In the

Supreme Court of the United States

JAMES RAYMOND MOORE, Petitioner,	)	
v.	)	No. 76-5344
ILLINOIS, Respondent.	)	

Washington, D. C.
October 3, 1977

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v.	:	No. 76-5344
ILLINOIS, Respondent.	:	

Washington, D. C.

Monday, October 3, 1977

The above-entitled matter came on for argument at 10:05 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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:

PATRICK J. HUGHES, JR., ESQ., Prisoners Legal Assistance, 343 South Dearborn Street, Chicago, Illinois 60604, for the Petitioner.

CHARLES H. LEVAD, ESQ., Assistant Attorney General, State of Illinois, 500 South Second Street, Springfield, Illinois 62706, 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 76-5344, Moore against Illinois.

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

ORAL ARGUMENT OF PATRICK J. HUGHES, JR., ESQ.,

ON BEHALF OF THE PETITIONER

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

The Petitioner here is challenging the validity of his Illinois rape conviction, a conviction -- based on the eyewitness identification testimony of the one and only eyewitness to the crime. The victim, who is a white woman was sleeping in a darkened room when she was awakened by a noise. She then had, at most, a ten to fifteen second opportunity to observe the face and the figure of her masked black assailant. I am sorry, unmasked black assailant. Subsequently, he was masked, during the course of the commission of the crime -- a conviction for which the Petitioner is presently serving a 30 to 50-year sentence of imprisonment.

The crime occurred on December 14, 1967. In the week after the crime occurred, this witness had two opportunities to view various photographs, but made no identification of anyone from those photographs. Seven days after the assault, without any showing of exigent circumstances, without any showing of necessity, the police brought this sole eyewitness

to a courtroom where the Petitioner was scheduled to appear charged with the crime that was committed upon her. The witness was brought to that courtroom specifically for the purpose of making an identification. That identification proceeding was to be her first opportunity to view any person since the date of the crime, since the time of the assault. She had viewed no suspect prior to that time. When she arrived at that courtroom, over her objection and before she viewed the suspect, she was asked to sign the formal charge that had already been placed against the Petitioner in that courtroom. She was then placed in that courtroom to wait,and while she was waiting there she saw other cases. In the course of seeing those cases, as the defendant's name in those cases was called, the defendants were brought out from the lockup. The defendants in custody were brought out from the lockup, and she observed that happening for some period of time before the Petioner's case was called. The Petitioner's name was then called, a name she recognized because she had seen it on the complaint that the police had asked her to sign a few minutes earlier, a complaint she didn't want to sign without making identification but which nonetheless at their urging she did. The Petitioner was then brought out from the lockup and stood before the bench, before the judge. The Complainant, the sole eyewitness, was then asked by the clerk -- her name was called by the clerk and she was aksed to come up. She was brought up to stand seven or eight feet from

the place where the defendant, Petitioner, was standing, in front of that same judge. At the time that the Petitioner stood there, not only was he an indigent without counsel but in violation of an Illinois statute which specifically required that the judge advise him of his right to have counsel, he was not so advised.

QUESTION: Mr. Hughes, the Appendix at page 43 and 44 has an apparent transcript of that proceeding. Is that the entire proceeding?

MR. HUGHES: No, sir. I believe that you will find that the entire proceeding is reported on pages 48 and 49 of the Appendix.

QUESTION: So this is just an excerpt.

MR. HUGHES: Yes, sir. The entire proceeding is found at pages 48 and 49.

The witness then -- this sole eyewitness then -- heard the prosecutor tell the judge that certain items taken from her home at the time of the assault, at the time the crime had been committed upon her, were recovered from the Petitioner's apartment when he was arrested. That statement was wholly untrue. The prosecutor's next statement was that the clothing her assailant wore was recovered from the Petitioner's apartment when he was arrested. None of that clothing was ever introduced in evidence in the course of the trial of this case. These statements were then immediately followed by the

prosecutor asking the witness to identify the Petitioner as her assailant, which she did.

The critical nature of this proceeding in this case, the identification procedure in this case, is emphasized by what we believe is the lack of other reliable evidence. For example, at the time, subsequent to the assault, the Complainant victim advised the police to look on a file box that was in the apartment for fingerprints. They did, in fact, find a fingerprint. The compared that fingerprint with that of the Petitioner and it was not his. The clothing, certain clothing was taken from him at the time of his arrest, and that clothing included a pair of trousers. The fly area as well as the rest of that area was tested by a Chicago Police Department lab technician, and that technician testified that he found no semen, no female cells, no matching hairs or fibers and no blood in the trousers, even though at the time of the assault -- examination by a doctor a few hours later disclosed that she was menstruating.

Our major contentions are first, that this indigent Petitioner had an absolute right to counsel at that initial court proceeding. At least the State, we believe, concedes in its brief that he had a right to counsel at that proceeding.

QUESTION: Do you think your first contention was treated by the Supreme Court of Illinois in its opinion?

MR. HUGHES: No, we don't think that it was treated,

sir.

QUESTION: Was it ever treated in any other State court proceeding?

MR. HUGHES: It was not treated. There were only two. There was the trial and then the appeal in the Illinois Supreme Court.

QUESTION: And it wasn't treated in either of those proceedings?

MR. HUGHES: No. Well, the defense lawyer raised it during the motion to suppress the trial and in his argument as grounds for his alleged, his argument that the lineup was so -- I mean the showup was so suggestive that it violated the principles of Wade, Gilbert and Stovall. It was alleged in that sense.

QUESTION: Was it pursued in the Supreme Court of Illinois?

MR. HUGHES: It was not pursued, as such, in the Supreme Court of Illinois, in terms of right to counsel.

QUESTION: What do you do about the exhaustion requirement of habeas?

MR. HUGHES: We are -- Clearly the issue of violation of Wade, Stovall and Gilbert was raised in the Illinois Supreme Court. The suggestivity of right to counsel was raised -- I mean the suggestivity of the confrontation was raised. As a matter of fact, during the trial of the proceedings, as I said,

in the State court, the issue of absence of right -- lack of right to counsel was brought out by the defense lawyer. When the case got to the federal district court, it got there because Petitioner filed his pro se habeas corpus petition, and in that petition he alleged suggestiveness. He alleged that the showup was conducted in violation of the principles of Wade, Gilbert and Stovall, and he also alleged that the conviction was tainted by the prosecution's untrue statements which were not available to his counsel at the time because his counsel was denied a transcript of that initial court proceeding. The district judge dismissed the case on the grounds he had not exhausted his State remedies and not filed an Illinois post-conviction proceeding petition. The Seventh Circuit said: "We believe that the Petitioner has made sufficient allegations to make it clear that he is now entitled to have a hearing in the district court" or at least a decision in the district court with respect to all the events which led up to his conviction in terms of the ideas of suggestibility -- the ideas of violation of Wade, Gilbert and Stovall.

QUESTION: Prior to this courtroom episode, there had been at least two, I guess there were two opportunities for her or exhibits to her of various photographs, were there not?

MR. HUGHES: Yes.

QUESTION: And what happened at those?

MR. HUGHES: The first one was a group of about two

hundred from which she selected people who had general physical characteristics of the person that she described as her assailant. It was not intended to pick out any person and she clearly did not.

QUESTION: What was its purpose?

MR. HUGHES: The purpose, apparently, was to narrow down as much as possible the number of possible suspects.

QUESTION: But it did not have as its purpose any effort for her to identify her assailant?

MR. HUGHES: Well, I presume that one of the police's interests was to have her make an identification if possible, but it was clear in her mind, and I think clear in the detectives' testimony because they testified at the hearing on the motion to suppress the identification at trial that essentially that viewing was of a large number. It was almost like the police folder book which in some jurisdictions is kept in the police station. It was a mug-shot book.

QUESTION: Some 200 pictures.

MR. HUGHES: Some 200, probably 200 different people, yes, sir, although the record doesn't indicate.

QUESTION: And then the second one?

MR. HUGHES: And the second one she was shown approximately between 9 and 12. The record, I think, would would indicate that there were 9. At that time, I think, the record makes it clear that she never identified any one person.

She did pick out 3 which she said had similar physical characteristics to her assailant. But, I think, her testimony ultimately was, "I did not make an identification of any person from a photograph."

QUESTION: Was his -- Was Petitioner's photograph included? In the 200 or in the smaller number 9 to 12?

MR. HUGHES: The police detective investigating the case said that it was so included. However --

QUESTION: In both?

MR. HUGHES: Only in the subsequent, as far as we know, Your Honor.

QUESTION: In the 9 to 12.

MR. HUGHES: Yes.

However, we don't know which 9 to 12 were shown to her because the police department didn't mark them in any way at the time they were shown. So, when the hearing on the motion to suppress identification came up in the trial court, the detective said, "To the best of my recollection, I am pretty sure, I'm reasonably sure that some of these" or "these are the photographs that were shown to her when we showed her --"

QUESTION: What you are saying, I gather, is that his photograph was in that -- among that smaller number and that she did not pick out that picture as her assailant.

MR. HUGHES: She picked out three of the nine, or so --

QUESTION: Was his one of the three?

MR. HUGHES: His was one of the three.

QUESTION: There seems to be some difference in understanding as to whether of those 9 to 12 photos there was only one picture of a person with a beard. You say somewhere in your brief that only the picture of the Petitioner depicted a person with a beard, and on page 5 of the Respondent's brief, they said "Nine to 12 photos all of which were male Negroes, several of whom were bearded." Now that is a matter of fact, but you apparently differ as to what the facts were.

MR. HUGHES: I believe -- although we can't be sure which ones she was shown because the detectives weren't sure. The detectives were reasonably sure that she had seen three of those before. The other six they weren't sure. She was not sure which ones she had seen before. As a matter of fact, she was not even sure that the one that was shown her at the time of the hearing on the motion to suppress, the one that did in fact have the Petitioner's picture on it, she wasn't certain whether or not that was the photograph she had been shown by the detectives previously in the police station during that week. It is possible that one or more of those twelve had beards. Of the three that she picked out, persons having similar characteristics, narrowed it down to three as having similar characteristics, without saying any of those three were the one.

QUESTION: You say three and again in Respondent's brief they say one or two. On page 5 of the brief.

MR. HUGHES: Well, my best recollection of the record is that of those nine, or so, perhaps, one or more had some facial hair. We don't know. Perhaps one or more.

QUESTION: She picked out one or two, is what's said on page 5, referring to the record at page 232.

MR. HUGHES: If you read the record, including her testimony, both at the hearing on the motion to suppress and during the trial and finally including a portion of the testimony in redirect examination by the State's Attorney, she makes it clear she was not identifying any person when she picked out those three photographs.

QUESTION: Now, you say three, and, as I say, here it says one or two. Now, again, it is helpful to us if you can get together, at least, on the facts.

MR. HUGHES: I believe that of the nine she saw at the second viewing she did, in fact, state that she picked out three of those nine as having similar physical --

QUESTION: As resembling her assailant.

MR. HUGHES: That's correct. Only one of which had a beard. The other two did not.

QUESTION: Mr. Hughes, admitting that her testimony was confused and the State's testimony was confused, the record isn't confused, is it? Now, what does the record show?

Does the record show that the three had beards or one had a beard or none had beards or two had beards?

MR. HUGHES: The record shows of the three that she picked out as being persons of similar physical characteristics one of those three had a beard.

QUESTION: And that was whom?

MR. HUGHES: That was this Petitioner.

QUESTION: That was him.

MR. HUGHES: Yes, sir.

QUESTION: And that the others did not have beards.

MR. HUGHES: The other two did not have beards, that's correct, sir.

QUESTION: What about Wasilewski's testimony at 88 of the Appendix, "She selected the photograph." This, I gather, was the examination of the nine. "She selected the photograph of the defendant as being the man who had attacked her. She also selected one more with the same physical characteristics of the man."

MR. HUGHES: That was his testimony. Her testimony is to the contrary, Your Honor.

QUESTION: How many courts have reviewed this case now? Two state courts and two federal courts?

MR. HUGHES: Two state courts and two federal courts, yes.

QUESTION: And they found any errors that occurred

in the trial to be harmless beyond a reasonable doubt, is that correct?

MR. HUGHES: Well, the record that they based it on was the record that we are here arguing has constitutional significance of the issues. In other words, we don't think their finding of fact is necessarily entitled to any more or less -- They didn't make any findings of fact, let me put it that way. The record -- The district court made its findings based on the record, the same record that was available to the Illinois Supreme Court.

QUESTION: On the day of the trial, in the courtroom, did she identify this defendant, the Appellant here, as the attacker?

MR. HUGHES: In the course of the trial before the jury she did so identify him, yes, Your Honor. But I would like to talk about that with respect to my second and third points. As I said, we believe that at that proceeding, as far as Point Number 1 is concerned, that initial formal criminal judicial proceedings had in fact been instituted, and under Kirby, Wade v. United States and Gilbert v. California, that our Petitioner was entitled to counsel at that initial court proceeding.

QUESTION: You say the state concedes that point.

MR. HUGHES: We believe they have. I am not sure their brief does.

QUESTION: Is part of your contention that, assuming that you did have a right to counsel, that the in-court testimony about the out of court pretrial identification was per se excludable.

MR. HUGHES: We believe that that's right.

QUESTION: Let's assume that that testimony about the out of court identification was automatically excludable, without showing any taint or any undue suggestiveness, just the fact that there was no counsel. Assume that there has been no finding of harmless error in this case, with respect to that evidence. If there is a finding of harmless error, I would like to know.

MR. HUGHES: Not specifically with respect to that evidence. There has not been. And that evidence, the evidence of that confrontation, in fact, went into evidence in the State's case in chief. The identification elicited was not merely, "Miss Witness, do you see the person in court that committed the crime upon you," or words to that effect. But the State also in its direct examination of the witness dwelled at length upon this initial in-court confrontation and identification.

QUESTION: Your basic claim is that this is simply a violation of the United States v. Wade, isn't it?

MR. HUGHES: That's one of our claims, but we would say independently of that, Your Honor, independently of that

when we are talking about identification, eyewitness identification, the lynch pin, I think this Court called it, of that is its reliability.

QUESTION: Isn't the rule of United States v. Wade a per se rule?

MR. HUGHES: Yes, we believe that it is. Yes, sir.

QUESTION: And if there was a violation of that doctrine here, that's the end of it unless Wade is going to be re-examined, isn't that right?

MR. HUGHES: We think that is so because the right to counsel is such an integral part of the fact-finding process.

QUESTION: And if you say that the criminal proceedings had begun against this person --

MR. HUGHES: We suggest there is just no doubt or question about it.

QUESTION: -- so that under the Kirby qualification or clarification of Wade, it violates the rule of United States v. Wade.

MR. HUGHES: That's correct, Your Honor. We think that's clear. Although Kirby uses the word "indictment," we think clearly --

QUESTION: The initiation of criminal proceedings.

MR. HUGHES: That's right.

QUESTION: Uses the word "indictment" among a series of other words.

MR. HUGHES: That's our position.

If I just may get back a little bit to the concept of reliability, because that's what we are talking about in identification. I think the thing this Court should keep in mind is that defense counsel never knew about those suggestions.

QUESTION: As regards the right to counsel, it is irrelevant whether it -- insofar as the in-court testimony about the out of court identification is concerned, reliability is irrelevant, isn't it?

MR. HUGHES: We think so. Yes, sir.

QUESTION: Well, isn't that what Gilbert held?

MR. HUGHES: We think that's what Gilbert held, yes, sir.

QUESTION: Wade and/or Gilbert?

MR. HUGHES: Yes, sir.

QUESTION: Mr. Hughes, may I come back to an issue of fact that was suggested by a statement I think you made to the effect that the missing musical instruments were not found in defendant's quarters. Were they ever accounted for?

MR. HUGHES: As far as we know, no, sir.

QUESTION: There was no evidence with respect to where they were?

MR. HUGHES: No, sir. They were never found, as far as we know.

QUESTION: Any explanation of the statement made at

preliminary hearing that they had been found in defendant's apartment?

MR. HUGHES: In the Seventh Circuit Court of Appeals, the Assistant State's Attorney who made those statements said in substance in an affidavit which apparently the court considered in terms of arriving at its decision and its opinion, that if the statements were untrue they were not made with knowledge of their falsity and that if he made them, that at the time he made them he made them thinking they were true. Because apparently what happened was very simply they recovered two musical instruments from the Petitioner at the time of his arrest, a guitar and a flute. It happened that the victim of the crime had a guitar and a flute taken from her, but they were not the same items.

QUESTION: They both just happened to be music lovers.

MR. HUGHES: They both happened to possess musical instruments, yes, sir.

QUESTION: In any event, that statement to which my brother Powell referred was not in any way brought to the attention of the triers of the fact on the trial of his innocense or guilt, was it?

MR. HUGHES: No, sir, it was not brought to the attention of the triers --

QUESTION: So what relevance does it have? I mean

what bearing does it have?

MR. HUGHES: Our position was that it has a great bearing on the reliability, because the triers of the fact are the ones who determine reliability.

QUESTION: Yes, but they didn't know anything about this statement. You just told me.

MR. HUGHES: Right. And, therefore, they could not calculate into their evaluation of the witness' reliability the very suggestive and impressive confrontation which was never brought to their attention, as it was never brought to the attention of the trial judge during the hearing on the motion to suppress. And it wasn't brought to their attention because the defense lawyer had been denied the transcript, and so he didn't know those statements had been made, and he at no time was able to plumb into, to bring to the attention of the trial judge or the jury their suggestibility, to ask the witness whether or not they, in fact, had affected her ability to make a fair eyewitness identification.

QUESTION: At the time of this courtroom confrontation, as you call it, what was the status of the criminal proceedings against your client?

MR. HUGHES: A complaint which is the way 99 and 9/10's percent of criminal cases commence in the County of Cooks.

QUESTION: And signed by the victim.

MR. HUGHES: Yes, sir. And filed in the court. And he was in custody, not of the Chicago Police Department anymore, but in the custody of the bailiff.

QUESTION: On this charge?

MR. HUGHES: On this charge.

QUESTION: And under Illinois procedure, what was the purpose of his being there and being brought before the court?

MR. HUGHES: Illinois, as far as I know, has no formal term for that. It is the first time a person is brought into court. In Illinois, if you are arrested, and cannot make bail,because in a felony case bail is almost always set unless you are arrested within a few hours of the court time, you are brought to court the next morning. If you make bail at the police station you are released and a court date is set for you sometime in the future.

QUESTION: And he had been arrested and a complaint had been filed, signed by the victim, and he was brought before the judge and it was at that time that this confrontation took place.

MR. HUGHES: That's correct.

QUESTION: And the purpose of that proceeding was what, to find whether or not there was probable cause to bind him over to the grand jury?

QUESTION: A finding of probable cause could well have

been made that day. The judge asked the defense lawyer -- I mean the defendant. I am sorry. There was no defense lawyer. -- if he was ready for hearing and before the Petitioner could answer the State's Attorney then made the statements.

QUESTION: Is there anything in the record to show who arrested him and why?

MR. HUGHES: I think that the record indicates he was arrested because they found a letter which they believed tied him into --

QUESTION: Who signed -- You mean you can pick up a man without anybody signing a complaint in Illinois?

MR. HUGHES: It is unclear whether or not --

QUESTION: Is that normal in Illinois, you can just go out and pick a man up?

MR. HUGHES: It is not normal. There is some question as to whether in this case an arrest warrant was issued by a judge. The State's Attorney said there was.

QUESTION: Is it in the record?

MR. HUGHES: Seven years, eight, nine years later, Judge, when we got the case, we subpoenaed the police record and the clerk's records and --

QUESTION: Is there anything in the record to show why he was originally picked up?

MR. HUGHES: Except for some language of the State's

Attorney's office, the record is bare in that regard.

QUESTION: Didn't they find some letter or address book, or something?

MR. HUGHES: They found a letter, yes, sir.

QUESTION: You don't claim that there wasn't probable cause to arrest him, do you?

MR. HUGHES: I don't think it is an issue.

QUESTION: That's not an issue here.

MR. HUGHES: I don't think it's an issue. I don't think we have to admit or deny it.

QUESTION: Don't you think it is a matter of interest as to how this man ended up in custody? I am interested, if nobody else is.

MR. HUGHES: Well, Your Honor --

QUESTION: I want to know why this man was in custody. The woman had not signed the complaint, and she had refused to sign it, and yet he is in custody and I would like to know why. If you don't know it's all right, but --

MR. HUGHES: We tried to find out, Your Honor, when we got in the case because we didn't represent him at the trial, and we subpoenaed all the records and there were no records available of any arrest warrant issued for him and we had sketchy excerpts from the police reports. The rest of the materials, police documents, had already been destroyed and a search by the clerk's office, pursuant to subpoena, came up with

no arrest warrant.

QUESTION: I find difficulty focusing or finding a focus on this matter of the address book. Can you shed some light on that?

MR. HUGHES: At the trial, there was admitted into evidence a checkbook-like document, a checkbook, I guess, would be the best description of it, although apparently it didn't have any checks in it.

QUESTION: Pocket checkbook type?

MR. HUGHES: I would think it would be the size like most people carry who carry checks. In that book, was a letter from a woman to her psychiatrist. That book was found in the apartment of the victim. The police tracked -- when she got -- after the assault, she went to pick up that book thinking it was hers, and when she looked in she expected to find $60, or she thought perhaps the assailant had taken her $60. She looked at it, saw the letter and determined it was not her checkbook, so she turned that checkbook over to the police. The police, in turn, contacted, apparently, the woman whose letter it was and had made some association between that woman and the Petitioner. And that's how they came to arrest the Petitioner, I believe, but I am not sure because the record doesn't contain all of the issues with respect to probable cause.

QUESTION: What was the linkage between that book

and Moore, the Petitioner here?

MR. HUGHES: Mr. Moore -- The woman who wrote the letter had been his girlfriend up until a day or so before the alleged rape.

QUESTION: There is some reference in the briefs, if not in the record, that on the following day, or shortly after the attack, he went to the bar inquiring about the existence -- whether that checkbook had been found in the bar. Is that correct?

MR. HUGHES: That's correct. Yes, sir.

QUESTION: Is that not some linkage between him and his possible presence in that room that night?

MR. HUGHES: I think it may be, Your Honor, but two things: Number one --

QUESTION: Put it this way: Do you think the jury hearing that could reasonably infer that he had been in that room at some time and had dropped that checkbook?

MR. HUGHES: The jury could infer that, but if I just may recite the evidence. The Petitioner introduced evidence indicating he had lost that book the night before in a bar, a bar where he had concededly met and talked briefly with the victim in this case. When she woke up -- I mean, sorry, not woke up, after the assault when she went to pick it up she thought it was hers. She might well have picked it up that night he lost it and brought it home thinking it was hers.

QUESTION: We are confronted now with what the jury would reasonably have had a right to believe. Would the jury -- I think you indicated the jury would have a right to infer from that evidence that if his property was found in the room of the victim, that perhaps he, too, had been there. Would they have a right to assume that?

MR. HUGHES: Certainly, they would have a right to assume that, but I think, Your Honor, again when we are talking about reliability we are not talking about it in terms of either corroborating evidence in order to determine whether somebody committed a crime. Reliability of an identification means the circumstances surrounding the identification, and that's all. For example, the same way as right to counsel does not mean even when the evidence is overwhelming that we can convict them without a lawyer if they don't intelligently waive the right to a lawyer. And I think the same analogy applies.

QUESTION: Mr. Hughes, before you sit down: Your brief and your opponent's brief were both filed before our decision last spring in Manson v. Brathway. Do you think that case has any bearing on this one?

MR. HUGHES: I think ours is a right to counsel and that is suggestive confrontation only, due process, Fourteenth Amendment. I think they are different.

QUESTION: That's your explanation?

MR. HUGHES: Yes, sir. But even if it did, we think in the record in this case we would still survive any examination in light of the factors in Manson.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Levad.

ORAL ARGUMENT OF CHARLES H. LEVAD, ESQ.,

FOR THE RESPONDENT

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

If I may, I'd like to address myself initially to some of the factual allegations that were made by Mr. Hughes, and maybe I can clear up some of the factual problems that are in the record at this point.

First of all, with regard to the purpose of the hearing that was held on December 21, 1967, I think it appears from the record and under Illinois law the first time an individual appears before the court is for a setting of bond. As a matter of fact, that is what happened in this case.

QUESTION: Why is he there at all? He has been arrested as a result of what? And a complaint has been filed against him?

MR. LEVAD: Complaint was filed prior to this hearing, yes, Your Honor.

QUESTION: Or does this happen just if he'd been arrested, even if no complaint had been filed?

MR. LEVAD: It happens even if no complaint has been filed.

QUESTION: Anybody who has been arrested is brought before the court rather promptly and the purpose is to set bond?

MR. LEVAD: The purpose is to set bond. On a complaint filed prior to the arrest, tentative bond is set, but he is still brought before the court for bond hearing.

QUESTION: But this complaint was not filed before the arrest.

MR. LEVAD: Apparently, it was not, Your Honor.

QUESTION: Apparently? The record shows that it was not.

MR. LEVAD: Yes, that is correct, Your Honor. I am sorry.

QUESTION: Well, why was he arrested? Stick to the record, if you can.

MR. LEVAD: I will, Your Honor. I can, Your Honor, to the best of my ability.

I don't think it is entirely clear from the record as to whether there was an arrest warrant or not, but I think the record does indicate that there was probable cause for the arrest, whether there was a warrant at that time or not. Prior to the arrest, the police detectives had the letter which was explained by Mr. Hughes and, if I may amplify on that a little

bit: It was stipulated at trial that the suspect, Mr. Moore, had obtained that letter from the girl's apartment, and I think -- and it appeared on Miss Miller's floor immediately after the rape. I think the jury and the police officers -- the jury later and the police officers at that time could infer and use that as a basis for probable cause for the arrest.

QUESTION: I am not being critical, but on that basis, you say it is unimportant as to who did actually make the arrest.

MR. LEVAD: I am not saying it is unimportant, Your Honor.

QUESTION: It is not an issue in this case.

MR. LEVAD: It is not an issue in this case.

QUESTION: Right.

MR. LEVAD: The probable cause for the arrest has never been challenged below in the state court or in the federal court.

QUESTION: And it is not an issue here.

MR. LEVAD: That is correct.

QUESTION: Getting her to sign the complaint after he was arrested was just an abundance of --

MR. LEVAD: No, it was necessary to file a complaint anyway.

QUESTION: Oh, it was? Under Illinois law at sometime they had to file the complaint?

MR. LEVAD: Yes, Your Honor. And when an arrest is made prior to filing complaint, Illinois law requires that it be filed as fast as possible.

QUESTION: Sometimes, I suppose, it is filed by the police, by the arresting officer, isn't it?

MR. LEVAD: Yes, it is.

I might address myself to the issue of whether there were other individuals -- strike that -- The photo identification that was made and which Mr. Hughes discussed, I maintain, was an identification prior to this bond hearing. The record indicates primarily during the motion to suppress that Miss Miller indicated that she did identify one individual from the nine that were shown her. That testimony is on page 155 of the record.

QUESTION: Do you happen to know if it is in the Appendix?

MR. LEVAD: Yes, it is, Your Honor. Page 68 of the Appendix.

That was presented by Detective Joseph Wasilewski who apparently was present when she did pick out that photograph of the defendant. However, indicative, I think, of what happened during this identification process, Miss Miller when she picked out that photograph didn't say, "That's the man." She didn't say, "That's the man that raped me." She said, "It looks like the man, but I'd like to see him in person."

I think it indicates that she was using some care in the identification. I think the first photospread that was shown to Miss Miller, the spread of 200, also indicated that they were using great care in going about this identification.

I might point out that the Illinois Supreme Court, in its opinion, after reviewing the record, saw the identification made at the December 21st hearing as merely a confirmation of a previous identification she -- that Miss Miller had made during the photographic process, when she was shown the photographic spread.

Now it should be noted and I think perhaps where some of the confusion has come up during this -- or with regard to this question, is that Miss Miller, apparently, isolated three photographs from the nine initially. There was testimony that the defendant's photograph was the only one with a beard, but on page -- strike that -- but there is testimony in the record and I believe that's the same page, 155 of the record, 68 of the abstract, that the defendant's photograph was not the only photograph in that spread of nine that had a beard. He was the only one of the three that she initially isolated that had a beard.

Mr. Hughes indicated also that no fingerprints -- a fingerprint was found at the scene of the crime and it was not that of the defendant, and there was nothing on the defendant's pants when they were examined. I might point out that this

doesn't negate his guilt, but merely indicates that the evidence was absent, or any evidence that may have been there was not at the time that it was checked.

QUESTION: Doesn't this case really parse down to this question: In the Wade and Gilbert cases, it was held by this Court that at a lineup there is an absolute right to counsel and no evidence of a lineup identification can be introduced at a subsequent criminal trial if that right has not been accorded. I think that is more or less a correct summary of the Wade and Gilbert rule. And here, there was concededly no counsel present and no advice that he had the right to counsel. And isn't the question whether or not this was a lineup or its equivalent? Because if it was, then doesn't the Wade and Gilbert rule require that your opponent prevail?

MR. LEVAD: That's correct. I think that is the issue.

And I might point out that Gilbert was decided back in 1967 by this Court and at that time the Court stated the balancing test that has been used by this Court on a number of occasions, most recently in identification cases of Neil v. Biggers and Manson v. Brathway. And the Court stated, if I may quote two lines: "The desirability of deterring the constitutionally objectionable practice must prevail over the undesirability of excluding relevant evidence." That rule in Gilbert was enunciated that time without any comment, but the

factors that the Court was weighing about the alternatives that the Court was rejecting at that time. I think that that rule was a mistake.

QUESTION: Your comments seem to be premised on the assumption that there was a right to counsel at this hearing that took place. And I take it your brief indicates that at least you assume there is the right to counsel. When do you think the right to counsel did attach in this case?

MR. LEVAD: I don't think there is any doubt in this case, Your Honor, that the confrontation that occurred on December 21, 1967, was in the midst -- or after the institution of a criminal charge.

QUESTION: You think, under Wade or Gilbert, the right to counsel had attached, and that there was a violation of it. And you just argue about whether -- what the consequences are?

MR. LEVAD: If Wade and Gilbert apply to this case, if this is a lineup as --

QUESTION: What is your position on it?

MR. LEVAD: My position, Your Honor, is this: That there was a prior identification. The photographic identification was one in which the victim in the case picked out a particular individual, using a great deal of care --

QUESTION: You are starting to argue now about whether the identification was reliable. Now how about the

right to counsel at the hearing?

MR. LEVAD: If Wade and Gilbert -- and I maintain that they do not -- if they apply to this type of situation where an individual --

QUESTION: What's your position about whether they apply, or not?

MR. LEVAD: I am getting to that, Your Honor. There was a prior identification. The individual was identified, there was other evidence against him; based upon that, a criminal complaint was filed, and he was brought into court. At some point during the legal proceedings against him, the defendant would be confronted by his accuser. He has a perfect right to that. In this case, it happened on his initial appearance in court. The proceeding itself was a bond hearing. It is common to show some evidence against the defendant in a bond hearing for the purpose of setting bond, and I suggest that that's all this was.

QUESTION: Is it true that she did not want to sign the complaint?

MR. LEVAD: I don't recall that from the record, Your Honor.

QUESTION: Well, she didn't sign it until that day, did she?

MR. LEVAD: She did sign it on that day, yes.

QUESTION: Well, isn't it normal that after she

identifies somebody she would sign the complaint? Isn't that normal?

MR. LEVAD: It is normal --

QUESTION: Why is it that she didn't sign it until that day?

MR. LEVAD: I don't know, Your Honor. I don't think that the record indicates why she didn't sign it until that day.

QUESTION: Your argument is that at this hearing no right to counsel had attached at all and so Wade and Gilbert have no applicability at all. Is that your position now?

MR. LEVAD: That is one of my arguments, Your Honor. I don't think the right --

QUESTION: Well, you didn't make that argument in the brief. You seem to concede the right to counsel, at least assuming --

MR. LEVAD: Well, I conceded, Your Honor, I think, and what I meant by the concession -- and if I've gone farther than that I apologize -- that a criminal proceeding had been instituted. I don't think there can be any question of that in this case.

QUESTION: If this was a lineup --

MR. LEVAD: If this was a lineup, Your Honor --

QUESTION: -- then Wade and Gilbert would apply, but your claim is that it was not a lineup and nothing

equivalent to a lineup.

MR. LEVAD: I don't think it is anything near a lineup, Your Honor, or what one would ordinarily call a lineup.

QUESTION: Are you arguing that this identification at that hearing is the same kind of an identification as was made in open court at the trial?

MR. LEVAD: Yes, Your Honor, I believe it is.

QUESTION: In other words, your argument is it was not a lineup at all.

MR. LEVAD: No, it was not.

QUESTION: Except the trial *a fortiori* had a right to counsel.

MR. LEVAD: Yes, that is correct.

QUESTION: Long before *Wade* and *Gilbert*.

MR. LEVAD: That's correct, Your Honor.

Primarily, what I am asking this Court is to re-examine the *Gilbert v. California* rule. I think the recent decision, *Manson v. Brathway*, does have a very definite impact on this case. In that case, this Court held that the approach to pretrial identification testimony, where challenged on due process grounds, is to be subjected to the test of its reliability. What we are dealing with is --

QUESTION: You haven't argued this in your brief, have you?

MR. LEVAD: No, I have not, Your Honor.

QUESTION: If you lose on the Wade-Gilbert point, are you relegated to an argument that this is harmless error?

MR. LEVAD: I think we would have that opportunity to. Yes, I am arguing also that there was harmless error, Your Honor.

QUESTION: No lower court has ever addressed that question.

MR. LEVAD: The harmless error issue? Not as such, Your Honor, because the rulings were in favor of the state in each case below, in each of the four courts.

QUESTION: You don't have a finding of harmless error until you first have a finding of error.

MR. LEVAD: That's correct.

QUESTION: Mr. Levad, in the footnote on page 8 of the State's brief, as I read it, you state that despite these reservations about Wade-Gilbert, you go on to say Respondent will concede for the purposes of this appeal that a Wade-Gilbert violation occurred at this preliminary proceedings. Is that your present position?

MR. LEVAD: Essentially, Your Honor, to the extent that this was a lineup which would fall under Wade-Gilbert.

QUESTION: I don't quite understand that. Are you taking the position in argument here today contrary to the footnote that Wade-Gilbert does not apply?

MR. LEVAD: No. What I am saying is I think Wade-

Gilbert does apply, to the extent that if this was a lineup or an identification proceeding that's covered by Wade-Gilbert, then a Wade-Gilbert violation does occur. I don't think I am taking a contrary position.

QUESTION: Doesn't that footnote concession to which Mr. Justice Powell has referred guide you to a harmless error position?

MR. LEVAD: No, it does not, Your Honor.

QUESTION: That's the next question I was going to ask: Where do you go from there?

MR. LEVAD: First of all, the Wade-Gilbert rule and the remedy that Gilbert applied to the in-court identification were applied in that case to a post-indictment situation. In Kirby v. Illinois, the Court rejected that rule and that remedy for the situation where the confrontation occurs prior to institution of any criminal charge, indicating by dicta that the right accrues after institution of a criminal charge.

This Court has never held that Gilbert applies to a pre-indictment situation. I am not arguing -- I am urging the Court not to extend the Gilbert rule to cover any more situations and, as a matter of fact, to re-examine that rule because it is inconsistent with the reasoning of the Court in Manson v. Brathway and Neil v. Biggers. In both those cases, the Court was dealing with exactly the same testimony, testimony in a pre-trial identification. The Court --

QUESTION: Neither of those cases involved a lineup. Wade-Gilbert is -- that rule is applicable to a lineup and only to a lineup --

MR. LEVAD: That's true.

QUESTION: -- or its equivalent. And I suppose your submission is that this case, like Manson v. Brathway and like the Biggers case and, unlike Wade and Gilbert, did not involve a lineup. Isn't that your claim?

MR. LEVAD: That's true. That's my first claim, Your Honor. Alternatively, if this is a lineup, that the Court would hold --

QUESTION: If this is a lineup or its functional equivalent, then, as your concession pointed out by my brother Powell indicates, you concede there was a violation of Wade and Gilbert.

MR. LEVAD: That's correct, Your Honor. That's correct.

QUESTION: Would you elaborate on why you think this was not a lineup. What is the difference, practically speaking, between an accused person in the circumstances of this defendant and one in the circumstances where you would concede there were lineups, or was a lineup?

MR. LEVAD: The purpose of a lineup -- and I think the purpose of the proceedings that the Wade-Gilbert-Stovall trilogy were concerned with were proceedings during which

evidence was to be obtained to be used at trial, identification evidence, in which there was some doubt as to whether that evidence would accrue out of those proceedings. In this case, we already had an identification. As a matter of fact, the Illinois Supreme Court specifically said this only confirmed the prior identification and it was introduced as evidence, going to the amount of bond that should be set. It was like a mini-preliminary hearing, but it was part of a judicial proceeding, and there was not doubt, I don't think, prior to this that there would be -- or not great doubt -- that there would be an identification. The other evidence had been obtained.

QUESTION: Was it for the purpose of identification?

MR. LEVAD: It was for the purpose of setting bond, Your Honor, the proceeding itself.

QUESTION: You just said for identification. Those were your words, just a second ago. Wasn't she brought there for the express purpose of identifying him?

MR. LEVAD: As testimony and as evidence to be introduced in the bond hearing, Your Honor, yes.

QUESTION: The purpose was to identify him.

MR. LEVAD: That was her purpose for being there, yes.

QUESTION: Well, what's the purpose of a lineup? To identify.

MR. LEVAD: The purpose of the lineup --

QUESTION: -- is to identify.

MR. LEVAD: Is to identify, that's correct, Your Honor.

QUESTION: So the difference is what?

MR. LEVAD: The difference is that prior -- lineups prior to trial have as their purpose the obtaining of evidence against the defendant to be used at trial and to be used at judicial proceedings prior to trial, and this was the use of that evidence. That was the difference.

QUESTION: If you had a lineup in the magistrate's office, it is your position that you wouldn't need a lawyer, under Wade and Gilbert?

MR. LEVAD: I am not sure I understand the question, Your Honor. A lineup in a magistrate's office?

QUESTION: Yes.

QUESTION: A typical lineup with 10 people, for example.

MR. LEVAD: I don't contend that you wouldn't -- that it wouldn't be subject to Wade-Gilbert and there wouldn't be a right to counsel.

QUESTION: If you do, I think you are in trouble here.

MR. LEVAD: Is this after charge or prior to charge?

QUESTION: Well, the charge that the woman made was made after the start of the hearing, correct?

MR. LEVAD: I don't believe so, Your Honor.

I believe the record indicates that she signed the complaint and it was filed prior to the hearing.

QUESTION: She signed it in the office, right then and there, didn't she?

MR. LEVAD: Just prior to the hearing, I believe, Your Honor, yes.

QUESTION: Well, she was brought there to identify him, you admit that?

MR. LEVAD: As part of that hearing, yes, Your Honor.

QUESTION: Well, she was brought to identify him.

MR. LEVAD: Yes, Your Honor.

QUESTION: And there was no lawyer present?

MR. LEVAD: There was no lawyer present.

QUESTION: Mr. Levad, let me ask you a question about the trial itself. The prosecutrix testified at the trial that she had previously identified this defendant at the preliminary hearing, however you may characterize it. Did she not?

MR. LEVAD: Yes, she did.

QUESTION: Would your case be any stronger or any different if she had not referred back to that prior identification, but had merely confined herself to an in-court identification?

MR. LEVAD: To the extent that Gilbert v. California may apply to this case, Your Honor, yes, it would directly fall

under U.S. v. Wade, in which the only testimony that is used at trial is the in-court identification. And even --

QUESTION: Then you would have the opportunity to try to prove some independent source, would you not?

MR. LEVAD: That's correct, Your Honor.

QUESTION: So that your problem stems primarily from Gilbert?

MR. LEVAD: That's correct, Your Honor.

QUESTION: Which laid down the per se rule?

MR. LEVAD: That's correct, Your Honor.

QUESTION: The evidence at the trial -- Was it a jury trial?

MR. LEVAD: It was a jury trial.

QUESTION: The evidence at the trial starts on page -- that is excerpts -- 53 of the Appendix and goes from there on through 69, or longer. I am just trying to find the transcript of the introduction of this evidence of the prior identification. Because that's really critical, isn't it?

MR. LEVAD: Yes, it is, Your Honor.

QUESTION: The testimony as to this confrontation at the bail hearing. That did come in at the trial, you told Justice Powell.

MR. LEVAD: It did come in at the trial, yes, Your Honor.

QUESTION: Somewhere in here in the Appendix?

MR. LEVAD: Part of it is on page 75 of the abstract, where it indicates Record page 234: "Did you know at the time, Marilyn, that he stepped out of that door that he was James Moore." She said, "I knew he was the man that raped me."

QUESTION: I see. At the time he stepped out of that door, that's not during the time of the rape. That's down in the courtroom.

MR. LEVAD: That is.

QUESTION: That's on page 75.

QUESTION: I see. I misapprehended that.

QUESTION: Mr. Levad, if, as Mr. Justice Blackmun suggested, you are pressed into the position of relying on harmless error which has not been treated by the other courts, reviewing courts, then is it harmless error because Moore's property was found in her room and a jury has resvolved that issue? Is there anything else besides that that would link him up with the crime, other than -- taking the identification out?

MR. LEVAD: The conviction does not stand alone on the identification, Your Honor.

QUESTION: But you don't suggest that the jury didn't rely on the fact, to some extent, that his checkbook was found in the victim's room, do you?

MR. LEVAD: I suggest that they could have and probably did rely on that to a great extent.

QUESTION: Well, if this is a harmless error case, which none of the reviewing courts have said it was, is there any other evidence that it is harmless, better evidence than that? What else would you rely on to make a harmless error case, if that's really what you had here?

MR. LEVAD: The only other evidence than the identification, Your Honor, is the letter, to my recollection from the record.

QUESTION: Well, the letter is tied in with the checkbook, is it not?

MR. LEVAD: Yes, it is. The letter, apparently was inside the checkbook. Maybe I can clear that up a little bit. The letter was a letter that was written by the girl that testified, who testified that she had gone with the defendant, and it was written to her doctor and was kept in that checkbook and the last time she saw it was two days prior to this incident, on December 12, 1967, and on that day she gave Mr. Moore the keys to her apartment to remove some of his possessions. The next time that letter showed up was in Miss Miller's apartment, right after the rape, on the floor beside the bed.

QUESTION: Well, if you are leaning, if not relying, on harmless error, is that not the most important actual element in this case, presuming you are in a position to raise harmless error now?

MR. LEVAD: Is the letter the most important --

QUESTION: The letter and the checkbook.

MR. LEVAD: I think it is a --

QUESTION: Mr. Levad, I don't quite understand that. It seems to me that the per se rule, the automatic exclusionary rule of Wade and Gilbert applies only to the testimony about the out of court identification. It certainly doesn't apply to the in-court identification.

MR. LEVAD: That's true, Your Honor.

QUESTION: And the Court of Appeals here found that there is an independent basis, and I take it that that is equivalent to finding no taint on the -- in connection with the in-court identification caused by the out of court. So, if you are talking about a harmless error rule, unless we are going to review and overturn the Court of Appeals' decision that there was an independent basis, it leaves the in-court identification as, perhaps, the most important piece of evidence attaching the Petitioner to the crime. And if the only thing that is going to be reversed is the -- if anything is going to be reversed -- if the only thing that's going to be reversed is the testimony about the out of court identification, it would leave a major part of your case.

MR. LEVAD: That's correct, Your Honor. I believe that that in-court identification is important to that determination and -- Yes, sir.

QUESTION: Finish it.

MR. LEVAD: -- is important to that determination, especially in view of the fact that that identification and that determination have been reviewed by three separate courts.

QUESTION: On page 59 of the Record, middle of the page: "Did you know that when your name was called, the suspect you were to view was to be brought out?"

"Yes.

"So when Mr. Moore approached the bench, did you know that he was the suspect you were to view?

"No. Not until his name was given.

"And once his name was given, did you know that was the suspect?

"Yes."

How could she have picked him out in a lineup if his name wasn't given?

MR. LEVAD: She picked him out as he walked in the courtroom.

QUESTION: She says here she picked him out because of his name, not until his name was given. "Once his name was given did you know that . . .?" "Yes."

MR. LEVAD: She knew that it was the individual that had been charged in the case, but she also testified that that was not a factor contributing to her identification. She said, "When he walked through the door, I knew that was the man

that raped me."

QUESTION: How many other negroes were in the room that day? The record shows there was one.

MR. LEVAD: At least one.

QUESTION: And one woman, but there was only one negro man in the joint.

MR. LEVAD: That's correct, Your Honor.

I would ask the Court to affirm the decision of the Seventh Circuit Court of Appeals.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:08 o'clock, a.m., the case in the above-entitled matter was submitted.)