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Constitutional Law - Criminal Law - Right of an Accused to the Presence of Counsel at Post-Indictment Line-Up - United States v. Wade, 87 S. Ct. 1926 (1967)

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Furthermore, as pointed out by the Federal Court of Appeals in the instant case, the Supreme Court of the United States has declared that while a federal District Court may accept the state court's findings of fact in a habeas corpus proceeding, federal law must be applied when the petition is heard in the federal court.[16]

The decision in *Fields v. Peyton* would therefore require that the federal District Court hereafter apply the Fourth Circuit rule (shifting the burden of proof to the prosecution) in hearings on habeas corpus petitions directed to the federal courts after dismissal in the Virginia courts. Since the federal courts have demonstrated an increasing readiness to review habeas corpus petitions by state prisoners,[17] the *Fields* decision has placed the Virginia courts in the position of having either to alter their current rule as to burden of proof, or face frequent reversal.

If the Virginia Supreme Court of Appeals maintains its present position without modification, and no clarification or reconciliation of the apparent conflict is forthcoming from the federal courts, repetitions of the result in *Fields* may be expected.

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Constitutional Law-Criminal Law—RIGHT OF AN ACCUSED TO THE PRESENCE OF COUNSEL AT A POST-INDICTMENT LINE-UP. In *United States v. Wade*,[1] defendant was indicted for the robbery of a federally insured bank in Eustace, Texas. After indictment, and without notice to Wade's court appointed attorney, defendant was exhibited in a police line-up before two bank employees who had witnessed the holdup. The line-up took place six months after the robbery, and defendant was placed in a position whereby he could be seen alone by the witnesses before the line-up began. In *Gilbert v. California*,[2] a companion case,

previous decisions. See, however, Mosley v. Dutton, 367 F.2d 913 (5th Cir. 1966), wherein it was said that, upon showing that the petitioner was jailed without preliminary hearing, held incommunicado for four months, appointed counsel three days before trial, and convicted of murder and sentenced to life imprisonment without a single witness being offered in his defense, and later requested appeal but no appeal was prosecuted, the burden of proof was shifted to the prosecution to show that his cause was not thereby prejudiced.

16. Townsend v. Sain, 372 U.S. 293 (1963), *cited in* Fields v. Peyton, 375 F.2d 624, 626 (4th Cir. 1967).

17. For a discussion of this trend, see Note, *Judicial Intervention in Prison Administration*, 9 WM. & MARY L. REV. 178 (1967).

1. 87 S.Ct. 1926 (1967).

2. 87 S.Ct. 1951 (1967).

petitioner was indicted for the armed robbery of an Alhambra savings and loan institution and for the murder of a police officer who intervened. Gilbert was also placed in a post-indictment line-up without notice to his attorney, and was exhibited before some one hundred persons, each an eyewitness to one of several robberies charged to Gilbert. In both cases, defendants were identified at trial by witnesses who had been present at the line-ups, and both were convicted on the basis of these identifications. On appeal, Wade's conviction was reversed by a U.S. Court of Appeals,[3] while Gilbert's conviction was affirmed by the California Supreme Court.[4]

The U. S. Supreme Court held, *inter alia*, that the post-indictment line-ups were a "critical stage of the prosecution" and that the right to counsel guarantees of the Sixth Amendment to the Constitution[5] had been violated when defendants were compelled, absent an "intelligent waiver" of such right,[6] to participate in the line-ups without notice to and presence of their attorneys.[7] The Court also ruled that, since the absence

3. 358 F.2d 557 (5th Cir. 1966).

4. 63 Cal. 2d 690, 408 P.2d 365, 47 Cal. Rptr. 909 (1966).

5. The Sixth Amendment to the United States Constitution provides, in part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. Amend. VI.

6. *See* Carnley v. Cochran, 369 U.S. 506 (1961). Therein petitioner, an illiterate and an indigent, was convicted of incest. The trial court's record was silent as to whether the assistance of counsel had been offered to petitioner and waived by him, but did show affirmatively that he was incapable of conducting his own defense. The Supreme Court held that this case was one in which the right to counsel was guaranteed by the Fourteenth Amendment to the Constitution, unless such right had been "intelligently and understandingly waived" by petitioner. Since the record was silent as to petitioner's representation by counsel, and since no other evidence was produced at trial to prove that the offer of counsel had been made and declined, petitioner's conviction was reversed.

7. United States v. Wade, 87 S.Ct. at 1936-38. In Stovall v. Denno, 87 S.Ct. 1967 (1967), a habeas corpus proceeding decided the same day, the Court expressly declined to make the ruling retroactive because of the particular function it was designed to serve, the reliance placed upon existing precedent before the new rule was enunciated, and the feared chaotic impact which retroactive application might have upon the administration of justice. In *Stovall*, petitioner was arrested for the knife murder of a New York man, and for the severe wounding of his wife. Since the woman was hospitalized for major surgery due to her wounds, petitioner was taken to the hospital alone by police to be viewed by the victim, who identified him as her husband's murderer. The Court stated that due to "the totality of circumstances involved," the police followed "the only feasible procedure" in taking petitioner to the hospital for identification, and that he was not thereby deprived of due process of law, nor was he entitled to be viewed by the victim only as part of a group at a line-up.

of counsel at the line-ups prevented defendants from effectively making use of their right to cross-examine trial witnesses who had been present at the line-ups, all identifications made at trial by such witnesses were inadmissible into evidence unless a determination could first be made, by clear and convincing evidence, that these identifications rested upon observations independent of the line-up.[8] Both cases were then remanded and the convictions vacated, to allow the prosecution an opportunity to present evidence relative to this determination, and to allow the appellate courts to determine if the in-court identifications constituted harmless error.[9]

These decisions mark the first examination by the Court of an accused's right to the assistance of counsel at a line-up,[10] but their content is clearly rooted in the rationale first enunciated in *Powell v. Alabama*[11] that the interval from arraignment to trial is "perhaps the most critical period of the proceedings," during which the accused "requires the guiding hand of counsel." [12] This rationale, applied in *Powell* to require appointment by the court of effective counsel in state court capital cases where the accused is indigent, has permeated a series of subsequent decisions designed to insure that

> the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate the accused's right to a fair trial.[13]

8. In *Gilbert*, it was also held that direct evidence of the witnesses' identification of petitioner at the line-up was *per se* inadmissible at his trial, and that the state was not entitled to an opportunity to prove that such testimony had any independent source, such evidence being the result of an illegal line-up "come at by exploitation of (the primary) illegality." Gilbert v. California, 87 S.Ct. at 1957. *See also* Wong Sun v. United States, 371 U.S. 471, 488 (1962).

9. United States v. Wade, 87 S.Ct. at 1940.

10. A similar case was presented to the court earlier in Williams v. United States, 345 F.2d. 733 (D.C. Cir. 1965), *cert. den.* 382 U.S. 962 (1965). Therein the Court refused to examine petitioner's claim that his Sixth Amendment rights had been denied when he was not furnished the assistance of counsel at a police line-up. This allegation had been unanimously dismissed by the appellate court as a "Disneyland contention." The only significant factual difference between *Williams* on one hand, and *Wade* and *Gilbert* on the other, is that in the former petitioner was placed in a police line-up before indictment while both Wade and Gilbert were placed therein after indictment. However, the Court did not recognize this distinction in *Wade* and *Gilbert*, which both fail to mention *Williams*.

11. 287 U.S. 45 (1932).

12. *Id.* at 60-65.

13. U.S. v. Wade, 87 S.Ct. at 1932.

In *Johnson v. Zerbst*,[14] the first decision involving the right to appointed counsel in the federal courts, the Court held that an indigent was entitled to court appointed counsel in a felony prosecution and that a felony conviction in federal courts without benefit of counsel is subject to collateral attack by habeas corpus proceedings. This decision has subsequently been incorporated in Rule 44 of the Federal Rules of Criminal Procedure,[15] wherein the accused's right to the presence of counsel in a felony prosecution attaches at arraignment.

Having applied to a limited extent the right-to-counsel provisions of the Sixth Amendment to the operation of state courts through the Fourteenth Amendment in *Powell*, the Court began to widen its interpretation in a series of cases dealing with the right-to-counsel in capital cases at all critical moments from pleading through trial. In *Avery v. Alabama*,[16] it was held, *inter alia*, that the right-to-counsel in state court cases is not satisfied by mere appointment of an attorney to act on defendant's behalf, but must include the opportunity for consultation and sufficient time to prepare a defense. In *Chandler v. Fretag*, the court held that even where the assistance of counsel is waived before trial in a non-capital case, the accused must be furnished counsel at his request if an additional charge or penalty would attach to his conviction.[17]

In *Hamilton v. Alabama*,[18] the presence of counsel for defendants at arraignment was made mandatory, while in *White v. Maryland*,[19] it was ruled that where an accused is required to plead at a preliminary

14. 304 U.S. 458, 462 (1938).

15. In addition, the Criminal Justice Act of 1964, 18 U.S.C. § 3006A, provides for the representation of counsel for defendants in all cases in the federal courts other than petty offenses, where the defendant is financially unable to retain an attorney, to be appointed at his first appearance before a United States Commissioner or court, and to serve at every stage of the proceedings from initial appearance through appeal. *See generally* Comment, *The Criminal Justice Act of 1964: A Critique*, 7 WM. & MARY L. REV. 331 (1966).

16. 308 U.S. 444 (1940). In Hawk v. Olson, 326 U.S. 271 (1945), it was further held that denial of the opportunity to consult with counsel "on any material step" after indictment and arraignment is a violation of a criminal defendant's Fourteenth Amendment rights of due process and right to counsel.

17. 348 U.S. 3 (1954). Petitioner was charged with the felony of housebreaking and waived his right to counsel. At trial he learned for the first time that, since this would be his third felony conviction if found guilty, he would be sentenced to life imprisonment upon conviction as an habitual criminal. Denial of petitioner's request for the appointment of counsel at this point was held to be violative of his constitutional rights.

18. 368 U.S. 52 (1961).

19. 373 U.S. 59 (1963).

hearing before arraignment without counsel, the plea is thereby rendered inadmissible at trial. Finally, in *Gideon v. Wainwright*,[20] the court overruled its earlier decision in *Betts v. Brady*[21] and declared that an indigent defendant may demand that counsel be appointed in any state court felony case. Criteria for requiring presence of counsel at judicial proceedings, at least in all felony cases in state courts and all cases involving more than petty misdemeanors in federal courts, thus center around the question whether the proceedings are a critical stage of the prosecution, in which the accused must exercise certain rights or lose them, and in which the prosecution takes further steps in proving the guilt of the accused.

Application of the right-to-counsel doctrine was first extended to cover extra-judicial police procedures in *Massiah v. United States*,[22] and was further extended in *Escobedo v. Illinois*[23] to require that an accused be permitted counsel at a police interrogation when the interrogation ceases to be part of a general investigation of crime and begins to focus upon the accused. The rule was further broadened in *Miranda v. Arizona*,[24] where it was established, *inter alia*, that a suspect must be informed of his right to counsel prior to the start of an interrogation by police and that, if he requests the assistance of an attorney either before or during the interrogation, the questioning must be delayed or terminated until the attorney is present.

In the context of the foregoing decisions, the Court's pronouncements in *Wade* and *Gilbert* represent both an enlargement of a criminal accused's right to counsel and a further extension of judicial purview over the power of law enforcement officials to apply traditionally standard

20. 372 U.S. 335 (1963).

21. 316 U.S. 455 (1942). Therein petitioner, an indigent, was denied appointed counsel at trial and was convicted of robbery. On dismissing petitioner's appeal from an earlier state court's refusal to grant release via habeas corpus proceedings, the Supreme Court held that the failure of state courts to appoint counsel in non-capital cases did not deny petitioner of due process of law as guaranteed under the Fourteenth Amendment to the U.S. Constitution. The Court held that the question was one of legislative policy to be left up to the individual states and that the appointment of counsel was not a fundamental right, essential to a fair trial therein.

22. 377 U.S. 201 (1964). In *Massiah*, the installation of a radio transmitter in petitioner's automobile after his indictment for violation of narcotics laws, done at government instigation by a former confederate, resulted in the subsequent recording by federal agents of incriminating statements made by petitioner in the absence of counsel. This procedure was held to be in violation of petitioner's constitutional guarantees of freedom from self-incrimination and right to counsel.

23. 378 U.S. 478 (1964).

24. 384 U.S. 436 (1966).

procedures to the investigation of crime. The concept of the police line-up seems destined to change somewhat from a heretofore informal, evidence-gathering stage of the prosecution into one of a more adversary nature, wherein the opportunity of witnesses to the criminal act to identify the criminal is balanced against the accused's right to the presence of counsel to prevent, or at least to note, irregularities during the conduct of the line-up.[25] The accused is to be aided in this regard by the presumption that, in the absence of his attorney, any line-up in which he takes part is suspect of illegality and, therefore, unconstitutional as a basis for supplying prosecution evidence of a participating witness' identification of the accused.

If the court's decision in *Wade* and *Gilbert* seems tenuously grounded in logic to some,[26] the extension of the right-to-counsel doctrine mandated therein may not be without its practical and legal limitations. *Wade* and *Gilbert* are based only on post-indictment situations, and the failure of the court to include pre-indictment line-ups within its scope seems to mark one limit of the extension of the rule, especially when considered in light of the earlier case of *Williams v. United States*.[27] The question of the accessability of substitute counsel at a post-indictment line-up when regular counsel is unable to attend is left unanswered, but presumably the rule would be satisfied as long as an accused's rights are adequately protected. It would seem that, if the underlying criterion for adoption of the rule is the desire to insure that the accused's basic right to a fair trial is protected, there should be no constitutional objection to a failure to notify counsel of a line-up and provide for his presence if accused's rights can be protected in another manner, as by the filming or the taking of written minutes of the entire proceedings.[28] Therefore, the rule enunciated in the *Wade* and *Gilbert* decisions may prove to be not only replete with legal loopholes, but too inflexible to withstand deviations necessary in police administration where unusual exigencies require wide and often spontaneous police discretion.[29]

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25. A fear that secret and unrecorded line-up confrontations between accused and victim may be frought with "innumerable dangers and variable factors which might seriously . . . derogate from a fair trial," supported by documentation of such irregularities in a handful of previous cases, was a prime consideration in the court's holding. United States v. Wade, 87 S.Ct. at 1933-36.

26. *See* dissent of White, J., Harlan, J., and Stewart, J., *id.*, at 1946.

27. 345 F.2d 733 (D.C. Cir. 1965), *cert. den.*, 382 U.S. 962 (1965). See note 10 *supra*.

28. *See* dissent of White, J., Harlan, J., and Stewart, J., *supra* note 26.

29. *See, e.g.*, Stovall v. Denno, 87 S.Ct. 1967 (1967); See note 7 *supra*.