Right to Counsel at Postindictment Corporeal Viewing Does Not Extend to Subsequent Interview of Witness Held Outside Defendant's Presence (United States v. Tolliver)

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CRIMINAL LAW

RIGHT TO COUNSEL AT POSTINDICTMENT CORPOREAL VIEWING DOES NOT EXTEND TO SUBSEQUENT INTERVIEW OF WITNESS HELD OUTSIDE DEFENDANT’S PRESENCE

United States v. Tolliver

The sixth amendment guarantees the right to counsel\(^1\) at all “critical stages” following the commencement of a criminal proceeding.\(^2\) One such “critical stage” is the postindictment, pretrial lineup, in which a suspect is displayed before an eyewitness for purposes of identification.\(^3\) Although the Supreme Court has held

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\(^1\) U.S. CONST. AMEND. VI provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have Assistance of Counsel for his defense.” Initially, the right to counsel was held applicable only in felony cases. See Powell v. Alabama, 287 U.S. 45, 60-65 (1932). The right was later extended to all prosecutions which could result in imprisonment for any term. See Argersinger v. Hamlin, 407 U.S. 25, 37 (1972). For an overview of the right to counsel, see Note, Right to Counsel at Lineups—A Pro Forma Right?, 7 SUFFOLK L. REV. 587 (1973); Comment, Right to Counsel at Police Identification Proceedings: A Problem in Effective Implementation of an Expanding Constitution, 29 U. PRRT. L. REV. 65 (1967) [hereinafter cited as Police Proceedings].

\(^2\) In Powell v. Alabama, 287 U.S. 45, 57 (1932), the Supreme Court stated that the right to counsel extends to “perhaps the most critical period of the proceedings . . . , the time of [the] arraignment until the beginning of [the] trial, when consultation, thorough going investigation and preparation [are] vitally important.” Since Powell, the Supreme Court expressly has held certain specific stages to be critical. See, e.g., Moore v. Illinois, 434 U.S. 220 (1977) (show-up at preliminary hearing); Coleman v. Alabama, 399 U.S. 1 (1970) (preliminary hearing to determine if evidence sufficient to present case to grand jury); Mempa v. Rhay, 389 U.S. 128 (1967) (sentencing hearing); White v. Maryland, 373 U.S. 59 (1963) (per curiam) (preliminary hearing); Hamilton v. Alabama, 368 U.S. 52 (1961) (arraignment). In addition, the Court has noted that changes in “law enforcement machinery” may require an expansion of the “critical stage.” United States v. Wade, 388 U.S. 218, 224 (1967).

The sixth amendment right to counsel is waivable under certain circumstances. In Johnson v. Zerbst, 304 U.S. 458 (1938), the Supreme Court ruled that to establish that a defendant had waived his right to counsel, the prosecution must bear the burden of showing “an intentional relinquishment . . . of a known right or privilege.” Id. at 464. The Court has continued to impose this standard in assessing the effectiveness of a waiver. See, e.g., Brewer v. Williams, 430 U.S. 387, 402-04 (1977); Schneckloth v. Bustamonte, 412 U.S. 293, 302 (1973). See generally Quinn, In Wake of Wade: The Dimensions of The Eyewitness Identification Cases, 42 U. Colo. L. Rev. 135 (1971); Read, Lawyers at Lineups: Constitutional Necessity or Avoidable Extravagance, 17 U.C.L.A. L. REV. 339 (1969); Sobel, Assailing The Impermissible Suggestion: Evolving Limitations on the Abuse of Pre-trial Criminal Identification Methods, 39 BROOKLYN L. REV. 301 (1971); Note, Pretrial Identi-
that an attorney is necessary to protect the accused from prejudice resulting from suggestive identification procedures,\(^4\) it has never defined clearly the scope of a suspect's right to counsel during a lineup. Recently, in *United States v. Tolliver*,\(^5\) the Second Circuit held that the right to counsel at a postindictment corporeal viewing does not extend to a subsequent interview held outside of the suspect's presence at which the witness communicates the identification to the prosecutor.\(^6\)

Using information supplied by an eyewitness, police apprehended Philip Tolliver in connection with a bank robbery perpetrated some 15 minutes earlier.\(^7\) At the suggestion of the trial judge, a pretrial lineup was conducted in which Tolliver and five other men were displayed to the eyewitness, James Zima.\(^8\) Tolliver's counsel

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1. United States v. Wade, 388 U.S. 218, 228 (1967). The *Wade* Court noted that reports of police practices reveal numerous instances of suggestive procedures, for example, that all in the lineup but the suspect were known to the identifying witness, that the other participants . . . were grossly dissimilar in appearance to the suspect, that only the suspect was required to wear distinctive clothing . . . , that the suspect [was] pointed out before or during a lineup, and that the participants . . . [were] asked to try on an article of clothing which fit only the suspect.

2. *Id.* at 232-33 (footnote omitted); see Eisenberg & Feustal, Pretrial Identification: An Attempt To Articulate Constitutional Criteria, 58 Marq. L. Rev. 659, 669 (1975); Comment, Pretrial Identification Confrontations, 45 Miss. L.J. 489, 497-508 (1974); Police Proceedings, supra note 1, at 79-81. The danger of misidentification resulting from such suggestive police tactics may be compounded by the witness' reluctance to inform authorities of his mistakes once an initial identification has been made. The result is a "freezing effect," whereby "the issue of identity [is] determined there and then, before trial." WILLIAMS & HAMMELMANN, IDENTIFICATION PARADES pt. I, at 479, 482 (1963). This "freezing effect" was recognized by the Supreme Court in *Wade*. 388 U.S. at 229. For compilations of case histories illustrating the dangers inherent in eyewitness identification, see E. BOCCH, CONVICTING THE INNOCENT (1932); F. FRANKFURTER, THE CASE OF SACCO AND VANZETTI (1927); O'Connor, "That's The Man": A Sobering Study of Eyewitness Identification and the Polygraph, 49 St. John's L. Rev. 1 (1974). See also Note, Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification, 29 Stan. L. Rev. 969 (1977).

3. 569 F.2d 724 (2d Cir. 1978).

4. *Id.* at 728.

5. *Id.* at 725-26. The eyewitness' curiosity was aroused when his car was "overtaken by a speeding green Pontiac." *Id.* at 725. He watched as the Pontiac came to a sudden halt and its occupants ran out and entered a white Cadillac parked nearby. After following the Cadillac for a few blocks and noting its license plate number, the eyewitness contacted police officers who relayed the information to field units in the vicinity. *Id.*

6. *Id.* at 726.
was present at the lineup and made no objection to the manner in which it was conducted. Zima, whose name was withheld from Tolliver's attorney, was instructed by the prosecution not to utter any identifying statements during the lineup. Over an objection from Tolliver's counsel, Zima was escorted from the lineup room and questioned in private concerning the identity of the driver of the getaway car. Tolliver's attorney subsequently moved to suppress the identification on the ground that he had been excluded from the interview. The motion was denied after the trial court conducted a suppression hearing. Tolliver was thereafter convicted of bank robbery and conspiracy.

Affirming Tolliver's conviction, the Second Circuit ruled that,

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9 Id.
10 Id.
11 Id. Testimony at a subsequent hearing revealed that Zima initially identified a lineup participant who was not Tolliver as the one who looked most like the individual he had seen driving the getaway car. It was only after a second viewing, during which each person in the lineup alternately donned a pair of sunglasses, that Zima was able to identify Tolliver beyond "a benefit of a doubt." Id. The second identification also was made outside the presence of Tolliver's counsel.

12 Id.
13 Id. Although the trial judge did not find the attorney's exclusion from the post viewing interview unlawful, he did express reservations concerning the use of the procedure. Id.
14 Id.
15 Id. Hearings to suppress eyewitness identifications were instituted after the Supreme Court's decision in United States v. Wade, 388 U.S. 218 (1967). The Wade Court recognized that a significant element of the right to counsel would be ignored if a tainted pretrial lineup identification were suppressed while the witness remained free to make an in-court identification of the defendant based solely on his observations during the lineup. Id. at 241. Accordingly, the Wade Court concluded that a witness who was exposed to a tainted pretrial identification procedure may not make an in-court identification unless his testimony is based upon independent information. Id. Factors to be considered in determining whether an independent basis for the in-court identification exists include the prior opportunity of the witness to observe the criminal act, any difference between a pretrial description of the suspect and his actual appearance, the time lapse between the crime and the pretrial identification procedure, any identification of another person prior to the lineup, failure to identify the defendant on prior occasions, and the conduct of the lineup itself. Id.
16 569 F.2d at 725. Tolliver was convicted of bank robbery by force and intimidation, see 18 U.S.C. § 2113(a) (1976), and conspiracy to rob a bank, see 18 U.S.C. § 371 (1976).
17 In addition to upholding the trial court's determination at the suppression hearing, the Second Circuit affirmed the denial of Tolliver's motion to set aside the conviction on the ground that he was denied the effective assistance of counsel. 569 F.2d at 731. The motion was based on his attorney's failure to move for a mistrial when his codefendant pleaded guilty, her failure to call the codefendant as a witness and her failure to cross-examine Zima. Id. at 730. The Second Circuit, however, found that the attorney's conduct did not constitute a deprivation of Tolliver's right to effective legal assistance, even under the "liberal standard that 'a defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate."' Id., at 731 (quoting United States v. DeCoster, 487 F.2d 1197, 1202 (D.C. Cir. 1973)).

The Supreme Court has long recognized that the right to counsel includes effective and competent legal assistance. See Tollett v. Henderson, 411 U.S. 258 (1973); McMann v. Richardson, 397 U.S. 759, 771 (1970); Reece v. Georgia, 350 U.S. 85, 90 (1955); Glasser v. United
in the context of postindictment lineups, the “actual confrontation is the only ‘critical stage’ requiring the presence of counsel.” Judge Gurfein, who authored the unanimous opinion, stressed that the primary purpose of requiring an attorney’s presence during a lineup is to minimize prejudice and preserve evidence of any improper suggestiveness “inherent in the actual confrontation.” Noting that the Second Circuit previously had held that photographic identification procedures may be conducted without the presence of an attorney, Judge Gurfein reasoned that the postviewing identification interview in Tolliver need not have been conducted in the presence of defendant’s counsel. The court, however, went on to observe that devices for making a verbatim recording of such an interview are readily available. The court reasoned that, although the confrontation ceases when the defendant no longer faces the wit-

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Footnotes:

11 569 F.2d 728 (citing United States v. Bennett, 409 F.2d 888, 900 (2d Cir.), cert. denied, 396 U.S. 852 (1969)); see notes 37-39 and accompanying text infra. The court observed that although the Supreme Court has recognized a right to counsel at a post indictment lineup, it has never determined when the “critical” aspect of the lineup actually ends. 569 F.2d at 727.

12 The Second Circuit panel consisted of Judges Gurfein, Feinberg and Oakes.

13 569 F.2d at 727 (quoting United States v. Cunningham, 423 F.2d 1269, 1274 (4th Cir. 1970)).


15 569 F.2d at 728.

16 Id.
ness, a recording of the subsequent interview "should be considered as an extension of the line-up." Accordingly, the court ruled that in future cases a videotape or taperecording of the postlineup interview must be made available to a defendant prior to a pretrial suppression hearing.

Turning to the issue of the concealment of the eyewitness' identity from defense counsel, the Second Circuit drew an analogy to the accepted practice of withholding the identity of a government informant. Noting that discovery of evidence is inherently limited

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21 Id.

22 The American Law Institute has advocated the use of videotape in pretrial identification proceedings. ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURES § 160.4 (1975), provides in pertinent part:

(2) A visual and sound record shall be made of any identification procedure involving hearing the voice of, or viewing a person in custody . . . .

(3) A [written or sound] record shall be made of any statement made by or to the witness in the course of the procedure . . . .

(5) The written or sound records . . . . shall include any objections, suggestions or observations of the person to be identified or his counsel as well as any action taken in response to such objection or suggestion.

Accord, ABA STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL § 2.1 (Approved Draft 1970). Although it is relatively new to the courts, videotaping has been suggested as a viable alternative to existing recording methods. See Murray, The Use of Videotape In the Preparation and Trial of Lawsuits, 11 FORUM 1152 (1976); Comment, Videotape In The Courts: Its Use and Potential, 3 RUTGERS J. COMPUTERS & L. 279 (1973). It has been noted that the use of advances in recordation could produce substantial savings in both cost and time by eliminating costly stenographic services and bulky transcripts, and minimizing the need for extensive cross-examination before and during trial. See Comment, Videotape: Recorded Trials- A Procedure for Judicial Expediency, 3 OHIO N.L. REV. 849, 890-96 (1976); Note, The Role of Videotape in The Criminal Court, 10 SUFFOLK L. REV. 1107, 1123-26 (1976). One commentator has argued that strict compliance with the principles articulated in United States v. Wade, 388 U.S. 218 (1967), "require[s] extraordinary devices such as . . . implementation of electronic procedures like audio and visual monitoring." Decker, The Demise of Procedural Protections in Laywitness Identifications in Federal Court: Who is the Culprit?, 9 LOYOLA L.J. 335, 351 (1978).

23 569 F.2d at 728.

24 Id. at 729. The Tolliver court recognized that its analogy between a "secret informer" and an ordinary citizen who witnesses a crime was incomplete since an informant's identity is protected, at least in part, in order to ensure his continuing usefulness as a source of information. Id.

Under the "informers privilege" doctrine, the government has the authority to withhold the identity of those who supply it with information concerning criminal activities. Scher v. United States, 305 U.S. 251 (1938); In re Quarles & Butler, 158 U.S. 532 (1895); Vogel v. Gruas, 110 U.S. 311 (1884). Discussing the scope of the privilege, in Roviaro v. United States, 353 U.S. 53 (1957), the Supreme Court stated that an approach balancing "the public interest in protecting the flow of information against the individual's right to prepare his defense" should be followed. Id. at 62. Although a proper balance depends on the facts of each case, the Court indicated that certain factors such as "the crime charged, the possible defenses, [and] the possible significance of the informer's testimony" should be considered. Id. The Second Circuit utilized this approach in United States v. Hyatt, 565 F.2d 229 (2d Cir. 1977). It should be noted that once the identity of the witness is disclosed, the "informers privilege"
in criminal prosecutions, Judge Gurfein concluded that the need to protect a witness' safety "outweighs total discovery as a preliminary requirement of fair trial." While he recognized the recurring danger of misidentification, Judge Gurfein stated that "there must be some ultimate reliance on the ethics of the prosecutor." The court acknowledged that "there is some danger that misplaced zeal can, consciously or unconsciously, steer a witness to a desired identification." Nevertheless, the court reasoned, the recording requirement established in Tolliver, coupled with a requirement that the prosecution obtain an ex parte direction from the trial judge permitting the witness' identity to be withheld, would provide adequate safeguards and minimize the possibility of prejudice. Although such procedures were not followed in Tolliver, the court found the error harmless under the facts in the case.

The principles underlying the judicially created right to counsel at pretrial lineups were first enunciated in United States v. Wade. Concerned with the possibility of erroneous identifications, the Wade Court concluded that an attorney's presence at lineup would insure that the lineup is conducted in an unprejudicial manner and guarantee the preservation of information necessary to conduct a meaningful cross-examination of the identifying witness at trial.

ceases to exist and the prosecution no longer has the right to prevent the defense from having access to the trial witness. See id. at 232. See generally IBM v. Edelstein, 526 F.2d 37, 41-44 (2d Cir. 1975). For a discussion of the "informer's privilege," see Comment, The Constitutional Rights of Criminal Defendants: The Identity of Informers, 8 J. MARSHALL L. J. 401 (1975).

The references in Tolliver to "harmless error" are somewhat confusing. Compare id. at 728 with id. at 730. Initially, the court indicated that the failure to record the interview was merely "harmless error" without indicating whether the error was of constitutional magnitude. Id. at 728. Later in the opinion, however, the Second Circuit applied the test for harmless constitutional error articulated in Chapman v. California, 386 U.S. 18 (1967). Under the Chapman test, a trial error which violates the defendant's rights need not result in the reversal of a conviction if it is shown "beyond a reasonable doubt that the error...did not contribute to the verdict obtained." Id. at 24. Unfortunately, the Tolliver opinion leaves unclear whether it was the failure to disclose the identifying witness' name or the failure to record the post lineup interview, or both, that had triggered the application of the Chapman analysis. See generally Mause, Harmless Constitutional Error: The Implications of Chapman v. California, 53 MINN. L. REV. 519 (1969); Note, Harmless Constitutional Error, 20 STAN. L. REV. 83 (1967).

The Wade Court's primary concern was that a suspect compelled to participate in a lineup without the presence of his attorney may lose his "most basic right as a criminal defendant—his right to a fair trial at which the witnesses against him might be
Although this reasoning could have served as the basis for applying 
Wade whenever an identification procedure gave rise to the possibil-
ity of prejudice, such an expansive view was dramatically cur-
tailed when the Supreme Court refused to extend the right to 
counsel to photograph identification procedures in United States v. 
Ash. The Ash Court concluded that a “critical stage” requiring the 
presence of counsel exists only when the defendant is actually con-
fronted with the government’s law enforcement machinery and the 
absence of an attorney would prejudice his ability to defend himself 
at trial. Once an analogy between a photographic identification
meaningfully cross-examined.” Id. at 224. Noting that it would be difficult for the defendant 
or the witness to detect prejudicial conditions and reconstruct at trial what transpired at the 
lineup, the Wade Court concluded that an attorney’s presence is necessary to insure that the 
defendant is not placed at an unfair disadvantage in the preparation of his defense. Id. at 
236-37 (citing Powell v. Alabama, 287 U.S. 45, 57 (1932)).

Some courts concluded that the Wade right to counsel was applicable to identifications 
made from photographic displays. E.g. United States v. Ash, 461 F.2d 92 (D.C. Cir. 1972), 
ve’d, 413 U.S. 300 (1973); accord, Cox v. State, 219 So. 2d 762 (Fla. App. 1969); People v. 
(1970). See also Note, Pretrial Photographic Identifications — A “Critical Stage” of Criminal 
Proceedings?, 21 SYRACUSE L. REV. 1235 (1970); Comment, Photo-Identifications: A Right To 

The scope of the Wade holding was first curtailed in Kirby v. Illinois, 406 U.S. 682 
(1972), wherein the Court held that the right to counsel attaches only at lineups conducted 
after the commencement of formal adversary proceedings. The Kirby decision was viewed by 
many as a severe constriction of the Wade holding, since in practice most lineups are con-
ducted prior to indictment. See, e.g., N. SOBEL, EYEWITNESS IDENTIFICATION: LEGAL AND PRACTI-
CAL PROBLEMS 30 (1972); The Supreme Court, 1971 Term, 86 HARV. L. REV. 1, 163 n.56 (1972). 
One commentator, however, argued that the Kirby decision would have the positive effect of 
encouraging early release of innocent persons by providing an incentive to law enforcement 
personnel to conduct lineups immediately after arrest. See Decker, supra note 24, at 342. 
Moreover, expeditious procedures would result in fewer misidentifications since the witness 
could utilize his “fresh recollection.” Id. See generally Grano, Kirby Biggers and Ash: Do Any 
Constitutional Safeguards Remain Against The Danger of Convicting The Innocent?, 72 
660 (1973).

Significantly, the procedures which have been recognized as “critical stages” all involve 
the physical presence of the accused. See, e.g., Moore v. Illinois, 444 U.S. 220 (1971) 
(show-up); Coleman v. Alabama, 399 U.S. 1 (1970) (preliminary hearing); Memza v. Rhay, 
385 U.S. 128 (1967) (sentencing); United States v. Wade, 388 U.S. 218 (1967) (lineups); In re 
Gault, 387 U.S. 1 (1967) (juvenile hearing); Pointer v. Texas, 380 U.S. 400 (1956) (preliminary 
hearing); White v. Maryland, 373 U.S. 59 (1963) (per curiam) (arraignment); Gideon v. 
Wainwright, 372 U.S. 335 (1963) (trial); Hamilton v. Alabama, 368 U.S. 52 (1961) (arraign-
ment). One commentator has noted that “the defendant’s presence is a sine qua non of 
confrontations; the sixth amendment right to counsel does not extend to procedures that do 
not personally involve the defendant.” See Grano, supra note 36, at 761 n.276.

413 U.S. at 315-17. The Ash Court reasoned that a photographic display was not a 
“trial-like adversary confrontation” between the witness and agents of the government where 
the accused could be “misled by his lack of familiarity with the law or overpowered by his
and a postviewing interview is drawn, it seems clear that the Ash reasoning would apply to the issue in Tolliver, precluding any absolute right to the presence of defense counsel at an identification interview conducted after a lineup.40

It is submitted, however, that the postviewing interview is distinguishable from other situations in which witnesses are examined outside the defendant's presence. In the case of a photographic iden-

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40 Even prior to the Supreme Court's decision in United States v. Ash, 413 U.S. 300 (1973), several courts determined that the right to counsel does not extend to a post lineup interview conducted outside the defendant's presence. In United States v. Cunningham, 423 F.2d 1269 (4th Cir. 1970), the Fourth Circuit found no infringement of a sixth amendment right although the defendant's attorney was ejected from the post viewing interview following an argument with the prosecutor. The Cunningham court reasoned that the defendant had no right to have his attorney present, since the potential for prejudice in a postviewing interview is no greater than it is in any other pretrial interview with a witness. Id. at 1274; see United States v. Wilcox, 507 F.2d 364 (4th Cir. 1974), cert. denied, 420 U.S. 979 (1975). Similarly, in United States v. Banks, 485 F.2d 545 (5th Cir. 1973), cert. denied, 416 U.S. 987 (1974), the Fifth Circuit held that the defendant's right to counsel was not abridged where the defense attorney observed the lineup preparation and execution and was able to interview the witnesses after the prosecution questioned them in a separate room. 485 F.2d at 548. Significantly, the Banks court declined to establish a per se rule, opting instead for an analysis of the issue on a case-by-case basis. The Fifth Circuit stated:

We emphasize that similar procedures might require a different result if counsel is denied the opportunity to reconstruct all elements of the lineup and related agent-witness interviews, or if any witness indicates suggestive statements or actions by prosecution agents while counsel for the accused is excluded. Id. at 548-49. Faced with a similar situation, the Ninth Circuit, in Doss v. United States, 431 F.2d 601 (9th Cir. 1970), held that the sixth amendment only required that defense counsel observe his client and the lineup proceedings, not that he be present at lineup or post lineup interviews. Id. at 604. See also United States v. Parker, 549 F.2d 1217 (9th Cir.), cert. denied, 430 U.S. 971 (1977); see United States v. Gholston, 437 F.2d 260, 263 (6th Cir. 1971). It should be noted that the Second Circuit's decision in Tolliver seems to represent an extension of the reasoning in these cases, since in Tolliver defense counsel was not permitted access to the identifying witness immediately after the postlineup interview. See 569 F.2d at 728.
ification, as in the case of a witness providing other types of information, the entire procedure may be conducted in the absence of the suspect. A postlineup interview, in contrast, is completely dependent upon the initial corporeal viewing and may be regarded as the third phase of a continuous process consisting of suspect presentation, recognition by the witness and verbalization of the identification. Such a wholistic view of corporeal viewing procedures was at least implicitly recognized by the Tolliver court when it characterized the postviewing interview as an "extension of the lineup." In holding that the right to counsel does not extend to postviewing interviews, while requiring such interviews to be preserved on tape, the Second Circuit appears to have been seeking a middle ground, balancing the criminal defendant's right to a fair trial against the government's interest in protecting witnesses and maintaining an efficient law enforcement system. The constitutional basis for such an approach, however, is difficult to discern. By requiring a recording and mandating that it be made available to defense counsel prior to the suppression hearing in most cases, the court would seem to be applying the broader Wade theory of constitutional protection to postlineup interviews. Yet, if the Wade rationale is applicable, there would appear to be no principled basis for excluding counsel from the interview. On the other hand, if the Tolliver holding is not based on constitutional mandate, its requirement that the defense attorney be afforded pretrial access to tapes of witness interviews seems questionable in light of the provisions of the Jencks Act, which precludes discovery of witnesses' statements until after they have testified at trial.

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1 The notion that a lineup is not complete until a verbal identification is made was advanced in United States v. Daniels, 506 F.2d 791, 795 (3d Cir.) (Adams, J., concurring), aff'd, 506 F.2d 1053 (1974), cert. denied, 421 U.S. 967 (1975). See also United States ex rel. Burton v. Cuyler, 439 F. Supp. 1173, 1179 (E.D. Pa. 1977). The Daniels majority, however, did not conclusively decide the issue, since it found that the lineup witness' in-court identification had a basis independent of the lineup. 506 F.2d at 793. The California Supreme Court's ruling in People v. Williams, 3 Cal. 3d 853, 478 P.2d 942, 92 Cal. Rptr. 6 (1971), see note 45 infra, also suggests that the "critical stage" does not necessarily end with the termination of the viewing phase of the lineup.

2 569 F.2d at 728.

3 See notes 33-34 and accompanying text supra.

4 18 U.S.C. § 3500 (1976); see also FED. R. CRIM. PROC. 16 (a)(2) (1976). The Jencks Act, which outlines discovery procedures, provides in pertinent part:

   In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of [subpoena], discovery, or inspection until said witness has testified on direct examination in the trial of the case.

18 U.S.C. § 3500 (a) (1976) (emphasis added). The term "statement" is defined to include verbatim recordings of oral statements made by witnesses to the prosecution. Id. § 3500(e)(2).
Despite its ambiguity, *Tolliver* may be viewed as both a refinement and a revitalization of the liberal *Wade* approach to the sixth amendment right to counsel. The decision also exemplifies the logical difficulties that courts encounter in attempting to apply the sixth amendment guarantees in the context of modern suspect identification techniques. It is hoped that the Supreme Court will direct its attention to this issue in the near future and provide clear guidelines for the courts to use in analyzing right to counsel questions in cases involving identification procedures.

*John E. Ryan*

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4 Recently, in a case decided after *Tolliver*, the Eighth Circuit held that there is no right to counsel at post viewing interviews. United States v. Bierey, 588 F.2d 620 (8th Cir. 1978). The *Bierey* court reasoned that the identification was already made at the lineup and the subsequent interview was necessary only to confirm this fact. Id. at 625. Although the result was the same, the route followed in *Bierey* differs significantly from that taken by the *Tolliver* court, see notes 19-25 and accompanying text supra, and the other circuits which have considered the issue. See note 40 supra. It should be noted that the courts are not unanimous in concluding that the right to counsel does not extend to postviewing interviews. The Third Circuit has not addressed the question directly but has hinted that it might find that the right to counsel attaches to a postlineup interview. See United States v. Daniels, 506 F.2d 791, 793, aff'd, 506 F.2d 1053 (3d Cir. 1974), cert. denied, 421 U.S. 967 (1975); United States v. Lewis, 456 F.2d 404, 407 (3d Cir. 1972). Moreover, in a decision discussed in the *Daniels* opinion, 506 F.2d at 795, the California Supreme Court stressed the inherent danger of suggestion by law enforcement officials and concluded that counsel should be able to reconstruct not only “the moment of viewing alone, but rather the whole procedure by which [a suspect] is identified.” People v. Williams, 3 Cal. 3d 853, 856, 478 P.2d 942, 944, 92 Cal. Rptr. 6, 8 (1971) (4-3 decision). But see *Bellew v. Gunn*, 424 F. Supp. 31 (N.D. Cal. 1976). (*Williams* analysis rejected). Two other state courts have addressed the issue of right to counsel at a postlineup interview and reached opposite results. Compare People v. McDonald, 23 Ill. App. 3d 86, 318 N.E.2d 489 (1974), aff'd, 62 Ill. 2d 445, 343 N.E.2d 459 (1976) with State v. *Favro*, 5 Wash. App. 311, 487 P.2d 261 (1971). In *McDonald*, the court concluded that *Wade* mandated not only counsel’s presence at the lineup itself but at the actual identification as well. 23 Ill. App. 3d at 90, 318 N.E.2d at 489. In *Favro*, the court found no right to counsel at the postlineup interview since the defendant was not physically present at that proceeding. 5 Wash App. at 312, 487 P.2d at 263.