions and told everyone not to move.

Immediately thereafter a second man entered the bank, ran behind the tellers' cages, scooped up the money, and ran out of the bank followed by the gunman who had

initially entered the bank. As the bandits ran from the bank, they again removed the stocking mask which covered their faces up to the bottom of their noses and at this point they were both seen with their faces uncovered by a woman who was seated in a car outside of the bank.

The two robbers, however, made good their escape and it was not until some five months after the robbery had occurred that a convicted felon, concededly seeking consideration from the authorities, told them that one Charles Ash had asked him, the informant, to participate in the bank robbery and had on the day following the robbery admitted his participation to the informant.

On the basis of this information police gathered five photographs, one of the defendant Ash, one of Bailey, who was the accomplice which the informant told the authorities Ash had implicated as the second man in the robbery, and three other photographs. These were all black and white and they were shown to four witnesses to the robbery. Two of them were bank tellers, and both of them selected photographs of Ash as the gunman. Neither was positive in their identification.

The third witness who was shown these photographs was a customer of the bank who had seen the gunman enter the bank and put the mask on. He also selected a photograph of Ash. His identification was likewise inconclusive.

The fourth witness was the woman who had seen the two running from the bank. She also picked out a photograph of Ash as being one of the two whom she had seen running from the bank. Her identification was likewise uncertain.

The case, for a number of reasons, was not scheduled for trial until May 8, 1965, some two and a half years after the showing of the initial photographs and some three years, almost three years, after the date that the crime was committed.

The assistant United States attorney in charge of the case no doubt wondering whether any of the eyewitnesses would be able to make any kind of identification at this stage of the proceeding, had five color photographs displayed to each of the four witnesses. The five photographs included one each of Bailey, one of Ash, and three others. The two defendants--

Q The three were unconnected?

MR. KORMAN: Unconnected with the robbery.

The two photographs of the defendants who were to go on trial the following day were what is known as, I believe, called full-length FBI case photographs, indicating their height and their build. Three other photographs were not full-length but were cut at some point above and below the chest.

At this point the results of the photographic

display were again inconclusive. Three of the witnesses picked out Ash's photograph and said that he looked like him or words to that effect. Their identification was uncertain.

A fourth witness, the gentleman who was a customer at the bank, could not pick out any photograph. Again, as in the first instance, none of the witnesses were able to pick out the photograph of the co-defendant, Bailey.

The district court, after a hearing, pre-trial hearing, held that the initial photographic display which took place five months after the robbery, was not impermissibly suggestive and that regardless of the propriety of the second showing of photographs, there was an independent basis for the uncertain at that point eyewitness identifications.

At the trial, the Government introduced the testimony of its informant, who under oath testified that Ash had asked him to participate in the robbery and that the day following the robbery Ash had admitted his participation to him.

The Government also introduced the testimony of the four eyewitnesses. Three of them again made inconclusive identifications. They were not positive of their identification of Ash, merely picking him out as looking like or words to that effect.

The fourth, the woman who was seated in the car

and who had of all the witnesses perhaps the greatest opportunity to view the bandits unmasked, picked out both Ash and Bailey positively.

Again, none of the other three witnesses were able to select Bailey at all as even looking like the second person that had been involved in the robbery.

The prosecution during its case did not elicit the fact that there had been any pre-trial identifications from photographs. Bailey's counsel, however, was anxious to show that Mrs. Apple, who had made a positive identification of Bailey in the courtroom, had been unable the day before to pick his photograph out of the five that were shown to her. And so during the defense case, he called the FBI agent and Mrs. Bailey to elicit the fact that, one, she had indeed been shown photographs; she had picked out one person as being one of the two she had seen running from the bank but was unable to pick out the photograph of Bailey. And he then offered the photograph of Bailey into evidence.

At this point the United States Attorney asked that Ash's photograph be offered into evidence, presumably less the jury get the impression that the other person she had picked out was someone other than Ash.

Ultimately all five photographs were admitted and the jury thus became aware that Mrs. Apple had made an uncertain identification of Ash's photograph on the day

before trial.

The jury was unable to reach a verdict as to Bailey. As to him, the only evidence was the positive identification of the witness in court. The jury was hung, and after the trial the judge directed a verdict of acquittal. The defendant Ash, however, was convicted of all counts of the indictment arising out of the armed bank robbery.

On appeal, the Court of Appeals did not reach the issue of whether the second pre-trial photographic display was improperly suggestive. The majority stated that certainly the elements of suggestiveness were strong enough so that it cannot be assumed there was no undue suggestiveness in the absence of explicit findings by the trial court. Of course, the trial court had not reached this issue, but the majority in the Court of Appeals likewise stated that it was aware that there are indications offsetting in part the inference of undue suggestiveness.

Since these other indications were not conclusive and since there were no explicit findings by the district court on this issue, the majority held that a remand would ordinarily be required but for its conclusion that the defendant was entitled to counsel at the photographic display on the day before trial and that thus reversible error was committed in the admission of the fact that Mrs. Apple

had in fact made an identification, albeit an uncertain one, on the day prior to trial.

We believe that this holding, which is contrary to the holdings of nine other circuit courts of appeals and the overwhelming majority of state courts is erroneous. Accordingly, we ask that the judgment be reversed and that the case be remanded for the further proceeding suggested in the opinion of the Court of Appeals.

The Court of Appeals rested its decision, the majority of five, principally on the holding of this Court in United States against Wade, that a defendant was entitled to counsel at forced confrontations between himself and the witness or victim of the offense. In holding that an interview between prosecutor and the witness, at which the accused was not present, was like a lineup, a critical stage of the proceeding. The court below, we submit, ignored the critical and crucial distinctions between a lineup and a photographic display.

The basis of this Court's holding, as we read Wade, was that lineups were susceptible to many forms of subtle suggestion, which increased the possibility of erroneous identification. And not only were they susceptible to this kind of subtle suggestion, but because of the nature of the proceeding, it was impossible for a defendant to reconstruct them at trial.

The reasons for the inability to reconstruct these events was peculiar to the nature of the tense emotional atmosphere that is involved when a victim or a witness to a crime is confronted with the person who is accused of perpetrating the crime.

The possibility of subtle suggestion is present simply in the fact that it is a live lineup; the defendant is asked to walk in, to move about, to don clothing, to utter words. The potential for suggestion, it has been suggested, is present in everything from the clothing he wears to the manner in which the lights are focused on him.

Under these circumstances, given the inability to reconstruct the subtle forms of suggestion, it was held that a lawyer was present to enable the defendant at trial to confront the witnesses against him and to elicit before the jury or for the benefit of the court those elements which were improper in the conduct of the lineup.

The difference between what Judge Wilkey in his dissenting opinion called the little drama of a live confrontation and the showing of five or six still photographs to a witness or a victim is apparent. Initially there are just these five photographs. There is no defendant present. He does not move around. He is not asked to say anything. He is not asked to don any clothing. No lights are shone upon him.

In addition, the photographs are generally shown in a much less emotionally charged atmosphere. They are shwon either in the office of the presecutor or, as in this case, at the home or place of business of the witnesses to the crime.

While it is true there is still a potential for suggestion, it is true that the photographs themselves may not be properly selective or in some other way indicate to the witness who it is that the police think committed this offense. But that kind of suggestion is readily shown simply by looking at the photographs at a suppression hearing. And, indeed, in this case the defendant argued and the Court of Appeals was able to give a minute description of the suggestive influences that it found present simply on the basis of viewing the photographs.

This is not the same as simply taking a picture of a lineup. A picture of a lineup would just show what happened during that one split second when the picture was taken. It would not show what happened a minute after or a minute before. So that this is not, as the defendant suggests in his brief, the equivalent of taking a picture of a lineup.

It is also true that there is a potential for suggestion in the words that may be spoken to the witness when the photographs are shown. But that kind of suggestion, number one, can be revealed by the witness. There is no

reasón in the world why he should not be able to testify truthfully as to what was said to him when the photographs were shown. More significantly, there is no more potential for suggestion there than in an interview without any photographs at all. After all, if the prosecutor was so inclined, he could simply tell the witness, "Well, remember you gave us a description. You said the gunman in this case was 19 years old. He was black, light skinned. He was well dressed. He was wearing glasses. Well, you go into the courtroom and take a look and see if you see him at the defense table."

That is the most apparent kind of suggestion which can take place without any kind of photographs being present. Yet it has never been held nor, as I understand, has it ever been suggested that any time a prosecutor even talks with a witness to the crime that a lawyer is required to be present.

And so for these substantial reasons we think that this proceeding, showing of still photographs, is significantly different and that this is not a critical stage of the proceeding.

Also, there is another significant fact that differentiates this case from the lineup case. This is what transpires when a prosecutor talks with a witness; this is simply the preparation by the prosecutor of a witness for

trial. We know of no case, one, that it is ever held that a defendant is entitled to a lawyer at a proceeding at which he himself is not present. Particularly this is so when the proceeding is nothing more than an interview had between the witness and the prosecutor as part of his preparation for the trial of the case. And I think that it is significant not only the language of the majority opinion weighed which constantly stressed the forced confrontation between the accused and a witness to the offense, but also the concurring opinions of the justices who cast the deciding votes on the issue of whether a lineup was a critical stage of the proceeding.

Mr. Justice Black, in concurring in that portion of the opinion which this Court said that a lineup is a critical stage of the proceeding, said, "I agree with the Court that a lineup is a critical stage of the criminal proceedings against an accused because it is a stage at which the Government makes use of his custody to obtain crucial evidence against him.

Mr. Justice Clark, who cast the concurring vote in that case, relied principally on Miranda v. Arizona as the basis for his concurrence. That case, of course, involved custodial interrogation of an accused who was in custody. And so that that factor that the accused was present when this transpired and needed a lawyer to help him

because of his very presence there we regard to be one of the other crucial factors which distinguished this case from Wade.

Q Was there testimony in this case about the pre-trial identification?

MR. KORMAN: Yes, there was.

Q At the trial?

MR. KORMAN: Only during the defendant's case, yes.

Q Only during the defendant's case--

MR. KORMAN: Right. The prosecutor did not offer any evidence during the course of the trial.

Q So, you think there is no Gilbert problem in this case?

MR. KORMAN: No, I do not follow you. In what way?

Q Let us assume that Wade did apply the photographic identifications and the prosecutor in examining his witness brought out the fact of a pre-trial identification absent counsel. It would not help to show no taint then, would it, under Gilbert?

MR. KORMAN: No, it would not. As I understand--

Q Is there any problem like that in this case or not?

MR. KORMAN: We do not dispute the finding of the Court of Appeals that it was the Government who asked that

Ash's photograph be introduced and that it was at the Government's behest that all--

Q Would you say then that if Wade were held to apply to this case that this case would automatically be reversed?

MR. KORMAN: That is correct, and that is precisely what the Court of Appeals did.

Q So that the finding of no taint--there was a finding of no taint, was there not, here?

MR. KORMAN: By the district court.

Q Yes, but that would not override a Gilbert violation?

MR. KORMAN: No, it would not.

Given both the state of the law, the overwhelming majority of the cases which have decided this issue and have held that a lawyer need not be present at a photographic display, the respondent has understandably relegated to second place in his brief the defense of the majority opinion of the Court of Appeals. And, instead, he would have this Court decide this case on an issue which was not dealt with by the district court, which the Court of Appeals felt was not properly presented, given this state of the record. That is, that in effect the showing on the day before trial was so impermissibly suggestive as to constitute a violation of due process.

As I have noted, the Court of Appeals, and I think quite properly, was very careful in dealing with this issue and in stating that they could not and would not, absent specific findings by the district court on this particular question, rule on this issue.

I think this careful disposition was correct for two reasons. Number one, the Constitution, of course, provides that all criminal trials shall be by jury, in Article Three, Section Two. A finding that a particular photographic identification was so impermissibly suggestive as to constitute a violation of due process necessarily ousts from the jury its function of considering the reliability and credibility of this eyewitness identification, even whereas here all of the facts can be brought before the jury.

So that before a court reaches such a conclusion, before a court determines to oust from the jury its crucial fact-finding function under the Constitution, it should be very careful to do so on a record that is complete on findings that are made by a district court and should not reach out and decide it on an inadequate record.

Second, it is worth noting that in this case are the factors which the Court of Appeals alluded to, which indicated the possibility that there was no such undue suggestion that would lead to a due process violation. One,

despite the alleged suggestion--and we have to keep in mind that these photographs, to the extent that they were suggestive, were suggestive as to Bailey as they were to Ash, yet not a single witness was even able to pick out Bailey's photograph and even say so much that he looked like Bailey.

In the second place, despite the suggestion--

Q Bailey was acquitted by the jury--

MR. KORMAN: Hung. He was acquitted by the judge after the jury was unable to reach a verdict.

Q I see.

MR. KORMAN: In the second place, even as to Ash, three of the witnesses on the day before trial were able to give only uncertain identifications and a fourth was not even able to pick out his photograph.

And, in addition, because of the way the proceedings were handled, the pre-trial hearing, none of the witness--all but one, I should say--only one of the witnesses was even asked questions about the effect which the viewing of the photographs had on her the day before trial.

And the third reason I think ought to be considered before the Court deals with this is that this is really a factual issue that has not been resolved by the two courts below. And at this stage we think it would be improper for this Court to reach out to decide the issue before any

consideration was given to it by the lower courts. And in this respect I would call the court's attention to an analogous case of United States against Foster, which this Court concluded by a five to four vote that, in fact, the identification was impermissibly suggestive, but declined to rule on harmless error argument that had been advanced for the first time in this Court, saying that it wished the lower courts to resolve that issue first before it got involved in what was essentially a factual determination.

And so for these reasons we would ask that the judgment of the Court of Appeals be reversed, not that the judgment of conviction be reinstated, but that the case be remanded to the Court of Appeals for appropriate disposition in accordance with the suggestion in its opinion. Thank you.

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

Mr. Cohn.

ORAL ARGUMENT OF SHERMAN L. COHN, ESQ.,

ON BEHALF OF THE RESPONDENT

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

The Government, we submit, was quite correct in Wade when it urged upon this Court that there is no meaningful difference as concerns the right to counsel between a pre-trial identification from photographs and a similar pre-trial

identification made at a lineup.

Indeed, the trial judge in this case himself testified, stated, in May of '68 that there then had been a recent increase in the use of photographic identification in the District of Columbia. This was nine months after the decision in Wade.

I respectfully suggest that this case illustrates precisely that the Government was correct in Wade, that Wade was a correct decision and still is and that drawing an artificial distinction between corporeal identification procedures and photographic identification procedures would not only be, in the Solicitor General's words, meaningless, but would permit the continued easy use of this device to evade this Court's clear holding in Wade.

One needs only to examine the facts in this case to see how intentionally or unintentionally the United States attorney attempted to use what I respectfully suggest is impermissible suggestions. I invite each and every member of the Court to examine personally the colored photographs of the 1968 identification procedure which are in your file.

I respectfully urge that they portray graphically what this case is all about. The witnesses to the crime--who had little opportunity to see the robbers, who made indefinite or no identifications at a photographic array some five months after the crime, who after the crime could describe

the robbers only as to height, about six foot; to build, thin, slender; and color, black, light complexion--was shown almost three years later and at that the day before the trial, five photographs. Three of these were size three by three or three by four. One of the defendant Bailey was four by six; and that of the defendant Ash was five by seven.

Only two were full length. Only two had height markers to indicate six foot. Only two carried police identification numbers. Only two were thin. In each and every case these two were the persons to be tried the next day. This the Government calls the preparation of a witness.

The Government urges that the fact that we know these facts demonstrates that the presence of counsel at the photographic ID could serve no purpose. But here we part ways with the Government and for two reasons.

First, as Gilbert v. California makes clear, the requirement for counsel at critical stages of the proceedings is not only to permit the raising and the proper presentation of defenses but also as a prophylactic to deter constitutionally objectable practices. Although I find it curious and surprising to find a lone United States attorney engaging in such practices as I described nine months after Stovall and two months after Simmons, I would find it most difficult to conceive of a United States attorney engaging in such tactics in the presence of the counsel for the defendant. He

would stand there as a reminder, a graphic reminder, that due process must be followed.

Secondly, although we know much of what happened at the photographic array, we cannot know all. We do not know, we cannot know, the nuances, the gestures, the intonation that might have been used. The Government urges that these matters could be developed in cross-examination. My learned colleague states that there is no reason in the world why the witness cannot testify as to the words that were used.

I suggest there is a reason, and the reason is stated in Wade. The reason is that the unschooled layman does not and cannot be expected to note those matters that are important. And, besides, if he does note them, they will not work.

Q Mr. Cohn, suppose instead of having had interviews in the context of this case, the police had the same five photographs of five different people, all of whom were at least thought to be suspect for one reason or another, and took them around the neighborhood and exposed them to people and said, "Have you ever seen any of these men before," and then "If so, where?" and narrowing it down to the day and details: What would you say about that exposure of the photographs?

MR. COHN: Mr. Chief Justice, I draw a line between identification of procedures that are investigative. We are

now after Kirby, so that we are dealing with a post-indictment situation as distinguished from a pre-indictment. Where there is investigation going on, where there has not yet been a focusing, where there has not been an indictment, where no criminal proceedings or prosecution, whichever word one wishes to use, has begun, we have an entirely different story than we do after indictment. Here there has not only been a focusing, but you have a man who is incarcerated several blocks away. The trial is about to begin. And what we have is an identification which is then entered as positive evidence.

My colleague stated that this was during the defendant's case, and I just want to emphasize it was by the co-defendant's counsel that it was offered, and that the picture of Mr. Ash was ultimately offered by the Government. So that whatever taint there is from the fact that it was ofered during the defendant's case, it was not during this defendant's case. And he did not offer it; then we would have an entirely different proposition.

Q It is not your claim, as I understand it, that photographs cannot be used in a variety of different ways during the investigation of a criminal offense. For instance, if a camera in a bank, one of these automatic cameras, takes a picture of a holdup man, there is nothing on earth, I suppose, in your argument that would require the

police to take a lawyer with him when they go around the neighborhood asking people, "Have you ever seen this man? Does he live here?"

Your argument is limited to the case of where this kind of evidence is used in the trial in order to convict comebody.

MR. COHN: That is correct. We have here--and this is where we also draw the line--

Q Through eyewitnesses.

MR. COHN: Yes.

Q Who testified.

MR. COHN: Here is where we part ground with the Government. The Government says, "This is the same as all other preparation of witnesses." I would hope not. But I suggest that what we have here is the production of positive evidence, positive evidence of identification. And this production, whether it is through a lineup which is then used or is through pictures which are then used or showup or anything of the sort, once the criminal prosecution has started, once there is an indictment or information or an arrest, to use the words of the Kirby case, once that happens, the right to counsel is attacked.

Q Mr. Cohn, you say this is positive evidence, and I take it that is the way you distinguish Mr. Korman's example where the prosecuting attorney is simply horse-

shedding the witness without any photographs.

MR. COHN: In a horse-shedding situation, the statements of the witness are not admissible as positive evidence. Perhaps for impeachment purposes--

Q But a photograph is not admissible until the witness in court identifies it.

MR. COHN: No, Your Honor. Here we have a situation of a police officer saying that these are the photographs that were shown and Mrs. Apple said, "This is the man." The actual identification itself, I suggest, is not hearsay. It is a positive act in itself.

Q Had she already identified the defendant at that time from the stand?

MR. COHN: At that time she had already been asked by Mr. Bailey's counsel--had she already identified him in court? I am sorry. The answer is yes, sir. Yes, she had.

Q She had already made an identification independent of any photograph, had she not?

MR. COHN: In court. That is correct. But now are we to use her identification itself outside the court as positive evidence to buttress the identification in court?

After all, we have a situation here where the first witness, the bank teller, had to be asked four times, "Is he here?" And three times she says, "I am not sure," and the fourth time, "Well, he looks similar."

The second bank teller says, "I am not sure, but I think."

Q How do you contend that her testimony was used independently to buttress it during the trial? What testimony is it of hers?

MR. COHN: If we can refer to the appendix, Your Honor, I believe that would be at--

Q Did this occur at the time of the reference case in chief?

MR. COHN: No, Your Honor. This occurred at the time of Mr. Bailey's case.

Q Mr. Cohn, is it not the standard rule in the Federal courts, a rule of evidence, that pre-trial identifications are admissible in evidence to corroborate in-court identification?

MR. COHN: That is my understanding.

Q That is generally the rule, is it not?

MR. COHN: Yes.

Q So, if the Government wants to, it may have the witness identify the witness in court and then say, "Did you identify him before?" and the witness can answer.

MR. COHN: That is correct.

Q Or the Government can simply offer the pre-trial identification without even getting around to an identification in court.

MR. COHN: That is my understanding.

Q How does it do that? It does it through the eyewitness who did make the pre-trial identification or does it do it through a third person?

MR. COHN: Either way. It can do it through the eyewitness or it can do it, as I understand it, through the policeman or, in this case, the United States attorney--

Q A policeman can say, "Mrs. Smith identified this picture."

MR. COHN: Yes. What was done here was--first of all, she was asked--

Q Do we have the page in the appendix?

MR. COHN: If I can start on page 104 of the appendix, Mr. Stanford is Bailey's attorney and she is asked this:

"Q I show you what has been marked Defendant's Exhibit No. 5"--this is in the middle of the page--"Mrs. Apple, is this photograph of the man you identified as being involved in the robbery? A Yes, it is.

"Q I see."

Now, there it stops, because at that point Mr. Stanford wanted to offer all the pictures. And there was an objection made on page 105, and there is a colloquy and they were withdrawn.

Now, we go over toward the end where Mr. Stanford

calls the police officer.

Q Where are we now?

MR. COHN: On page 123 is where Mr. Fallin, the police officer who accompanied--this was involved with the sixty-six. Let me get this. 126. Mr. Bailey, who is the FBI officer, who accompanied the assistant United States attorney. On page 127--we are talking in terms of Mrs. Apple now--

Q Mr. Bailey's attorney--

MR. COHN: This is Mr. Bailey's attorney.

"Q Did you at any time show her several photographs, photographs in color?

"A Yes, I did.

"Q Did she identify one of these as the man?

"A Yes, she selected one, she thought he was the one."

Then shows him Exhibit No. 5. Is that the one?

"A That is correct.

"Q I show you Defendant's Exhibit No. 4, did she make an identification" as to him?

"A No, she did not."

Number four is Bailey. She then states that.

Q Number five is Ash?

MR. COHN: Number five is Ash. So far the jury does not know that five is Ash.

Q I see.

MR. COHN: Okay. But they now know that four is Bailey and that she did not identify Bailey, but she identified somebody else.

At this point the assistant U. S. attorney at the bottom of the page says, "I believe the five photographs should go into evidence." I am assuming the word "that" means the five, but I am not quite sure whether it is only Ash's or all five at that point.

And Mr. Rosen, who is Ash's attorney, says, "I will object to that, Your Honor."

Then there is a colloquy that goes on on page 128 and 129 in which Mr. Rosen is constantly objecting, and there is a lot of discussion as to what should happen.

On page 130--

Q Mr. Stanford is Bailey's attorney?

MR. COHN: That is correct.

Q Mr. Sepenuk is the prosecutor.

MR. COHN: That is correct.

Q And Mr. Rosen is Ash's attorney; is that right?

MR. COHN: That is correct, sir.

Then on page 130, about the middle of the page, Mr. Rosen still says, "I would oppose that."

And then the Court down a few lines: "I would be

disposed to admit it regardless of who offers it."

And then at the end of that paragraph: "Should we introduce all five?"

And Mr. Rosen says, "That might avoid prejudice against Ash."

At that point the Court has already ruled that they are to be admitted.

131, they--

Q Mr. Rosen did agree?

MR. COHN: He agreed, and I suggest that he agreed once the Court had ruled that Ash's picture should go in that what his statement is is that the least amount of prejudice would be if all five pictures go in. But the Court has already ruled by this time on Mr. Stanford's request.

Q As he ruled, he indicated that he has a leaning. He said, "I would be disposed to admit it." That is hardly a ruling at that stage. It is a suggestion of how he feels about it, but it does not foreclose objection and argument, does it?

MR. COHN: I suggest, Your Honor, that we have had now pages of argument on the subject, and that at the end of that paragraph the Court himself suggests, "Should we introduce all five?"

Q At least Mr. Rosen did not have to agree.

MR.COHN: I agree, Your Honor. If I were there

secondguessing him, I would not agree to any form of it. But here was the man under fire--

Q He was not agreeing until--I mean, at the top of page 130, the same page, he said, "It is not going into evidence."

MR. COHN: Oh, he is objecting all along.

Q I have not read this carefully. I cannot here. But it seems to me that finally when it became evident that at least one of the pictures was going to go into evidence, that the Court had so indicated if not ruled; he said it is better to have all five of them than just one of them.

MR. COHN: That is the way the Court of Appeals apparently read it, and I would certainly say that is a permissible reading, the way I would read it, sir.

Q Mr. Cohn, would you say that if it were held that Wade applies to photographic identifications, those involved in this case, that based on what we have just been over here, there was a Gilbert error in the sense that the prosecution should be charged with having relied on pre-trial identification so that a finding of no taint would not suffice?

MR. COHN: That is correct, sir. That is correct.

Q You would think, even though the Government carefully avoided pre-trial identifications on its side of

the case and the defense brought it up--

MR. COHN: Yes.

Q --first presented it to the jury--

MR. COHN: Yes.

Q --that nevertheless a finding of no taint would not suffice?

MR. COHN: What we really have here is Bruten situation where we have pictures instead of a confession being used. And it is a problem of how you are going--where you have two co-defendants in a case and how do you handle this.

Q How does the Government avoid this sort of thing?

MR. COHN: By having counsel at the photographic identification, I suppose is the easy answer. By seeing that a case such as this is tried separately rather than together. And--

Q Were there motions here to sever?

MR. COHN: I am afraid not, Your Honor.

Again, one might say that it would be better at this point or earlier to have made a motion to sever. I was unable to find one--

Q When the motion to sever is not made, is it not a reasonable inference that both the defendants thought that it was to their advantage not to be severed.

MR. COHN: Unfortunately I cannot cross-examine the mind of Saul Rosen, the attorney here, as to what he had in mind.

Q He is talking about inferences from known facts.

MR. COHN: That is possible. I can only rely back on the fact that this certainly did prejudice my client and if it was offered by Mr. Bailey, from my client's standpoint it should not have been admitted into evidence because it violated the standards of Wade.

Q Do you agree that what triggered the introduction of the five photographs was the proposal to introduce the Bailey photograph?

MR. COHN: I will, yes. Yes, sir.

Q So that this was not the Government's idea?

MR. COHN: It was the Government's idea then to go on and introduce the Ash photograph. That I will lay at the steps of the Government. If everything would have stopped with the introduction of the Bailey photograph, we would have a different case.

Q But once having avoided a motion to sever and elected to have a joint trial, this is the type of difficulty which is inherent in a joint trial, is it not?

MR. COHN: That is correct, Your Honor. And at the same time--

Q Sometimes lawyers can foresee that and sometimes they cannot.

MR. COHN. But at the same time it would be avoidable by the Government and counsel, by the court, cautioning all that we have to have in here is that there was a photograph of Mr. Ash shown to Mrs. Apple, and she did not identify it. If everything would have stopped there, we would not have this case. It was the Government going on to say that we now want the Ash photograph.

Q Mr. Cohn, assuming there was not a so-called Gilbert violation here and that a finding of no taint would avoid a reversal, even if Wade applied the photographs. Was there a finding of no taint here sufficient for that purpose?

MR. COHN: As far as the in-court identification is concerned, when you say no taint.

Q Yes.

MR. COHN: The trial judge found that there was no taint on the in-court identification.

Q It came from an independent basis?

MR. COHN: It came from independent basis.

Q Are you satisfied that that would suffice even if Wade were applicable in this case?

MR. COHN: No, Your Honor.

Q Absent a Gilbert--

MR. COHN: No, Your Honor. If we were at that point, if that issue were here, I would argue that based upon this record that that was not a permissible finding. But that issue was not brought here by the Government.

Q Excepting that finding though, the finding in form is sufficient, in form?

MR. COHN: The Court of Appeals ruled that it was not sufficiently detailed, that it was much too general. And I will stand on that, if I may.

Q Mr. Cohn, the first photographic identification in this case was on February 3, 1966.

MR. COHN: That is correct, sir.

Q Let us assume for the moment that Mr. Ash had been indicted at that time. Would your formulation have required the presence of counsel when the FBI agent presented those five photographs?

MR. COHN: That is correct, sir, because under Kirby, once you have the indictment or information or arrest, and I would assume arrest having to do with this matter.

Q Suppose one of those witnesses, let us say the customer who was in the bank, had been in Seattle and the FBI had wanted to ascertain whether she could identify the indicted defendant. Your position, as I understand it, is that counsel would have had to go out and be present at that identification?

MR. COHN: That is my position, but I do not agree with all of the unstated implications that I hear. Because it would seem to me that notice to counsel would be adequate, and then he could go or he could retain counsel out there to appear at the photographic identification. So that I do not think that is any insoluble problem or even impractical.

Q Your formulation does not depend at all on whether or not the photographic showing is or is not suggestive. Counsel must be present in any event?

MR. COHN: That is correct. And I do not think that is the way it is either. It is a prophylactic against this sort of thing occurring.

May I emphasize--

Q Was there any suggestion of harmless error in this case?

MR. COHN: No, sir. And where you have had such indefinite identifications, I suggest--and here again I part ways with my brother here--that once that the photographic identification could be read to have contributed to whatever positiveness there was to the identification or at least we cannot say that the witnesses would not have been less definite but for the identification.

Q Did not the Government have a rather strong case when they had the would-be accomplice testify that Ash had asked him to join in this enterprise and then told him

the day afterwards that he had carried it out and then you had one witness at least who made a positive identification; a pretty strong case, is it not?

MR. COHN: But whether it was strong enough, Your Honor, for the jury without the photographic identification--

Q Suppose the Government had stopped right there. Just put the would-be accomplice and the lady who was positive about the identification, stop there, you would concede that there was a case for the jury, would you not?

MR. COHN: Oh, sure.

Q And then if you had a conviction, you would not be here.

MR. COHN: That is correct. But what we do not know from our vantage point is whether the jury would have then convicted, and that is our problem.

Q We never know that as a certainty in a harmless error case, do we? This is a judgmental factor.

MR. COHN: That is a judgmental factor; that is correct. That is correct.

If I may comment on a few matters raised by the Government in the few minutes that I have here, the point is raised that we did not have here the presence of the accused, and therefore this is different than Wade. May I suggest that that has been answered in Gilbert, that in Gilbert when this Court examined whether the taking of the

handwriting exemplars was a critical stage, the fact that the defendant was present was not at all dwelt upon. What was dwelt upon was whether there is a sufficient risk to the defendant at the time of trial that could not be remedied by the trial proceedings so that the talisman that the Government would now offer us--though at the time of Wade they too did not see it--of the presence of the defendant is, I suggest, nothing but a mystery.

Q A few moments ago Mr. Justice White asked you something about a Gilbert violation as contrasted with a Wade violation. What did you understand by that?

MR. COHN: I understood what he meant--

Q Perhaps I had better just ask Justice White at some other time, but I did not understand his question or your answer.

MR. COHN: I am not so positive I did either. I heard him ask the question to each of us, and I am not quite sure.

Q I thought Gilbert--either Wade or Gilbert, one or the other--indicated that if the Government in this case in chief not only asked the witness to identify the defendant in the courtroom but referred to a pre-trial identification that the witness had been engaged in and that the pre-trial identification had been without counsel, that then there was an automatic reversal and that a no-taint

finding would not suffice.

MR. COHN: That is correct, but then the next question--

Q Automatic reversal only if there were not harmless error.

MR. COHN: But the--

Q In Wade, if the Government just has an in-court identification and there has been a pre-trial identification without counsel, if the Government can demonstrate that the in-court identification is independently based and not tainted, the absence of counsel will not result in a reversal.

MR. COHN: I thought you were also applying that to the Gilbert, the question being whether the in-court identification can come in at a new trial. That is an issue that is still open in this case.

Q I thought, Mr. Cohn, that your argument as to Ash was that there was a Gilbert violation because of the way that the Ash photograph got into evidence, and if that were so and the principles of Wade and Gilbert applied to photographic identification, then I take it Gilbert would require a reversal unless there were harmless error.

MR. COHN: And we would have a requirement of a new trial and then we would have the question as to whether the in-court identification itself is salvagable.

Q Yes, but if we recall in Gilbert we sent the case back for a new trial unless there were a determination of harmless error. There was no issue of taint then involved.

Q Taint is irrelevant.

Q That is right.

MR. COHN: Okay, I am sorry. Then I misunderstood your question.

Q If you have evidence of the identification, the pre-trial identification itself, which by hypothesis in Gilbert violated the Constitution, then even an untainted in-court identification does not correct that constitutional error. I understand now.

MR. COHN: There would have to be then a new trial.

Q Yes, and then you would have the question to which you referred.

MR. COHN: Yes.

Q Unless there is a Gilbert finding here, unless there is a Gilbert violation here, the issue of the applicability of Wade to photographs is not here at all if you accept the no-taint.

MR. CHIEF JUSTICE BURGER: Mr. Korman.

REBUTTAL ARGUMENT OF EDWARD R. KORMAN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. KORMAN: Mr. Chief Justice, I would just want to allude to one or two points. The only real substantive policy

reason which has been suggested for having counsel present by Mr. Cohn is that it would act as a deterrent to--the very fact that counsel was present there--would act as a deterrent against the use of suggestive procedures.

I do not think that that deterrent is necessary. It is enough of a deterrent to the prosecutor that if he engages in a suggestive identification procedure he is going to totally endanger the in-court identification. That is represented by the very facts in this case, that even if we are successful here, we are hardly out of the woods in terms of sustaining the judgment of conviction in this case. So that by engaging in suggestive procedures, he is endangering the entire in-court identification, bringing upon himself a whole mess of problems before trial.

In the second place, by having a suggestive photographic procedure, he also undermines to a substantial degree whatever corrobative basis the fact that an out-of-court identification was made. It is not likely to have very much impact with a jury that before trial a witness picked out a photograph in an array that was obviously suggestive.

And, of course, finally that substantive policy reason for having a lawyer present was not even suggested, as I understood or read the Court's opinion in Wade.

Also, there has been some allusion both in the opinion of the Court of Appeals and by Mr. Cohen to the

Government's brief in Wade where we are quoted as saying that there is no difference between a lineup and a photographic display. What the Government said in Wade was that clearly no one has ever suggested that a lawyer was required when photographs are shown and that we saw no difference as far as lineups go. This Court disagreed only to the extent that it did find a difference as far as lineups went, but as a matter of fact the opinion of Mr. Justice Brennan pointed out that the prosecution could show in attempting to evade a taint finding that there had in fact been a prior identification by photographs. And these, unless there are any questions, are the only two points that I wanted to make. Thank you.

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

Mr. Cohn, you were appointed by the Court to this case, and on behalf of the Court I want to thank you for your assistance to the Court and of course your assistance to the client.

MR. COHN: Thank you for the privilege.

MR. CHIEF JUSTICE BURGER: The case is submitted.

[Whereupon, at 2:35 o'clock p.m. the case was submitted.]

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