In the

Supreme Court of the United States

JOHN GREGORY WATKINS,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 79-5949
	)	
DONALD E. BORDENKIRCHER, WARDEN; and	)	
	)	
JAMES WILLARD SUMMITT,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 79-5951
	)	
DONALD E. BORDENKIRCHER, WARDEN,	)	
	)	
Respondent.	)	

Washington, D.C.
November 10, 1980

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ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

JOHN GREGORY WATKINS, Petitioner, v. DONALD E. BORDENKIRCHER, WARDEN; and JAMES WILLARD SUMMITT, Petitioner, v. DONALD E. BORDENKIRCHER, WARDEN, Respondent.	No. 79-5949 No. 79-5951

Washington, D.C.

Monday, November 10, 1980

The above entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 o'clock a.m.

APPEARANCES:

FRANK W. HEFT, JR., ESQ., Chief Appellate Defender of the Jefferson District Public Defender, 200 Civil Plaza, 701 West Jefferson Street, Louisville, Kentucky 40202; on behalf of the Petitioners.

VICTOR FOX, ESQ., Assistant Attorney General, Capitol Building, Frankfort, Kentucky 40601; on behalf of 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 first this morning in Watkins against Bordenkircher and Summitt against Bordenkircher. Mr. Heft, you may proceed whenever you are ready.

ORAL ARGUMENT OF FRANK W. HEFT, JR., ESQ.,

ON BEHALF OF THE PETITIONERS

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

The issue brought before the Court today in these consolidated cases is whether or not constitutional due process of law requires a hearing outside the presence of the jury to determine the admissibility of -- identification evidence.

We submit that the issue before this Court is not the narrow one concerning the admission of identification evidence, but rather the issue, and the essence of that issue goes to effective assistance of counsel. The Court must examine the practical application of the issue because it has a direct effect on the practice of criminal law in cases throughout this country. The Petitioners will demonstrate to the Court that the necessity for requiring an in camera hearing is so intricately interwoven to effective assistance of counsel, that due process requires an in camera hearing.

QUESTION: This is as to the admissibility of any identification evidence?

MR. HEFT: Yes, be it a show-up, line-up, or --

QUESTION: Or a proposed identification in Court?

MR. HEFT: That's correct, Justice Stewart. The --

QUESTION: What you're saying is that cross-examination is not sufficient?

MR. HEFT: Exactly. We feel that, this Court has examined in its history, numerous cases involving identification testimony. Those cases, to-wit, Wade, Stovall and Gilbert, were concerned with the suggestive identification procedures that may be implemented.

The more recent decisions, specifically the Biggers and the Manson decisions, deal with the reliability of the identification evidence. The emphasis has, in fact, shifted.

The present stand of the Manson standard, which requires that the reliability of identification evidence be weighed against the corrupting effect of suggestive identification procedures, requires an evidentiary hearing to determine how that procedure is going to be implemented.

QUESTION: The first three cases you mentioned had to do with; the first two with a line-up and the third one with a show-up, so-called?

MR. HEFT: That's correct.

QUESTION: And the second cases, category of cases you mentioned, had to do with identification in court?

MR. HEFT: Well Biggers, when the -- I believe when

the test shifted to Biggers, there was a show-up conducted in the Biggers case and the Court determined, rather than to rely only on the -- the only test was that various factors had to be determined --

QUESTION: The question in Biggers, as I remember it, I haven't read it recently, was how much of an opportunity did the victim of the rape in that case have to, actually have to identify the defendant, isn't that it?

MR. HEFT: Exactly. The Court recognized that a show-up is a suggestive procedure, per se. But the real question in the Biggers case was, could the witness, notwithstanding any suggestive identification procedures, could the witness give an accurate and reliable identification.

QUESTION: In Court?

MR. HEFT: Yes.

QUESTION: There was not a line-up in Biggers, was there?

MR. HEFT: No, just the show-up. The question becomes how does due process require the Manson analysis to be implemented. And we submit there are several considerations along this line.

First of all, as the Respondent argues here, that discovery is an adequate method by which to implement the Manson analysis. We submit that discovery is totally inadequate; primarily because the purpose of discovery is only to

disclose what possible evidence may exist. It has nothing to do with the resolution of issues of constitutional magnitude.

More importantly there is no due process right to discovery. Discovery is necessarily a matter of state procedural law. Consequently, it's -- what is discoverable today may not be discoverable tomorrow.

In fact, Kentucky at the present time is going through a revision of its discovery rules. And we feel for those reasons discovery is constitutionally inadequate to achieve a reliable identification.

The respondent also argues that the defense attorney has equal access to pretrial interviews of witnesses and that this will satisfy any constitutional requirements --

QUESTION: Counsel, did you make and preserve this right to counsel argument as opposed to the Wade, Stovall, Denno argument all through the Kentucky courts into the District Court in the Sixth Circuit?

MR. HEFT: Justice Rehnquist, I don't think anyone ever questioned the individual's right to counsel. We are not saying that the individual is entitled to counsel in pre-critical stages; that's not the issue. We assume, for example in Watkins' case, Watkins was identified in a line-up and a show-up before his indictment. We're not saying that he had a right to counsel at those points in time, all we're saying in this brief, is that counsel did have the right to an

in camera hearing to challenge the reliability --

QUESTION: You mean that when the in-court identification was offered by the prosecution, did you then at that time ask for a hearing outside the presence of the jury?

MR. HEFT: In Watkins' case, there was a pretrial motion filed to suppress.

QUESTION: That isn't what I asked you. Now, you objected at the -- in trial, did you?

MR. HEFT: That's correct.

QUESTION: And did you ask at the time when the trial was going on for a hearing outside the presence of the jury?

MR. HEFT: Pretrial. The judge called the case for trial, both attorneys asked for in camera hearings. Both attorneys in the Watkins and the Summitt cases cited Wade, Stovall and Gilbert and constitutional principles, to justify the request for the hearings.

QUESTION: You still haven't answered Justice Rehnquist's --

QUESTION: Did they cite Jackson against Denno, or --

MR. HEFT: No. No one cited Jackson v. Denno.

QUESTION: So that you didn't raise the point in the state court?

MR. HEFT: It was raised and it was considered by, particularly, the Sixth Circuit.

QUESTION: Well, but the Sixth Circuit on a habeas can't consider a point that wasn't raised and considered in the state courts, can they?

MR. HEFT: The state courts did not specifically address the Jackson issue.

QUESTION: Because you hadn't raised it?

MR. HEFT: It had been -- Jackson had not been, specifically raised.

QUESTION: Well why did the federal habeas court think that you had exhausted your state remedies on this particular question?

MR. HEFT: Well the Kentucky Supreme Court just found, in both of these cases, that there was no due process right.

QUESTION: To what, to what?

MR. HEFT: To have the in camera hearing before eye witness identification could be admitted.

QUESTION: Well, so you did raise it in the state court?

MR. HEFT: That specific issue was raised.

QUESTION: Yes, but was it -- on the grounds of what? Why did you think you were entitled to an in camera hearing?

MR. HEFT: Due process. Because the attorney on cross-examination cannot adequately challenge the reliability

of identification.

QUESTION: Well Mr. Justice Rehnquist asked you if you had presented that issue in the state courts?

MR. HEFT: Well Justice White, it had not been raised specifically in Jackson v. Denno terms in the state court. It had been raised --

QUESTION: Well I don't care whether you -- it isn't so much whether you cited Jackson against Denno, but it's whether or not you claimed that the federal constitution as a matter of due process --

MR. HEFT: Yes, it was claimed --

QUESTION: -- requires you to -- requires an in camera hearing.

MR. HEFT: Yes sir, it was. Due process grounds --

QUESTION: You've now embellished it with this, it's really a right to counsel, due process argument, is that it?

MR. HEFT: It has certain ramifications for effective assistance of counsel, that's our position.

QUESTION: Well the evidence was admitted, wasn't it?

MR. HEFT: Yes sir.

QUESTION: And you don't challenge that it wasn't admissible? Or do you say that if counsel had the unrestrained right to cross-examination, it might not have been?

MR. HEFT: That's the issue to be determined and

that's the value of the in camera hearing. We don't feel that an attorney on cross-examination can adequately challenge the reliability of identification. There are too many factors the attorney has to consider when he undertakes cross-examination. He's got to understand the nature of the case. I think this Court has to analyze the issue presented here from the perspective of the trial attorney. When the trial attorney is going to cross-examine a witness, for example, in the Summitt case, he's going to cross-examine a rape victim who is still emotionally distraught because of this experience over almost two years after the rape itself. He also has to take into consideration what did the prosecutor achieve on direct examination.

The Watkins case is a classic example. The prosecution didn't even touch the pretrial identification --

QUESTION: The rule you're advocating would apply, I take it to, as equally, to six witnesses, identification witnesses or 12, as it does to one, would it not?

MR. HEFT: Yes.

QUESTION: And it would apply outside the identification field, I would take it, because a trial attorney has to make that sort of determination you're talking about, how much did the prosecutor accomplish on direct, with respect to every single witness in the case, whether to decline cross-examination, make an extensive cross-examination, or the like?

MR. HEFT: That's true. His -- what we're saying is that, without this in camera hearing, the attorney is just in an incredibly untenable position to challenge the reliability of the identification.

We would submit that, granted it would take time to conduct the evidentiary hearing, pretrial, or out of the presence of the jury, but we would submit that it is judicial economy to conduct that hearing, for several reasons. First of all, the attorney is going to -- if, assuming the reliability is very strong, an in camera hearing may result in settlement of the case. Second of all, if the reliability is so strong, the attorney, he may waive cross-examination of that witness and certainly, he's going to restrict and limit his cross-examination. He's not going to engage in the rambling type of cross-examination that Summitt's attorney engaged in. Summitt --

QUESTION: So you're saying, in effect, that the Constitution requires that there be this in camera or pretrial exploration so that the attorney can decide whether he wants to cross-examine and if so, how much; isn't that what it adds up to?

MR. HEFT: It adds up to a question of the effective assistance of counsel, and --

QUESTION: No, just answer my question. Isn't that what you're asking for?

MR. HEFT: Yes. That's correct.

QUESTION: Now, if it's a hold-up of a bank, or a supermarket, and you've got 12 witnesses, eyewitnesses, you're going to, on your theory, have to have the in camera examination of each one of those witnesses to see how fallible or how strong their identification may be?

MR. HEFT: That's correct.

QUESTION: Would you extend the same rule to the testimony of a police officer in a drug case who testifies that yes, this white substance was a controlled substance?

MR. HEFT: No sir. I think this particular issue is restricted only to identification evidence cases.

QUESTION: But what logical ground is there to separate one from the other?

MR. HEFT: Well, you would not -- I think, primarily, the constitutional ramifications of suggestive identification procedures and unreliability of identification evidence. In your hypothetical, Justice Rehnquist, the matter of whether or not a certain substance may be cocaine or heroin, that -- I don't see any constitutional problems with a denial of an in camera hearing to determine whether or not the substance is in fact a controlled substance. But here there are just far-reaching constitutional ramifications that require the hearing.

QUESTION: Well you're talking about reliability?

MR. HEFT: Exactly. But I would --

QUESTION: Would you also give the state the right to examine alibi witnesses ahead of time?

MR. HEFT: I think that's a matter, Justice Marshall, of state procedural law.

QUESTION: Well why isn't this also a matter -- what part of the Constitution says you have to have a rerun of your evidence?

MR. HEFT: There's nothing in the Constitution that says you have to have a rerun of your evidence, but the Constitution says --

QUESTION: What is there in the Constitution that says that the government has to help you in your case?

MR. HEFT: I don't know if it's so much --there's nothing --

QUESTION: What is there in the Constitution that says that the government should do what you should do yourself as defense counsel?

MR. HEFT: I think the Sixth Amendment requires the hearing.

QUESTION: That the government should do what you ought to do yourself?

MR. HEFT: The Constitution requires the government to do it. It doesn't require what the defense attorney wants it to --

QUESTION: Well what in the Constitution says that

you should have the right to examine one class of witnesses before they are put on the stand?

MR. HEFT: I think it's the nature of the evidence.

QUESTION: Oh, it's the nature of the evidence.

MR. HEFT: Yes, this --

QUESTION: In any kind of case?

MR. HEFT: No sir, not at all.

QUESTION: What kind of a case, a rape case?

MR. HEFT: One's a rape case and one's a robbery case. But they --

QUESTION: Well, is it restricted to those?

MR. HEFT: No sir.

QUESTION: Rape and robbery?

MR. HEFT: It's only restricted to cases in which identification evidence is going to be introduced.

QUESTION: Suppose it's an SEC case for identification?

MR. HEFT: I'm sorry, I don't follow the analogy. I don't --

QUESTION: Neither do I, I don't follow where you are either. See, that's my trouble. I just don't understand why this is singled out, except that this is the case that you have --

MR. HEFT: Well, --

QUESTION: -- that's the only reason it's singled

out, isn't it?

MR. HEFT: It's -- no, because I think there's a conflict --

QUESTION: Well you name me one other field it would apply to?

MR. HEFT: I would submit that a determination of whether a confession can be admitted into evidence, as evidenced in Jackson v. Denno.

QUESTION: But you didn't raise Jackson v. Denno.

MR. HEFT: That was raised, the courts did consider that.

QUESTION: Which court?

MR. HEFT: The Sixth Circuit. It explained the --

QUESTION: I'm talking about the state court; that's where it started.

MR. HEFT: The state court concluded that there was no due process violation, for failing to conduct the hearing. The Sixth Circuit reached the same conclusion, but based on Jackson in the Pinto decision. And we submit that's an erroneous conclusion. Because the analysis in Jackson went right to the practical effect of allowing -- what happens when the jury is allowed to determine the voluntariness of the confession, and pass on the defendant's guilt or innocence?

QUESTION: Yes, but the jury is not permitted to pass on the admissibility of evidence.

MR. HEFT: That's correct.

QUESTION: And of identification of it.

MR. HEFT: They have to determine the reliability of the evidence, and the reliability is based first of all, on, perhaps, suggestive identification procedures. That's -- has to be, whether or not the identification procedure is suggestive has to be determined.

We submit that that's a question of law, given the decisions of this Court along these lines. After the Court decides whether or not the identification is suggestive, the Court then has to determine whether or not in spite of any suggestive procedures, is the identification reliable and can the jury itself pass on the credibility of the witness and the reliability of that identification.

The problem I see, that this Court should take into account, is if we don't have the in camera hearing, what happens when the jury is confronted with the Foster v. California situation? In which the identification procedures are obviously suggestive, the identification of the witness is obviously unreliable. What's the jury going to do in that situation? Is the jury, from the standpoint of human nature, going to be able to follow the trial judge's admonition to ignore any evidence concerning identification --

QUESTION: You mean, when it's -- after the hearing before the jury the evidence is excluded by the judge, he

says it is unreliable?

MR. HEFT: Yes.

QUESTION: And then you say that the jury would have a very tough time of putting that aside?

MR. HEFT: That's correct.

QUESTION: That's quite a different case from the one you're -- where the evidence was admitted, the judge says that it's reliable, it's admissible, and your only argument is that you didn't have a fair opportunity to show that it was unreliable because of the limited cross-examination you claim?

MR. HEFT: That's correct.

QUESTION: That's a much different case from saying that the evidence is excluded and arguing that instructions to disregard the evidence is ineffective. That was really the bottom line in Jackson against Denno, wasn't it?

MR. HEFT: That's true. But we think that the Jackson v. Denno case can be analogized very clearly to this case, for the reasons we've set forth.

QUESTION: Do you suggest that ever, under any circumstances, that the witness who is tendered as an identification witness could be excluded?

MR. HEFT: Yes, Mr. Chief Justice, I think --

QUESTION: Under what circumstances and for what reasons?

MR. HEFT: I think that the analogy that keeps coming to mind is the Foster v. California situation, where the defendant was put in a line-up with seven individuals, who bore no resemblance to him; right after the line-up, the prosecuting witness said I'm not sure that that's the man. Foster was then brought, on a one-on-one confrontation, to confront the man. The witness said I'm still not sure. A line-up was held sometime later, a week or so later, --

QUESTION: And excluding line-up now, no line-up at all.

MR. HEFT: Okay.

QUESTION: The case is called for trial and John Jones' name is listed as a prosecution witness. He takes the stand and begins to testify and says yes, I was in the bank, I saw the robbery, and this is the man. Can you exclude that on any basis whatever?

MR. HEFT: No, no, I'm only suggesting to the Court that where you may have to exclude evidence is where there may be any indication of suggestive identification procedures.

QUESTION: Well if I understood your argument that you've been making, it is that you are entitled, as a constitutional matter, to have some private sort of examination of that witness to see how strong or how weak his basis may be for the identification?

MR. HEFT: No, we don't subscribe to that position

at all. For example, if an individual observed the defendant coming out of a house, the defendant was charged with -- carrying a t.v. -- the defendant was charged with burglary, we would submit that we would not be constitutionally entitled to a hearing under those set of circumstances. There are no suggestive identification procedures.

QUESTION: Are you saying then that your argument doesn't apply to in-court identification?

MR. HEFT: I'm saying that our argument applies only to those situations in which the police, or any government authorities, have conducted identification procedures. That in order to determine the -- whether or not those procedures were suggestive, due process requires the hearing; only in those instances.

QUESTION: Well, go back to the Chief Justice's question, if you will. You simply have a man named as a witness, he gets on the stand and begins testifying about how he was in the bank at the time. He doesn't, no one asks him whether he has previously identified the witness, and then he is simply asked the question, do you recognize the defendant and was he in the bank. Now do you say you're entitled to an in camera hearing before that?

MR. HEFT: I don't necessarily think, Your Honor, if there has been no indication that the state has not engaged in suggestive identification procedures. I'm not suggesting

that in each and every case in which you have identification evidence that you're required to have a due process hearing. Only in those cases where the state has implemented identification procedures. Because of the suggestive natures of those procedures. The Court has recognized the problem posed by identification procedures. We submit that when those circumstances arise, then we are entitled to the due process

QUESTION: Well, but the courts also distinguish between in-court identification, where the witness simply says yes, I saw that man in the bank, and the question then asked the witness, did you previously identify him, right after the robbery. Now, would you make a distinction between those two?

MR. HEFT: Yes, I think I would.

QUESTION: So that, your Jackson against Denno hearing would require it only where a witness is asked about a proceeding out of court identification?

MR. HEFT: Yes, such as presented here with these two cases. I don't think every witness in every case has to

Only in those instances where the state has implemented identification procedures; the determination has to be made whether those state sanctioned procedures are suggestive, and then reliability is determined--

QUESTION: Well let me understand you, sir. If the victim comes to the trial and says, that's the man, pointing

to the accused sitting at counsel table, no out of court proceeding is required in that situation?

MR. HEFT: Assuming that there has been no other --

QUESTION: I've given you the hypothetical. The victim comes and testifies, as most do, I take it, that that man robbed me, and so forth --

MR. HEFT: That's correct.

QUESTION: -- and as to that testimony, no out of court proceeding is required, is that it?

MR. HEFT: That's correct.

QUESTION: It's required only if the witness gets on the stand and says, I identified this man at a show-up on such and such a date at such and such a place or at a line-up. In that circumstance, before he can repeat the identification in Court, there has to be a proceeding such as you suggest, is that it?

MR. HEFT: That's correct, Justice Brennan. That's our position.

QUESTION: Well, in Watkins, the -- all the prosecution relied on, as I understand it, was the in court identification?

MR. HEFT: That's correct.

QUESTION: And then, on cross-examination, the defense brought out pretrial matters.

MR. HEFT: That's correct, Justice White.

QUESTION: And you say, even in that case, there must be a hearing outside the presence of the jury.

MR. HEFT: Yes, we do.

QUESTION: Well, how do you know until, if the prosecution puts on its witness and finishes -- shouldn't you get up and -- when does your right attach?

MR. HEFT: I think as soon as -- I think the right attaches as soon as the police or the government authority conducts an identification procedure --

QUESTION: You mean, before court, before trial?

MR. HEFT: As long as, just before the identification evidence is admitted, whether it is before trial or after the commencement of trial, we would suggest that it be done before trial.

QUESTION: Well, but you say that -- I'm not exactly sure how much your response to Mr. Justice Brennan's hypothetical eliminates. Is it in any case where an identification witness has previously talked to a police officer or to a prosecuting attorney?

MR. HEFT: No sir. If in the course of the prosecuting attorney's examination, if he goes to that witness and says tell me what you saw and the witness says I saw that man rob the bank or I saw that man come out of that house with a t.v., I don't think the due process right would necessarily attach to challenge the reliability of the identification

testimony. I think cross-examination would be adequate in those instances. But where the identification has been made, the state has implemented the line-up procedures or any type of identification procedures, that's where the due process right attaches.

QUESTION: Well there will always be -- won't there always be a pretrial identification of some kind?

MR. HEFT: Certainly.

QUESTION: Well I would -- suppose you would say, then, anytime the prosecution has had the victim or some witness identify the defendant before trial, you have this due process right; well that would be always.

MR. HEFT: Perhaps I've not made myself clear, Justice White. I don't --

QUESTION: Well, you haven't.

MR. HEFT: I don't think that it --in the situation that Justice Brennan gave, you're always entitled. You are entitled to the due process hearing. Only when the state has implemented --

QUESTION: Well won't there always be a pretrial identification of some kind?

MR. HEFT: Yes. But whether or not the state has undertaken any procedures which may have suggested or may have impaired the reliability of the identification, that's the issue to be determined.

QUESTION: Well it will either -- how do you ever identify anybody before trial? By photographs, by show-up or by a line-up.

MR. HEFT: Not -- no, not necessarily.

QUESTION: Or by somebody saying well, yes, I know that person because it was my brother.

MR. HEFT: I think in Justice Brennan's hypothetical, there's no -- there are no identification procedures at all. The identification does not have to be made from a photograph--

QUESTION: Because you know, because if some neighbor, some neighbor says I saw him, and I know my neighbor very well --

MR.HEFT: Certainly, the next-door neighbor --

QUESTION: Mr. Heft, suppose the policeman just goes out and picks up a man at random and charges him? You would not have a right to go into that, would you? I'm assuming they picked up the wrong man. You wouldn't have a right then to have the hearing, would you? Would you?

MR. HEFT: No, it does not -- no. I think cross-examination --

QUESTION: Does that cut you any way at all?

MR. HEFT: Our only position is that --

QUESTION: That man is rather innocent.

MR. HEFT: I think cross-examination in that particular respect --

QUESTION: Well what would you get, on your theory that you wouldn't get on cross-examination?

MR. HEFT: The problem --

QUESTION: It's really getting cross-examination ahead of time, that's all you're getting.

MR. HEFT: It's very limited in its nature.

QUESTION: That's all you're getting, cross-examination ahead of time?

MR. HEFT: That's all -- that's correct.

QUESTION: Do you know of any defense lawyer that wouldn't like to do that?

MR. HEFT: No sir.

QUESTION: Do you know of any government lawyer that wouldn't like to do that?

MR. HEFT: No sir. But that's --

QUESTION: Do I correctly understand, you're just saying, you're making this claim in any case where you object to an identification on the ground it was unduly suggestive?

MR. HEFT: That's correct.

QUESTION: And it is true, isn't it, most states allow this kind of pretrial hearing?

MR. HEFT: Well most, a number of states follow Kentucky's approach, in which the Kentucky Supreme Court said in both of these cases, this in camera hearing was a preferred course of action. There are also numerous jurisdictions that

mandatorily require this hearing. And we submit that when so many jurisdictions recognize the benefits of such a hearing, that there is a due process right to be derived therefrom.

QUESTION: But most of the cases don't rely on due process, though.

MR. HEFT: I would disagree, respectfully, Justice Marshall.

QUESTION: Well, the Third, Ninth, and the TC don't.

MR. HEFT: The Third Circuit, I believe, couched the issue in terms of the Jackson v. Denno situation, and said that you are entitled to the hearing if you can show that your claim of suggestiveness is not frivolous.

QUESTION: So you say that, would you say that Driber in the Third Circuit, represents your position?

MR. HEFT: No. No. Because we --

QUESTION: That's what the Third Circuit held, wasn't it?

MR. HEFT: As a practical point, from a practical aspect, we would -- we don't agree with the application in the Driber case. We would submit that if you're going to have the hearing to determine whether or not your motion is frivolous, the evidence is going to come out anyway. And due process would require the hearing just on motion alone.

I would just like to make a few concluding remarks. The issue, in recent years, the defense bar has come under

criticism in examination from courts, judges, commentators and lawyers, alike, concerning the effectiveness of their representation at the trial level.

And we would submit that the decision that this Court is going to reach today on these two cases is going to touch specifically that issue; that's the long-range effect of this case. We would submit that the dissenting opinion in the Sixth Circuit which recognized the dangers of blind cross-examination, which recognized the untenable position of defense attorneys when they are denied the in camera hearing, would echo the sentiments of every defense attorney in the country.

The issue here is not necessarily an academic one which is necessary to the resolution of constitutional issues; it's more a practical determination that this Court is going to make. This Court is going to make a decision today that's going to affect the nuts and bolts of the practice of law in every criminal case in the United States. And we would submit that with that in mind, due process requires the hearing. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Fox.

ORAL ARGUMENT OF VICTOR FOX, ESQ.,

ON BEHALF OF THE RESPONDENT

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

The Sixth Amendment right to counsel does not mandate

an in camera determination of the admissibility of evidence. What Plaintiff, or Petitioner, is asking here is basically that because of Wade, and a series of identification cases, that they have the right, constitutionally, to determine the admissibility of evidence.

We have used the phrase "reliability" today. Reliability is used to denote two separate things: first, the admissibility of evidence, and second, the credibility of the witness in presenting that evidence. One is a function of the trial court, the other is a function of the jury.

The right to counsel is predicated upon an inherent fairness in our system. It's to remove the inequality of the adversarial proceedings. Wade, the man was unable to cope with what the government was doing at that point in time without counsel. This damage to him could not be cured later, with cross-examination. The practical aspects which this Court has indicated through its questioning are just beyond belief. The phrase "nuts and bolts of justice", I submit we're going to have a lot more bolts than we are nuts to go on them. The process of the brother identification; what about an eyewitness as to a physical object such as an automobile? The t.v. camera in a bank robbery? All the practical aspects that we're talking about, just because defense counsel would like to cross-examine and determine out of the hearing of the jury, whether or not he wants to ask questions in front of the jury.

Those which are beneficial to him he will ask. Those which "prejudice" his client, i.e., indicate or incriminate, he's not going to ask.

QUESTION: I suppose it would be an advantage to both the prosecution and defense if there could be a complete dress rehearsal and make believe trial in advance with cross-examination of every witness and direct examination, would it not?

MR. FOX: Not only in trial, but before this Honorable Court, I would certainly appreciate a rehearsal of this argument before standing up here.

I think we all would. The ability to hear your questions and to know how to respond before you all really make a determination, and wait to sit down and answer my questions. The ability for trial counsel to -- the prosecutor to go in and check the alibi witnesses, the -- you know, is the defendant going to make this statement this time, or is that going to be an incriminating statement, or if it is, I'll ask it at trial, if it's not an incriminating statement, if it's to his advantage, I won't ask it as trial counsel.

QUESTION: Attorney General Fox, isn't there another consideration which you at least think about in a case like this? In this case, of course, the testimony is found to be admissible. But supposing you had show-up testimony that went in before the jury and after it went in, the judge thought it

was unduly suggestive and then ordered the jury to disregard it. Now it is true, is it not, that in that situation there would be a likelihood of substantial prejudice on the defense?

MR. FOX: Well, that which we're going after is the likelihood of irreparable misidentification.

QUESTION: And is it not true that if inadmissible show-up identification testimony went in, it could be highly prejudicial?

MR. FOX: That is correct, Your Honor.

QUESTION: And the purpose of the pretrial suppression hearing would be to avoid that kind of prejudice?

MR. FOX: There is an alternative to that. Upon the judge declaring that evidence inadmissible, it would be no different than him declaring hearsay inadmissible, or any other evidence inadmissible. Trial counsel, defense counsel, at that point in time, asks for an admonition, if not given sua sponte, and in addition, he may ask for a mistrial. Admittedly, the prosecutor runs the burden, or runs the risk that if his identification is inadmissible everything is going to go down the tubes at that point in time.

But assuming -- going on with your hypothetical, that the trial court denies the motion for mistrial, we still have the appellate review of due process, the fundamental unfairness aspect; it does not require a per se constitutional requirement that we determine all these factors prior to trial.

QUESTION: Mr. Fox, in your response to Justice Stevens' question, at what point did you assume that the determination was made, that the identification witness or testimony was unduly suggestive? Did you assume it was made by the trial judge on a motion for new trial?

MR. FOX: No, Your Honor, I made the assumption that the motion, it was following a motion by defense counsel during trial.

QUESTION: After the testimony had gone in?

MR. FOX: Yes, Your Honor. We have a contemporaneous objection rule, and I'm basing my response somewhat on Kentucky, that you must object at the time evidence is admitted or you waive the objection.

The objection, on the hypothetical, the objection was made at the time the evidence was admitted. The objection was sustained, because it was inadmissible, and admonition given, Your Honor, admonition was insufficient, moved for mistrial, mistrial overruled. That is preserved for a fundamental fairness test on review. I don't think it requires a constitutional mandate to determine prior out of -- at least out of the hearing of the jury. I think the defendant is protected in this particular instance and I think the orderly administration of justice is followed.

QUESTION: Well what you're positing then, is a situation where, on a question by question basis, which is the

way cross-examinations and direct examinations take place, the judge allows a witness to testify in such a manner, overrules objections to individual questions, and then at the end of a line of questioning, comes to the conclusion that he should have sustained them?

MR. FOX: It can go both ways, Your Honor. He could initially determine that it's not admissible after it's come in, or it could be on a question by question basis. The fact situation, and I'd like to back up in this particular instance.

In the rape case in Summitt, the motion to suppress was based on the fact that counsel was not present at the photographic viewing. In Watkins, the basic objection was lack of counsel at the line-up. The line-up was conducted, it was a pre-indictment line-up. The basic motions presented to these two separate trial courts was right to counsel at the initial identification procedure. These motions were presented outside the hearing of the jury. The Court took a look at what was available, in fact, I believe in the Summitt case, it was an off the record determination, there were some comments off the record. And the Court said no, the cases are, and there is no right to counsel at a photographic -- especially when the individual had gone through some 1200 photographs and mug shots before identifying Mr. Summitt. The Court said there is no suggestiveness here, that identification would be admissible. He had made the determination.

QUESTION: Attorney General Fox, let me change -- just give you a hypothetical. Supposing you have a post-indictment line-up identification where there is a clear right to counsel. But say there's a dispute of fact as to whether counsel arrived in the middle of the line-up or before it started, or something like that, and you had to know the facts in order to know whether the right, which admittedly would exist, had been preserved. Under Kentucky practice, would you have that put in the line-up testimony and then during the trial decide the question of fact, or would you have a pretrial suppression hearing?

MR. FOX: Normally there would be a motion to suppress, based on those grounds; there would be conduct of a hearing to determine that particular issue. In other words, there would be --

QUESTION: Then there's the point in this case, that the evidence was clearly admissible and therefore there was no need for the hearing. But if there were legitimate differences of opinion as to the admissibility of the allegedly suggestive identification, would you then say that the Constitution would require a pretrial hearing?

MR. FOX: If there were sufficient -- I think it would be --

QUESTION: Well in the case I gave you, say, I say you say you think they would allow hearing, would you say the

Constitution would require it in that situation?

MR. FOX: Per se, no, Your Honor, I do not. I think the constitutional protection is available upon the -- a later determination.

QUESTION: Such as the fact that the witness said that the man looked like he was around 30; and the man was actually 17?

MR. FOX: That could be a factor.

QUESTION: Well that was Watkins.

MR. FOX: That was Watkins, however, Watkins was identified in Court without any reference to the pretrial. The victim was -- identified, and there was no pretrial identification brought in at Watkins, it was simply an in court identification.

QUESTION: I'm sorry, Mr. Fox, did I understand your brother to say that Kentucky has now adopted a rule governing this question?

MR. FOX: No, Your Honor, in fact, not to my knowledge.

QUESTION: Perhaps I misunderstood him.

MR. FOX: Normally, in our jurisdiction, a motion to suppress -- there is, it's made pretrial, and the courts go into it. These are --

QUESTION: I didn't hear you.

MR. FOX: I said normally there is a motion made

pretrial to suppress, and there is at least a hearing, a determination as to whether or not the motion will be granted or not.

These particular --

QUESTION: Well what happens at that, in that proceeding? I mean, is evidence taken, or what?

MR. FOX: It can be, Your Honor. It's not a requirement that evidence has to be put on, on the facts, as in these particular cases. The motion, the grounds for the motion was he was entitled to counsel at them, no he wasn't. That was it. There was no --

QUESTION: I guess you have to come prepared to put on evidence, if you have to?

MR. FOX: Yes, Your Honor.

QUESTION: Should you be?

MR. FOX: You should be, and basically, when they do take the evidence is that they put on -- a police officer who either took the photographs out and showed them or conducted the line-up, or something of this nature. And it shows that the identification procedure itself was not suggestive. Does not get into the person who actually made the identification. We're talking here not --

QUESTION: Well are there instances in which the trial judge in a suppression hearing will say yes, I find that it was suggestive?

MR. FOX: Oh yes, Your Honor.

QUESTION: And therefore, you may not use that evidence, that identification evidence at trial?

MR. FOX: Yes, Your Honor. Yes, Your Honor. In fact -- well, it's not before the Court, so I won't mention a particular factual situation. Needless to say, in one instance that I'm aware of, that prosecutor, defense counsel and trial judge beforehand said, hey, this is all we've got, we'll put it before the jury and if I -- the judge said, if I rule admissible, it will go to the jury; if I rule it inadmissible, I'll move for a mistrial. I'll entertain a motion for mistrial and direct a verdict of acquittal.

QUESTION: Do I understand you to say that in Kentucky practice, there is always a pretrial motion available to suppress either identification or other evidence?

MR. FOX: Yes, Your Honor. The motion to suppress is basically a routine motion filed if there is evidence which has been seized, either a Fourth Amendment right or identification procedure.

QUESTION: Does your practice require giving a list of witnesses to the defense in advance of the trial?

MR. FOX: Witnesses are available. On our pretrial discovery motion, scientific evidence, statements of witnesses are not available from the state. Witnesses are available, names are available.

QUESTION: You mean, that's --

MR. FOX: Pretrial.

QUESTION: -- pretrial. So the defendant knows.

MR. FOX: In addition, we normally hold a preliminary hearing, in which there is sufficient information put on normally, as to, it's used as a discovery motion. And basically, that's what petitioners are asking for here, is an extension of discovery.

QUESTION: Well, I would have thought from your answer to some of the other questions that it was accorded under Kentucky procedure now. On a motion to suppress after being furnished a list of witnesses, can the defense counsel move to suppress the testimony of one of the witnesses on the grounds that it's identification testimony?

MR. FOX: He can move to suppress for any grounds that he wishes, whether it be identification or witness identification. It's just the trial court makes the determination as to whether it will or will not be.

QUESTION: Well, does the trial court have to hear whatever the defense counsel has to say at that time, and is it a factual determination?

MR. FOX: It's the --

QUESTION: Will they call witnesses at the hearing?

MR. FOX: There can be, it's not required. It's as the commentary to Federal Rule 104 says, that in the best

interests of justice. The discretion of the trial court, the factual situation presented at that particular motion, should we go into a hearing or is it so obvious --

QUESTION: Well here it was denied.

MR. FOX: Both were denied in this particular instance.

QUESTION: There was a motion and they said no hearing.

MR. FOX: The motion was to suppress because there was no attorney present at the photographic ID. Under, clearly under Ash, he was not entitled. The motion should have been denied on that basis and on that basis alone. There was no necessity to hold the hearing.

QUESTION: Well was there a motion to suppress any in court identification; I thought there was?

MR. FOX: The grounds --

QUESTION: On the -- because the pretrial identification was --

MR. FOX: Because counsel was not present at pretrial.

QUESTION: Well anyway, he made the motion and it was denied? And no hearing was granted --

MR FOX: There was no full blown hearing with evidence taken.

QUESTION: Yes, well, he was -- but he claims he was entitled to a hearing on admissibility outside the presence

of the jury.

MR. FOX: Admissibility of any evidence. I do not-- I cannot make the compartmentalization that petitioners do for identification admissibility and other evidentiary hearings.

QUESTION: So you say however broad the right to a pretrial hearing is, it doesn't cover this case?

MR. FOX: No, Your Honor, that was not --

QUESTION: Under Kentucky practice, you would say if this very same case came up again tomorrow, the request for a pretrial hearing would be denied?

MR. FOX: Under the same facts, yes, Your Honor, and the same motion, same grounds to suppress. If they were to raise the issue that has been raised later, that -- the motion may be granted. But again, it's at the discretion of the trial court. It's not a per se constitutional rule that such a hearing can determine, or determine the admissibility of the evidence. I'd like to point out basically the difference in Jackson, or that we perceive to be the difference in Jackson, is that in Jackson there was a statute which required the jury to determine the voluntariness of a confession. This Court said that that could not be, the same jury determined the voluntariness as well as the credibility of it, as -- and the guilt and innocence. We would submit that in this particular instance, there is no requirement that the jury determine the admissibility of this evidence; the court, trial court, still makes

that determination, the admissibility of the evidence.

QUESTION: And if the trial court is wrong, the reviewing court can reverse and order a new trial on that ground?

MR. FOX: Yes, Your Honor, --

QUESTION: Under Kentucky practice, is that correct?

MR. FOX: That is correct. And if it should perhaps get through our system, and on a habeas action, it would probably not get past that stage.

QUESTION: And basically I take it your, or the state's case, is that it is the function of cross-examination to expose the flaws in any testimony, or flaws in the credibility of any witness?

MR. FOX: Right, credibility is always an issue for the jury. The credibility issue as to the identification, the witness' firmness in the identification is for the jury. And these are probably the only two cases that I'm aware of in Kentucky in which there were no -- there was no pretrial hearing. They came about a year apart and came out of the same jurisdiction.

QUESTION: Mr. Fox, suppose in these cases, the -- let's say in the Watkins' case, the prosecution witness is about to testify and identify, making an in court identification and the defense objects and says this is a tainted identification, I'd like a hearing outside the presence of

the jury; denied. Then on cross-examination -- and the in court identification is admitted, with no reference to the -- any out of court identification -- on cross-examination, the out of court identification is brought out, and then the -- the witness is cross-examined and then the defense asks the Court to exclude the in court identification on the ground that it was tainted, or impermissive -- unreliable. And the judge agrees and strikes the testimony and instructs the jury to disregard it.

MR. FOX: As defense counsel, I would move for a mistrial or, at the very least, a directed verdict of acquittal.

QUESTION: But let's assume there's other identification, going to be other identification testimony. But would you say that that is, that constitutionally the Defendant then is entitled to a new trial just because the jury -- you could never rely on the jury to put aside the evidence that it heard?

MR. FOX: I would, unringing bells is a very difficult task.

QUESTION: Well that was part of Jackson against Denno. Do you think the same risk inheres in this case?

MR. FOX: Well let me answer that by saying this, that in your hypothetical there was other identification evidence which pointed to the defendant. Setting aside

that which, in your hypo, should not have been admitted, as though it had not been, and looking at the remainder of the case, and there was adequate identification evidence, I would say that no, there is not an entitlement to, constitutionally.

I, again, going back to the fundamental fairness --

QUESTION: You don't think that kind of a case would come down to harmless error?

MR. FOX: Well that's basically what I'm saying when you set it aside, you set aside the error and taking a look at it.

QUESTION: Is this not a matter of discretion, the sound discretion of the trial judge, if he thinks the testimony is very damaging and that he can't unring the bell, as you put it, then you either grant a mistrial, grant a new trial, or after verdict a judgment notwithstanding the verdict?

MR. FOX: Which we permit.

QUESTION: So there are a whole range of remedies to deal with this that have always been available?

QUESTION: Why would you grant judgment notwithstanding the verdict simply because of trial error? Wouldn't you grant a motion for new trial?

MR. FOX: We have both in Kentucky, Your Honor.

QUESTION: Well, I realize you have both, but aren't they generally posited on different grounds?

MR. FOX: I really do not know, it depends, I think personally, upon the counsel. If he is moving for a judgment, or directed verdict of acquittal prior to the jury verdict, he comes back, he moves for a judgment notwithstanding the verdict, I think those are identical, the motion for new trial --

QUESTION: It's just a question of time?

MR. FOX: Yes, Your Honor.

QUESTION: Then the motion for new trial simply says that there was some procedural unfairness or evidence admitted that may not have been reliable, and the defendant ought not to be sentenced on the basis of the first trial, but nonetheless, there was sufficient evidence to go to the jury?

MR. FOX: A motion for a new trial is still within the discretion of the trial court.

QUESTION: But a motion for directed verdict of acquittal says there simply was not enough evidence to persuade a reasonable juror to convict, doesn't it?

MR. FOX: Our motion for directed verdict of acquittal must be made before it is given to the jury. At the close of all evidence. If that is overruled and it goes to the jury and a verdict of guilty comes back, then the judgment o.v. can be made.

QUESTION: And those are the same standards?

MR. FOX: Basically yes, Your Honor.

QUESTION: Which is basically the sufficiency of the evidence?

MR. FOX: Yes, Your Honor.

QUESTION: And a motion for a new trial would basically be some error that occurred during the trial, having nothing to do with his ultimate innocence or guilt, or the sufficiency of the evidence.

MR. FOX: That is correct, Your Honor.

QUESTION: The judge's motion, if the judge decided at the end of the case, after the verdict, to enter a judgment notwithstanding the verdict, he would do that only if he decided that, excluding the challenged evidence as to which he had instructed the jury to disregard, there was no evidence upon which a reasonable jury could return a verdict of guilty, that would be the process of the judge's thinking, would it not?

MR. FOX: Well, we basically have a standard that where it would clearly not be unreasonable for the jury to reach a verdict of guilty.

QUESTION: But if he was in doubt on --

MR. FOX: He'd probably deny it and let it go up on appeal.

QUESTION: Or order a new trial?

MR. FOX: He'd probably still let it go up on appeal, and let the appellate court, since we have elected judges,

would let the appellate court direct that a new trial be granted.

QUESTION: Of course, Mr. Fox, in Jackson against Denno, as I remember it, there was evidence other than the confession, which was sufficient to sustain the verdict, but the court nevertheless held that due process required a separate hearing. So I guess your real distinction here isn't it, is that the distinction between the prejudicial effect of a confession where the defendant in effect says I was the man, as opposed to third party testimony saying that was the man; one is much more prejudicial than the other.

MR. FOX: Yes, I think in fact we're talking two separate constitutional rights, and one is the Fifth Amendment right not to incriminate oneself; and the other is the right to counsel, and the -- you know, in Pinto, it said it's prudent to hold the hearings. And I can't but be perfectly candid with this Court and say it would have been far more prudent in both of these instances, simply because if they had held the hearing we would not be here today. But that still does not take away the fact that there was no denial of due process in these particular cases. You look at the evidence, the 1200 photographs in the rape case, the identification to the police beforehand, the descriptions. It's simply and basically a commonsense approach to the admissibility of evidence, do you hold separate trials, at what point do we

draw the line? I can draw the line between the voluntariness of a confession and the admissibility of identification evidence. I have difficulty in viewing the difference between an eyewitness of a person and an eyewitness as to the color of an automobile involved in an automobile accident.

QUESTION: Except that such a distinction is drawn by this Court's cases, there are some special cases dealing with identification evidence --

MR. FOX: Identification evidence.

QUESTION: -- there is no doctrine pertaining to identification of automobiles.

MR. FOX: The standard is basically that which is the fundamental unfairness. It's the right to, you know, prevent inequality in the adversarial proceedings. We're pointing out that there is no inequality in this adversarial proceeding, they had the preliminary hearing, they had pretrial, everything else available.

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

(Whereupon, at 11:00 o'clock a.m. the hearing in the above matter was submitted.)

CERTIFICATE

North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

Nos. 79-5949 and 79-5951

JOHN GREGORY WATKINS AND JAMES WILLARD SUMMITT

V.

DONALD E. BORDENKIRCHER, WARDEN

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY: William J. Wilson