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## Criminal Law - Right to Counsel - Extrajudicial Photographic Identification

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jured by an intoxicated patron would be an effective deterrent to unlawful and negligent sales by the vendor.<sup>38</sup>

By application of standard principles of tort analysis, applicable statutory standards, and its own holdings in closely analogous cases, the Supreme Court of California has rendered a decision in accordance with today's standards of wisdom and justice.

### SCOTT BALLOU

**CRIMINAL LAW—RIGHT TO COUNSEL—EXTRAJUDICIAL PHOTOGRAPHIC IDENTIFICATION**—Appellant was arrested and charged with the commission of several bank robberies. Three days after counsel had been appointed, appellant was placed in a lineup which was conducted by law enforcement authorities and attended by appellant's counsel and fifty eyewitnesses to the various bank robberies. Prior to this lineup, the authorities had confronted each of the eyewitnesses with photographs, including that of the appellant, for identification. The photographic display was conducted in the absence of accused's counsel. The United States Court of Appeals, Third Circuit, reversed the convictions, holding that an accused who is in custody is entitled to counsel at photographic confrontations with prospective witnesses and that it was error to allow evidence of the identification of accused. *United States v. Zeiler*, 427 F. 2d 1305 (3rd Cir. 1970).

The Sixth Amendment of the Constitution of the United States guarantees that anyone who is a defendant in a criminal prosecution shall enjoy the right to have assistance of counsel in preparing a defense.<sup>1</sup> Failure of authorities to comply with this fundamental right is deemed to contravene the Fourteenth Amendment<sup>2</sup> requiring that convictions be reversed.<sup>3</sup>

The purpose of this comment is to determine whether the right to counsel is applicable to photographic pretrial identification procedures conducted by law enforcement authorities. To achieve this purpose, it is necessary to examine some of the cases that have developed the law as it relates to pretrial identification procedures and the Sixth Amendment.

The United States Supreme Court cases of *United States v.*

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38. *Id.*

1. U.S. CONST. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to have Assistance of Counsel for his defense."

2. U.S. CONST. amend. XIV.

3. *Powell v. Ala.*, 287 U.S. 45, 71 (1932); *Gideon v. Wainwright*, 372 U.S. 335, 341 (1963).

*Wade*<sup>4</sup> and *Gilbert v. California*<sup>5</sup> were the landmark decisions which first held that an accused was entitled to have counsel present at corporeal lineups.<sup>6</sup> The corporeal lineup is an actual physical confrontation of a suspect with eyewitnesses to the crime in question. At this confrontation, the eyewitness has the opportunity to identify the suspect who is exhibited with other individuals. *Wade* and *Gilbert* held that a corporeal lineup was a "critical stage"<sup>7</sup> of the prosecution, and as such, the right to counsel attached.

The instant case is concerned with another aspect of pretrial identification. The court dealt with the propriety of extending the *Wade* doctrine to cases of photographic displays, conducted for identification purposes, while the accused is in custody. The result was an unprecedented extension<sup>8</sup> of *Wade* to include photographic displays for identification purposes within the "critical stage" category.<sup>9</sup> While many of the considerations that influenced the court in *Wade* are present with the display of photographs for identification, it is quite apparent that there are some distinctive incongruities.

Opponents of the *Zeiler* extension of the *Wade* rule point out that the *Wade* rationale requires the presence of counsel at corporeal lineups to allow accurate reconstruction of the event at trial.<sup>10</sup> They contend that the distinction between corporeal lineups and pictorial lineups is such that the events of a pictorial showing can be reconstructed at trial without the aid of counsel more easily than could the events which transpired at a corporeal lineup. First, they assert that with each type of lineup, cross-examination is available. Second,

4. *United States v. Wade*, 388 U.S. 218 (1967).

5. *Gilbert v. Cal.*, 388 U.S. 263 (1967).

6. *Gilbert* and *Zeiler* both held that it was constitutional error "per se" to admit evidence of the identification of an accused which was elicited at the corporeal lineup and the pictorial lineup, respectively, *Wade* and *Zeiler* would not apply a "per se" exclusionary rule with regards to in-court identification. However, they did hold that after pretrial identification conducted without accused's counsel, subsequent in-court identification by the witnesses would be allowed only if the prosecution had "established by clear and convincing evidence" that the witnesses had not been influenced by the prior improper confrontation. See *United States v. Zeiler*, 427 F.2d 1305, 1308 (3rd Cir. 1970); *United States v. Wade*, 388 U.S. 218, 233 (1967); *Gilbert v. Cal.*, 388 U.S. 263, 273 (1967).

7. Mr. Justice Brennan's majority opinion in *Wade* states that a "critical stage" of the prosecution exists where there is more than a minimal risk that counsel's absence at such stages might derogate from the accused's right to a fair trial. *United States v. Wade*, 388 U.S. 218, 224, 228 (1967).

8. The Second, Fourth, Fifth, Sixth, Seventh, Ninth and Tenth Federal Circuits have specifically declined to extend the *Wade* doctrine to photographic showings while the accused is in custody. See *United States v. Bennett*, 409 F.2d 838 (2nd Cir. 1969); *United States v. Collins*, 416 F.2d 696 (4th Cir. 1969), cert. denied, 396 U.S. 1025 (1970); *United States v. Ballard*, 423 F.2d 127 (5th Cir. 1970); *United States v. Serio*, 440 F.2d 827 (6th Cir. 1971); *United States v. Robinson*, 406 F.2d 64 (7th Cir. 1969); *United States v. Williams*, 436 F.2d 1160 (9th Cir. 1970); *United States v. Fowler*, 439 F.2d 133 (9th Cir. 1971); *Rech v. United States*, 410 F.2d 1131 (10th Cir. 1969), cert. denied, 396 U.S. 970 (1969).

9. *United States v. Zeiler*, 427 F.2d 1305, 1307 (3rd Cir. 1970).

10. "Since it appears that there is grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial, there can be little doubt that for *Wade* the postindictment lineup was a critical stage of the prosecution. . . ." *United States v. Wade*, 388 U.S. 218, 236, 237 (1967). See also *United States v. Bennett*, 409 F.2d 888, 899, 900 (2nd Cir. 1969).

having the pictures in court would allow the fact finders themselves to determine whether any of the pictures were of a suggestive nature. In such a manner, they contend, the events surrounding the photographic display could be accurately reconstructed.

Another argument advanced for the rejection of the *Zeiler* extension is that modern law enforcement agencies would be unable to function in an efficient manner if they were required to have counsel represent an accused every time a picture is used for identification purposes.<sup>11</sup> This argument appears to reject any distinction between the mere investigative stage of a case and the actual preparation of the prosecution's case against a particular individual whose identity has been ascertained.

Recent cases which fail to make the above distinction, or feel it is not appropriate, rely on the tests established in *Simmons v. United States*<sup>12</sup> to determine when an individual's "due process" has been violated by the exhibition of his photograph. *Simmons* was a post-*Wade* case wherein the defendant was convicted of bank robbery. A photographic identification of the defendant had occurred during the investigative stage of the case; that is before any arrest had been made. Although the issue of right to counsel at photographic identifications was not raised, Mr. Justice Harlan while speaking for the majority stated:

. . . convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.<sup>13</sup>

This has become the standard test for all the courts which have failed to adopt the *Zeiler* extension.<sup>14</sup>

The case of *United States v. Bennett*<sup>15</sup> illustrates the application of this test and offers an additional reason to reject the *Zeiler* doctrine. *Bennett* was a prosecution for conspiring to import and distribute narcotics.<sup>16</sup> A pretrial identification of the defendant had been made with the use of photographs. The witness identified a "mug

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11. *United States v. Bennett*, 409 F.2d 888, 899-900 (2nd Cir. 1969). It should also be noted that jurisdictions which adopt *Zeiler* might be required to change their criminal investigation techniques by removing "mug shots" from all "mug books" while an accused is in custody. If this was not done and a prospective witness viewed the photograph, the prosecution might be required to sustain the burden of demonstrating that any in-court identification by that witness was not the product of a prior improper identification proceeding.

12. *Simmons v. United States*, 390 U.S. 377 (1968).

13. *Id.* at 384; see also *United States v. Ballard*, 423 F.2d 127, 131 (5th Cir. 1970).

14. *United States v. Zeller*, 427 F.2d 1305 (3rd Cir. 1970).

15. *United States v. Bennett*, 409 F.2d 888 (2nd Cir. 1969).

16. The prosecution was under 21 U.S.C.A. §§ 173, 174 (1961).

shot" of the accused from a group of six photographs. As to the other aspects of the pretrial identification proceedings, the record was silent. Writing for the majority, Mr. Justice Friendly stated that this record was inadequate to make any finding that the *Simmons* due process standard had been violated.<sup>17</sup> It was also pointed out that an analysis of the role of counsel and the assistance to be given by counsel reveals that it is limited to situations where the accused himself would be vulnerable to "traps" devised by the prosecution.<sup>18</sup> This is not the case during photographic identification proceedings since the accused is not present. Mr. Justice Friendly's argument continues by noting that the same opportunities for undue suggestion that are afforded in the display of photographs are also afforded in other aspects of the prosecution's case. For example, a witness to a crime who is interviewed concerning the events that transpired, could be influenced in making an inaccurate statement of those events by the improper suggestion of police officials.<sup>19</sup> However, even in such instances, the presence of accused's counsel is not required by law<sup>20</sup> since these are not deemed to be "critical stages" of the prosecution.

The *Zeiler* court rebuts this reasoning by attempting to demonstrate that inherent in the nature of photographic showings is a particular and exceptional susceptibility to prejudicial suggestion.<sup>21</sup> For example, the photographic showing in *Zeiler* pictured only the accused wearing eyeglasses as did the actual perpetrator of the robbery.<sup>22</sup> While this type of suggestiveness could be exposed by introduction of the pictures into evidence, such a course would not expose the suggestiveness of the actual procedures of the individuals conducting the interview. Thus, where an accused's photograph is exhibited many times to a witness along with photographs of others, a substantial opportunity for misidentification results due to a subconscious emphasis.<sup>23</sup> *Zeiler* would argue that cross-examination is an inadequate tool to expose this type of taint. Although the *Wade* case did not deal with pictorial lineups, it too recognized the inadequacies of cross-examination, in the identification context:

And even though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability. Thus in the present context, where so many variables and pitfalls exist, the first

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17. *United States v. Bennett*, 409 F.2d 888, 898 (2nd Cir. 1969).

18. *Id.* at 899, 900.

19. *Id.* at 900.

20. *Id.*; *United States v. Ballard*, 423 F.2d 127, 131 (5th Cir. 1970).

21. The danger that an accused could not affectively reconstruct any unfairness at trial would appear to be compounded in the case of a photographic lineup where the accused is not present. See *United States v. Zeiler*, 427 F.2d 1305, 1307 (3rd Cir. 1970).

22. *Id.* at 1308.

23. *Simmons v. United States*, 390 U.S. 377, 388-384 (1968).

line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself.<sup>24</sup>

Cross-examination may prove especially inadequate if a witness has memory problems to compound any perception inaccuracies which resulted from the identification proceedings. Such could easily be the case when the courts' dockets are crowded and trial is many months in the future. When trial is held, it is possible that there would be no way to elicit accurate testimony from the witnesses as to whether an in-court identification was the product of a picture that subconsciously stood out, or the result of independent memory of the incident in question.<sup>25</sup>

The *Zeiler* case appears to be a much needed extension to the *Wade* doctrine. Without such an extension, it is foreseeable that the consequences could include a "watering down" or nullification of the *Wade* decision. The acceptance of *Zeiler* does not allow law enforcement officials to circumvent the *Wade* requirement by merely substituting a pictorial lineup in place of a corporeal lineup.

With the great possibility of prejudicial suggestion, inherent in photographic confrontations, it does not appear to place more than a justifiable burden on law enforcement agencies to require that counsel for an accused, who is in custody, be notified and allowed to attend any photographic confrontations. As both a corporeal lineup and a pictorial lineup, conducted while the accused is in custody, appear to be "critical stages" in the prosecution, the accused should be allowed aid of counsel.

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24. *United States v. Wade*, 388 U.S. 218, 235 (1967).

25. *Wade* points out that improper suggestion to identifying witnesses probably accounts for more miscarriages of justice than any other single factor. The decision also mentions that after standard pretrial identification procedures, the identification issue is for all practical purposes determined prior to trial. See *United States v. Wade*, 388 U.S. 218 (1967).

