St. John's Law Review

Volume 47, December 1972, Number 2 Article 14

Right to Counsel--Kirby Distinguished (Saltys v. Adams)

St. John's Law Review

> of discretion. It is capable of abuse. It is in the stream of inculpation. Cross-examination can play only a limited role in offsetting false inference or misleading coincidence from a 'stacked' handwriting exemplar.[262]

Moreover, the Seventh Circuit has indicated that it is "an abuse of the grand jury process for the Government to impose on that body to perform investigative work that can be, and heretofore has been, successfully accomplished by the regular investigation agencies of Government."[263]

In short, the Second Circuit has provided law enforcement agencies with a new evidence-gathering tool. Perhaps, as the Ninth Circuit has held,[264] the more fundamental question that should be answered is whether the witness (potential defendant) is being afforded due process of law. The degree of unreliability of handwriting samples and the potential abuse that this may engender present serious constitutional doubts. Our system of justice should not tolerate any procedure which may so readily undermine basic constitutional protections.

RIGHT TO COUNSEL — *Kirby* DISTINGUISHED

Saltys v. Adams

The Second Circuit recently demonstrated its reluctance to follow the spirit of the Supreme Court's latest ruling on the sixth amendment right to assistance of counsel. Earlier this year, a plurality of the Supreme Court, in *Kirby v. Illinois*,[265] held that "a person's sixth and fourteenth amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against

---

262 *Id.* at 292 (Fortas, J., dissenting).

263 *In re* Mara, 454 F.2d 580, 585 (7th Cir. 1971).

264 In United States v. Dinsio, No. 72-2413 (9th Cir., Sept. 15, 1972); the court opined:

> [M]odest breaches of grand jury secrecy may well be required when nondisclosure would defeat fundamental constitutional rights, including the right to due process of law.

Slip opinion at 3. The Seventh Circuit has also decided that fifth amendment due process considerations are "needed to protect citizens from infringement of their Fourth Amendment rights through abuse of the grand jury process." 454 F.2d at 584.

265 406 U.S. 682 (1972). Kirby was stopped and asked to produce identification by police who thought he was a suspect wanted for an unrelated offense. Kirby was carrying travelers' checks and a social security card bearing the name Shard. He was arrested when he could not satisfactorily explain his possession of these items. Upon arrival at the station house, the police learned that one Shard had been robbed the day before. At the police station and again at trial, Kirby was identified by Shard as one of the robbers. At the time of the station house identification, no formal proceedings had been initiated, no attorney was present and Kirby had not been advised of any right to counsel. Kirby was convicted and appealed on the grounds that the identification confrontation violated his sixth amendment right to assistance of counsel.

him."[266] In *Saltys v. Adams*,[267] the court of appeals directed the issuance of a writ of habeas corpus on the grounds of "woefully inadequate" representation by counsel[268] but, more significantly, for the purpose of granting habeas corpus relief, it resuscitated the "critical stage" test[269] of *United States v. Wade*,[270] *Gilbert v. California*,[271] and *Stovall v.*

266 *Id.* at 688.

267 465 F.2d 1023 (2d Cir. 1972). Petitioner Saltys, while awaiting arraignment on an unrelated charge, was identified as a participant in a West Hartford, Connecticut, drug store robbery by the clerk present at the time of the holdup. Immediately after identifying Saltys as "resembling" the robber on the basis of mugshots, the clerk and a friend present at the robbery were "walked through" the "bullpen" where Saltys was awaiting arraignment. They immediately identified the petitioner as a perpetrator of the holdup and later that day reaffirmed their identification at "viewings" of the petitioner in the "bullpen" and also in a glass-enclosed detention area in the Hartford Circuit Court. At no time was the petitioner or his attorney (retained to defend the unrelated charge) notified of the identification sessions. Saltys was convicted of robbery in state court and instituted federal habeas corpus proceedings after a state writ was denied. The District Court for the District of Connecticut denied the application.

268 By virtue of what we consider "woefully inadequate" . . . representation, key objectionable evidence, without which Saltys in all probability could not have been convicted, was admitted without objection. It was then strengthened, or at least expanded on, by an ill-advised cross-examination. With resultant prejudice, counsel's omissions here justify reversal.

465 F.2d at 1029 (citations omitted). *See* note 29 *infra*.

269 The Supreme Court has never been overly concerned with setting an exact point in time at which the right to counsel attaches. For example, the Court has said that the accused "requires the guiding hand of counsel at every step in the proceedings against him." Coleman v. Alabama, 399 U.S. 1, 7 (1970). *See also* Johnson v. Zerbst, 304 U.S. 458, 463 (1938); Powell v. Alabama, 287 U.S. 45, 87 (1932).

The Court has used phrases such as "critical period" or "critical stage" to describe the time at which the right to assistance of counsel attaches. *See* Coleman v. Alabama, *supra* at 9; Stovall v. Denno, 388 U.S. 293, 298 (1967); Gilbert v. California, 388 U.S. 263, 272 (1967); United States v. Wade, 388 U.S. 218, 224, 227 (1967); White v. Maryland, 373 U.S. 59, 60 (1963) (per curiam); Hamilton v. Alabama, 368 U.S. 52, 53 (1961); Powell v. Alabama, *supra* at 57. In United States v. Wade, *supra*, the Court declined to fix a "critical stage" at any one point in time but declared that the accused "need not stand alone at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." 388 U.S. at 226. The Court emphasized its willingness to "scrutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial . . . ." *Id.* at 227 (emphasis in original).

A year later, in Simmons v. United States, 390 U.S. 377, 382-83 (1968), the Court explained that the rationale of *Wade-Gilbert* "was that an accused is entitled to counsel at *any* 'critical stage of the prosecution' and that a post-indictment line-up is such *a* 'critical stage'" (emphasis added).

Even prior to *Wade-Gilbert-Stovall*, the Court, in Escobedo v. Illinois, 378 U.S. 478 (1964), and Miranda v. Arizona, 384 U.S. 436 (1966), did in fact extend to the accused the right to assistance of counsel prior to the initiation of adversary judicial proceedings. The *Escobedo* Court indicated that it would not fix a "critical stage" at any particular point in time: "It would exalt form over substance to make the right to counsel . . . depend on whether at the time of the interrogation the authorities had secured a formal indictment." 378 U.S. at 486. The *Kirby* plurality characterized these cases as "deviations" and declared that they were directed toward the fifth amendment right to counsel. 406 U.S. at 689. *But see* note 276 *infra*.

270 388 U.S. 218 (1967).

271 388 U.S. 263 (1967).

Denno[272] as to the time of accrual of the sixth amendment right to assistance of counsel.

An individual's right to the assistance of counsel springs from two separate and distinct constitutional sources — the self-incrimination clause of the fifth amendment[273] and the assistance of counsel clause of the sixth amendment,[274] both of which are applicable to the states through the fourteenth amendment.[275] The rights to counsel acknowledged by the two amendments have, to a large degree, evolved independently.[276] However, intensive case law development over the last decade has clouded the extent to which the rights granted by the amendments overlap with respect to the time at which they accrue. In *Miranda v. Arizona*,[277] the Court held that the fifth amendment right attaches when the police attempt to investigate a suspect "after . . . [he] has been taken into custody or otherwise deprived of his freedom of action in any significant way."[278] The Court characterized this confrontation between police and accused as the "point that our adversary system of *criminal* proceedings commences. . . ."[279]

In *United States v. Wade*,[280] on the other hand, the Court construed the sixth amendment right to assistance of counsel to apply to "critical stages of the proceedings,"[281] which the Court defined as "any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial."[282] While the event under consideration in *Wade* took place after the indictment had been returned, the Court indicated a willingness to scrutinize "any pretrial confrontation of the accused to determine

---

272 388 U.S. 293 (1967).

273 U.S. CONST. amend. V: ". . . nor shall be compelled in any criminal case to be a witness against himself. . . ." In Miranda v. Arizona, 384 U.S. 436, 469 (1966), the Court stated: "[T]he right to have counsel present at the interogation is indispensable to the protection of the fifth amendment privilege under the system we delineate today."

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

275 Griffin v. California, 380 U.S. 609 (1965) (self-incrimination clause); Gideon v. Wainwright, 372 U.S. 335 (1963) (assistance of counsel clause).

276 In the course of deciding "fifth amendment" cases, the Court has used sixth amendment language. *See* Miranda v. Arizona, 384 U.S. 436, 442 (1966); Escobedo v. Illinois, 378 U.S. 478, 491 (1964). In United States v. Wade, 388 U.S. 218, 226 (1967), the Court stated: "[N]othing decided or said in the opinions in the cited cases [*Miranda* and *Escobedo*] links the right to counsel only to protection of Fifth Amendment rights."

277 384 U.S. 436 (1966).

278 *Id.* at 444.

279 *Id.* at 477 (emphasis added).

280 388 U.S. 218 (1967).

281 *Id.* at 224. *See* note 269 *supra*.

282 *Id.* at 226. *See* note 269 *supra*.

whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial. . . ."[283]

In *Kirby v. Illinois*,[284] however, a plurality of the Court[285] severely limited the *Wade* "critical stage" test by holding that a person's sixth amendment right to assistance of counsel attaches "only at or after the time that adversary *judicial* proceedings have been initiated against him."[286] The Court offered "formal charge, preliminary hearing, indictment, information, or arraignment" as examples.[287]

The event common to *Wade-Gilbert-Stovall, Kirby* and *Saltys* was an in-person identification of a suspect by a victim or witness, generally referred to as a "lineup" or "showup."[288] Despite the fact that the Court has characterized this identification procedure as a critical stage "peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial,"[289] if the identification takes place *before* the initiation of adversary judicial proceedings, under the *Kirby* rule the accused is not entitled to assistance of counsel under the sixth amendment.

While in custody pending arraignment on an unrelated charge, petitioner Saltys was, without notice to his attorney, personally identi-

---

283 *Id.* at 227 (emphasis in original).

284 406 U.S. 682 (1972).

285 The plurality opinion was written by Justice Stewart, who was joined by the Chief Justice and Justices Blackmun and Rehnquist. Justice Powell concurred only in the result. *Id.* at 682.

286 *Id.* at 688 (emphasis added).

287 *Id.* at 689. Under federal rules, a complaint institutes a criminal proceeding in the federal courts. *See generally* FED. R. CRIM. P. 3-9; 8 J. MOORE, FEDERAL PRACTICE ¶ 3.02 (2d ed. 1972); 8A *id.* at ¶ 44.02.

In the states comprising the Second Circuit, the statutory provisions are essentially similar. In New York, "[a] criminal action . . . commences with the filing of an accusatory instrument against a defendant in a criminal court. . . ." N.Y. CRIM. PRO. LAW § 1.20(15) (McKinney 1971). The statute defines "accusatory instrument" as an indictment, information or complaint. *See id.* at § 1.20(1).

The Connecticut statutes offer no exact point of commencement of criminal proceedings but commentary indicates that the filing of an information or complaint initiates criminal proceedings. *See* CONN. GEN. STAT. ANN. § 54-42, commentary (1958).

In Vermont, no official commencement point is set down but, interestingly, the law provides for assistance of counsel whenever an individual has been detained. Detention is defined as to "have in custody or otherwise deprive of freedom of action." VT. STAT. ANN. tit. 13, §§ 5201, 5231 (Supp. 1972).

Of course, state rules of procedure cannot authoritatively determine constitutional principles.

288 The term "lineup" implies a formal identification session at which a witness attempts to identify a suspect from a group, whereas a "showup" can be an informal confrontation between witness and suspect alone. *See generally* United States v. Roth, 430 F.2d 1137 (2d Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971) (*Wade* applies to informal, as well as formal, confrontations).

289 United States v. Wade, 388 U.S. 218, 228 (1967).

fied by two witnesses as a participant in a West Hartford, Connecticut, drug store robbery. It would seem clear that since the identifications occurred prior to the initiation of adversary judicial proceedings,[290] Saltys was not entitled to assistance of counsel. The Second Circuit stated, however, that

> it is arguable that *Wade* and *Gilbert* still would require counsel at the viewings here, even within the limitations of *Kirby*. . . .[291]

The court did not indicate how it would distinguish *Kirby* but proceeded to restate the *Wade-Gilbert-Stovall* "critical stage" test and apply it to the case at bar. Since the witnesses testified at the trial that they had previously identified the petitioner, the Second Circuit declared that their testimony should have been automatically excluded.[292] Considering the fact that the identification testimony was the only evidence against the petitioner connecting him with the crime, the court held that the failure of Saltys' counsel to object to the admission of the testimony or, at the very least, to request a *Wade* hearing constituted "woefully inadequate" representation.[293]

Chief Judge Friendly, in a strong dissent severely criticized the

---

290 Whether the arrest and detention of Saltys had advanced past the threshold at which adversary judicial proceedings commence is not clear from the record. *See* 465 F.2d at 1030 (Friendly, C.J., dissenting). It is certain that Saltys had not yet been arraigned on the unrelated charge, but it is unclear whether his arrest was preceded by the filing of an information. By comparison of the date of arrest (late February) and the date of the viewing (March 13), it is not unreasonable to conclude that formal charges had been instituted in the unrelated robbery.

291 465 F.2d at 1026. The court cited United States v. Roth, 430 F.2d 1137 (2d Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971), in support of this proposition. However, *Roth* was concerned only with post-indictment confrontations. *See id.* at 1140.

292 465 F.2d at 1028. *See* Gilbert v. California, 388 U.S. 263, 272-73 (1967), for a statement of the exclusionary rule.

293 At the state trial, which took place after the Supreme Court's decision in *Wade* and *Gilbert*, but before *Kirby*, petitioner's attorney failed to object to the in-court identification as arising from illegally conducted viewings. In light of the objection and arguments which his attorney could have made on *Wade* and *Gilbert* grounds, the Second Circuit held that the failure to do so constituted inadequate representation of counsel. 465 F.2d at 1028-29. *See* United States v. Currier, 405 F.2d 1039 (2d Cir.), *cert. denied*, 395 U.S. 914 (1969):

> Where inadequacy of counsel is alleged, the courts have established stringent requirements. Relief may only be obtained when representation has been so woefully inadequate "as to shock the conscience of the Court and make the proceedings a farce and mockery of justice."

405 F.2d at 1043, *quoting* United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 388 U.S. 950 (1950). The *Currier* court explained that

> Errorless counsel is not required, and before we may vacate a conviction there must be a "total failure to present the cause of the accused in any fundamental respect."

405 F.2d at 1043, *quoting* United States v. Garguilo, 324 F.2d 795, 796 (2d Cir. 1963). Apparently the majority in *Saltys* felt that the *Currier* test of "woeful inadequacy" was satisfied.

majority for their alleged failure to follow the *Kirby* precedent.[294] While conceding that the result might have been correct had this *appeal* been decided pre-*Kirby*, the Chief Judge argued that since such was not the case, the petitioner had no right to habeas corpus under the Habeas Corpus Act.[295] The Act, he noted, requires that, in order to secure review, the petitioner must present a bona fide claim that he is being held "in custody in violation of the Constitution or laws or treaties of the United States."[296] In the Chief Judge's opinion, the petitioner's counsel cannot now be faulted for failing to object to testimony elicited before the commencement of an adversary judicial proceeding "on the basis of what was then thought to be the law . . . although, as we *now* know [in light of *Kirby*], wrongly so."[297] The petition should, therefore, be denied, the Chief Judge declared, as Saltys is not, under the Supreme Court's most recent pronouncement, "in custody in violation of the Constitution."[298]

In Judge Friendly's view, the issue squarely presented in *Saltys* is whether *Kirby* is to apply retroactively to bar assertion of grounds for habeas corpus relief based on the law as it existed under *Wade-Gilbert-Stovall*.[299] Any attempt to apply *Kirby* retroactively flies directly in the face of *Stovall v. Denno*[300] which specifically denied re-

---

294 465 F.2d at 1031.

295 28 U.S.C. § 2254(a) (1971).

296 *Id.*

297 465 F.2d at 1031 (dissenting opinion).

298 *Id.*

299 Prior to *Kirby*, five states refused to apply *Wade-Gilbert-Stovall* to pre-indictment confrontations. *See* State v. Walters, 457 S.W.2d 817 (Mo. 1971); Buchanan v. Commonwealth, 210 Va. 664, 173 S.E.2d 792 (1970); State v. Fields, 104 Ariz. 486, 455 P.2d 964 (1969); Perkins v. State, 228 So. 2d 382 (Fla. 1969); People v. Palmer, 41 Ill. 2d 571, 244 N.E.2d 173 (1969).

However, 13 states and every federal court of appeals which considered the matter found that *Wade-Gilbert-Stovall* did apply to pre-indictment confrontations. *See* Wilson v. Gaffney, 454 F.2d 142 (10th Cir. 1972); Virgin Islands v. Collwood, 440 F.2d 1206 (3d Cir. 1971) (dictum); United States v. Greene, 429 F.2d 193. (D.C. Cir. 1970); Cooper v. Picard, 428 F.2d 1351 (1st Cir. 1970); United States v. Phillips, 427 F.2d 1035 (9th Cir. 1971) (dictum); United States v. Ayers, 426 F.2d 524 (2d Cir. 1970) (dictum); Long v. United States, 424 F.2d 799 (D.C. Cir. 1969); United States v. Broadhead, 413 F.2d 1351 (7th Cir. 1969); Rivers v. United States, 400 F.2d 935 (5th Cir. 1968); Commonwealth v. Guillory, 356 Mass. 591, 254 N.E.2d 427 (1970); Commonwealth v. Whiting, 439 Pa. 205, 266 A.2d 738 (1970); *In re* Holley, 268 A.2d 723 (R.I. 1970); Hayes v. State, 46 Wis. 2d 93, 175 N.W.2d — (1970); People v. Fowler, 1 Cal. 3d 335, 461 P.2d 643, 82 Cal. Rptr. 363 (1969); Thompson v. State, 85 Nev. 134, 451 P.2d 704 (1969); Martinez v. State, 437 S.W.2d 842 (Tex. Crim. App. 1969); State v. Hicks, 76 Wash. 2d 80, 455 P.2d 943 (1969); State v. Singleton, 253 La. 18, 215 So. 2d 838 (1968); State v. Wright, 274 N.C. 84, 161 S.E.2d 581 (1968); People v. Hutton, 21 Mich. App. 312, 175 N.W.2d 860 (1970); State v. Isaacs, 24 Ohio App. 2d 115, 265 N.E.2d 327 (1970); Palmer v. State, 5 Md. App. 691, 249 A.2d 482 (1969).

300 388 U.S. 293 (1967). In *Stovall* the Court gave three criteria to guide resolution of the question of retroactvity:

(a) the purpose to be served by the new standards,

troactive application of *Wade-Gilbert* on virtually the same critical facts as found in *Kirby*.[301] If, then, *Kirby* is not to be applied retroactively, Saltys' detention was clearly in violation of the Constitution and the law as it existed at the time of his trial.

The Second Circuit's displeasure with *Kirby* is manifestly evident in the majority's frequent approving citations to *Wade-Gilbert* and its repeated references to Justice Brennan's vigorous *Kirby* dissent.[302] While the court of appeals cannot directly refuse to follow the Supreme Court's ruling, it may have set a precedent for distinguishing *Kirby* in personal identification cases. Given the critical nature of personal identification confrontations, especially, as often is the case, when the identification is the sole evidence connecting the accused with the commission of a crime,[303] the reluctance of the Second Circuit to enthusiastically embrace *Kirby* is clearly understandable.

PERJURY — LIE BY NEGATIVE IMPLICATION

United States v. Bronston

Perjury, under federal law, is defined as the knowing and wilful giving of a materially false statement in a judicial proceeding under oath.[304] The elements of the crime are: a lawfully administered oath, a

(b) the extent of the reliance by law enforcement authorities on the old standards, and
(c) the effect on the administration of justice of a retroactive application of the new standards.

Id. at 297. However, the Court was concerned with the retroactive application of a *liberalizing* decision; retroactive application of a *narrowing* criminal law decision is usually rendered unnecessary by double jeopardy considerations. *See generally* pp. 237-40 & n.13 *supra*.

301 In both cases, the confrontation occurred before the commencement of adversary criminal proceedings. *See* Kirby v. Illinois, 406 U.S. 682, 684 (1972); Stovall v. Denno, 388 U.S. 293, 295 (1967).

302 465 F.2d at 1027-28.

303 *See, e.g.*, N.Y. Times, Nov. 11, 1972, at 1, col. 3. Lawrence Berson was arrested on charges of rape and was released on bail. Several days later, he was picked up for the rape of a fourth woman and was sent to Rikers Island House of Detention. Eyewitness testimony of the victims was the sole evidence against Berson. After 11 days in the house of detention, he was released when the police arrested one Richard Carbone who confessed to the crimes that Berson allegedly committed. Upon comparison, the two looked startlingly alike.

Oklahoma has recognized the critical nature of identification confrontations conducted prior to the initiation of adversary judicial proceedings by providing attorneys at all such instances. *See* Chandler v. State, 501 P.2d 512 (Okla. Ct. Crim. App. 1972).

304 Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly . . . wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury. . . .

18 U.S.C. § 1621 (1970). This section replaced § 5392 Revised Statutes which, in turn, had replaced various perjury statutes adopted from the common law. *See, e.g.*, BLACKSTONE'S COMMENTARIES 808 (B. Gavit ed. 1941).