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NOTES

THE STATE RESPONSES TO KIRBY v. UNITED STATES

I. INTRODUCTION

The enlargement of the sixth amendment right to counsel\(^1\) played an important role in the expansion of the due process rights of accused persons during the 1960's.\(^2\) The Supreme Court has found that the right to counsel is a fundamental right, applicable to the states through the fourteenth amendment,\(^3\) in all criminal cases in which the accused faces possible incarceration.\(^4\) The sixth amendment right to counsel need not be requested,\(^5\) and can only be waived knowingly and intelligently.\(^6\) In 1967, the Supreme Court made the right to counsel applicable to federal and state pretrial corporeal identification procedures,\(^7\) but in 1972, the

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1. U.S. Const. amend. VI provides in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence."


4. In Argersinger v. Hamlin, 407 U.S. 25 (1972), Justice Douglas rejected the argument that the right to counsel is inapplicable to crimes punishable by less than six months imprisonment.


expansion of the right to counsel in the identification context ceased, when in *Kirby v. Illinois* the Court restricted the right to counsel to identification procedures occurring after the initiation of formal judicial proceedings against the accused.

The purpose of this Note is to determine the current status of the right to counsel at state identification procedures, and to evaluate the treatment given *Kirby* by the state courts. This Note will also examine the general basis of the right to counsel, the development of the right to counsel in the context of corporeal identification procedures, and alternatives to *Kirby* which the states might adopt.

II. THE THEORETICAL BASIS OF THE RIGHT TO COUNSEL

A. The Special Circumstances Analysis

The Supreme Court first applied the right to counsel to state cases under a general due process analysis, rather than by formulating and applying a precise sixth amendment test. In 1932, in *Powell v. Alabama*, the Court held that "ignorant and illiterate" defendants had a


9. The due process clause that was applied to the states in *Powell v. Alabama*, 287 U.S. 45 (1932), see notes 11-15 infra and accompanying text, was, of course, that found in the fourteenth amendment.


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

12. Id. at 52. The defendants in *Powell* were seven black youths. They were
“fundamental right” to counsel.\textsuperscript{13} Since the accused “required the guiding hand of counsel at every step in the proceedings,”\textsuperscript{14} due process mandated the extension of the right to counsel to the period between the time of arraignment and the time of trial.\textsuperscript{15}

In Betts v. Brady,\textsuperscript{16} however, the Court held that the Powell precedent applied only to special circumstances in which the accused was intellectually incapable of defending himself.\textsuperscript{17} Betts refused to incorporate the sixth amendment into the fourteenth amendment due process clause, reasoning that the representation of counsel was not essential to a fair trial.\textsuperscript{18}

strangers to the Alabama community in which they were charged with raping two white girls. \textit{Id.} 50-51.

13. \textit{Id.} at 68.
14. \textit{Id.} at 69.
15. \textit{Id.} at 57. The Court explained that:

\textit{[D]}uring perhaps the most critical period of the proceedings . . . from the time of their arraignment until the beginning of their trial, when consultation, thorough going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.

\textit{Id.} at 57, \textit{citing} People ex rel. Burgess v. Risley, 66 How. Pr. 67 (N.Y. Sup. Ct. 1883) and Batchelor v. State, 189 Ind. 69, 76, 125 N.E. 773, 776 (1920).

However, the Court in Powell deemed it unnecessary to fashion a broad holding, stating:

All that is necessary now to decide . . . is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law . . . .

287 U.S. at 71.

16. 316 U.S. 455 (1942). The Supreme Court granted certiorari to review the state court’s denial of Betts’ writ of habeas corpus, 315 U.S. 791 (1942). Justice Roberts, writing for the majority, characterized the case:

\textit{[P]}etitioner was indicted for robbery. . . . Due to lack of funds, he was unable to employ counsel, and so informed the judge at his arraignment. He requested that counsel be appointed for him. The judge [refused], as it was not the practice . . . to appoint counsel for the indigent defendants, save in prosecutions for murder and rape.

316 U.S. at 456-57.

17. Betts conducted his own defense, a simple alibi. He elected to have a bench trial, cross-examined adverse witnesses, and called favorable witnesses. He was found guilty and sentenced to eight years. \textit{Id.} at 457. Justice Roberts concluded that:

\textit{T}he accused was not helpless, but was a man forty-three years old, of ordinary intelligence, and ability [sic] to take care of his own interests on the trial of that narrow issue.

\textit{Id.} at 472.

18. \textit{Id.} at 471, 473. Justice Roberts listed the state constitutional and statutory provisions regarding the right to counsel, in addition to state case law. \textit{Id.} at 467-71 & nn.20-30. It is interesting to note that Justice Roberts interpreted the Federal Constitu-
B. The Critical Stage Test

In 1961, in Hamilton v. Alabama,10 the Supreme Court rejected the Betts approach sub silentio,20 and held that the right to counsel attached at any "critical stage" in a criminal proceeding.21 Gideon v. Wainwright22 expressly overruled Betts23 and established the right to counsel in all serious state criminal proceedings. The Court has since used the critical stage test to extend Gideon to all state criminal proceedings, whether serious or petty.24

Having determined that the right to counsel turns upon whether a particular procedural stage is "critical," the Court established that sentencing,25 and the first appeal granted as a matter of right26 are critical

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10. See supra note 19.
26. Douglas v. California, 372 U.S. 353 (1963). Douglas relied upon the equal protection reasoning of an earlier decision, Griffin v. Illinois, 351 U.S. 12 (1956). In Griffin, the Court held that if state law conditions appeal upon the availability of a stenographic trial transcript, the equal protection clause demands that the state make transcripts available to indigent defendants. The plurality opinion asserted: "There can be no equal justice where the kind of trial a man gets depends on the amount of money
post-trial stages requiring appointment of counsel. Similarly, the Court has held arraignments,27 preliminary hearings,28 and in-custody interrogations29 to be critical pretrial stages.

In Escobedo v. Illinois,30 the Court applied the “critical stage” test to interrogation at a police station,31 and held that the right to counsel attached upon request when an “investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect.”32 Although the right to counsel now attaches at in-custody interrogations as a matter of right,33 the Escobedo accusatory-focus analysis is still significant in the application of the critical-stage test to pretrial procedures.34

he has.” Id. at 19, Douglas applied the “equal justice” analysis of Griffin to invalidate the California procedure of refusing to appoint an appellate attorney for an indigent if the appellate court reviewed the record and determined that “no good whatever could be served” by the appointment. 372 U.S. at 354-55.
27. Hamilton v. Alabama, 368 U.S. 52 (1961); see notes 19-21 supra.
29. Miranda v. Arizona, 384 U.S. 436 (1966). In Massiah v. United States, 377 U.S. 201 (1964), the Supreme Court held that the sixth amendment prohibits extraction of incriminating statements, in the absence of counsel, from an indicted person who is not in custody. A law enforcement agent had wired for sound the automobile of Massiah’s codefendant, who then engaged in an incriminating conversation with Massiah. The post-indictment Massiah rule has been made applicable to the states. McLeod v. Ohio, 381 U.S. 356 (1965) (per curiam). But see Hoffa v. United States, 385 U.S. 293 (1966); notes 65-66 infra.
31. Id. at 479.
32. Id. at 490-91.

The use of the critical-stage test as the theoretical basis for determining the right to counsel was firmly established by 1963. The Court had applied the critical-stage test in White v. Maryland, 373 U.S. 59 (1963), Gideon v. Wainwright, 372 U.S. 335 (1963), and Hamilton v. Alabama, 368 U.S. 52 (1961). By 1965, the majority of state courts recognized that the critical-stage test was the most important factor in applying the right to counsel. Tucker v. State, 42 Ala. App. 174, 157 So. 2d 229 (1963); State v. Alford, 98 Ariz. 124, 402 P.2d 551 (1965); People v. White, 233 Cal. App. 2d 765, 43 Cal. Rptr. 905 (Dist. Ct. App. 1965); State v. Morrocco, 2 Conn. Cir. 568, 203 A.2d 161 (App. Div. 1964); Harris v. State, 162 So. 2d 262 (Fla. 1964); Freeman v. State, 87 Idaho 170, 392 P.2d 542 (1964); People v. Morris, 30 Ill. 2d 406, 197 N.E.2d 433 (1964); State v.
III. THE RIGHT TO COUNSEL AT CORPOREAL IDENTIFICATION PROCEEDINGS

A. The Federal Standards

In 1967, United States v. Wade\(^8\) extended the right to counsel to include pretrial identification procedures in federal cases.\(^9\) Justice Bren-   


36. In Wade, the police put the defendant in a lineup with five or six other prisoners in a local county courtroom. Each participant in the lineup was required to wear strips of tape similar to those allegedly worn by the robber during the crime. In addition, each participant, upon direction, stated "put the money in the bag," words allegedly spoken by the robber. Two bank employees identified Wade. 388 U.S. at 220. The Court held that compelling Wade to appear in the lineup, speak, and wear the tape did not violate his fifth amendment privilege against self-incrimination.

The Court relied upon Schmerber v. California, 384 U.S. 757 (1966) to find that Wade's participation in the lineup did not produce testimonial evidence, and therefore was not within the fifth amendment proscription. 388 U.S. at 221. Schmerber established that nontestimonial evidence (blood samples) may be taken from an accused without violating his fifth amendment rights. Wade clarified the investigatory powers of law enforcement officials in its holding that a suspect may constitutionally be required to wear items or speak during identification procedures. Id. at 221-22. In Gilbert v. California, 388 U.S. 263 (1967), the Court upheld the constitutionality of requiring a suspect to produce handwriting exemplars. UNIFORM RULE OF EVIDENCE 25 provides in part:

(b) no person has the privilege to refuse to submit to examination for the purpose of discovering or recording his corporeal features and other identifying characteristics . . . and

(c) no person has the privilege to refuse to furnish or permit the taking of samples of body fluids or substances for analysis . . .

A proposed federal rule of criminal procedure would permit law enforcement authorities to use nontestimonial identification procedures upon less-than-probable cause. Proposed Amendments to Federal Rules of Criminal Procedure, rule 41.1(c)(2), 52 F.R.D. 409, 463 (1971). The proposed rule defines nontestimonial identification as including:
nan reasoned that the inherent dangers of eyewitness identification in the pretrial context\textsuperscript{37} compelled the decision and stated:

The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification . . . .

"[t]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined."\textsuperscript{38}

The Court noted that when counsel is absent at the identification stage, the defense can seldom accurately reconstruct the lineup at trial,\textsuperscript{39} and

\begin{quote}
identification by fingerprints, palm prints, footprints, measurements, blood specimens, urine specimens, saliva samples, hair samples, or other reasonable physical or medical examination, handwriting exemplars, voice samples, photographs, and lineups.
\end{quote}


\begin{quote}
Detentions for the sole purpose of obtaining fingerprints are . . . subject to the constraints of the Fourth Amendment. It is arguable, however, that . . . such detentions might . . . be found to comply with the Fourth Amendment even though there is no probable cause . . . . Detention for fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions.
\end{quote}

Although the fifth amendment does not protect the accused from nontestimonial identification procedures, those procedures must, nonetheless, be reasonable to avoid violating the fourteenth amendment due process provision. See Breithaupt v. Abram, 352 U.S. 432 (1967); Rochin v. California, 342 U.S. 165 (1952).


38. 388 U.S. at 228-29, quoting WALL 26.

39. 388 U.S. at 230. Justice Brennan pointed out:

Improper influences may go undetected by a suspect, guilty or not, who experiences the emotional tension which we might expect in one being confronted with potential accusers. Even when he does observe abuse, if he has a criminal record he may be reluctant to take the stand . . . . [A]ny protestations by the suspect of the fairness of the lineup . . . are likely to be in vain; the jury's
that an identifying witness who has selected the defendant at the lineup is unlikely to "go back on his word" at trial.\(^{40}\)

Although the Court clearly based its decision upon the right to counsel, the right in pretrial identification procedures is inextricably tied to the sixth amendment right to confrontation. Justice Brennan asserted that, because the accused is unable to challenge effectively at trial any unfairness in a pretrial identification procedure, denial of counsel at the pretrial stage of the proceedings deprives the accused of

his only opportunity meaningfully to attack the credibility of the witness' courtroom identification. . . .

. . . .

Insofar as the accused's conviction may rest on a courtroom identification . . . which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him.\(^{41}\)

Although the lineup in \textit{Wade} occurred after the accused had been indicted,\(^{42}\) the Court did not expressly limit its holding to postindictment procedures, stating that precedent "requires that we scrutinize any pretrial confrontation."\(^{43}\) In a companion decision, \textit{Gilbert v. California},\(^{44}\) the holding of \textit{Wade} was applied to the states.\(^{45}\) After the

choice is between the accused's unsupported version and that of the police officers present.

\textit{Id.} at 230-31 (footnotes omitted).

40. \textit{Id.} at 229.

41. \textit{Id.} at 232, 235.

42. \textit{Id.} at 219.

43. \textit{Id.} at 227 (emphasis original). In Stovall v. Denno, 388 U.S. 293 (1967), decided the same day as \textit{Wade}, the Court declined to apply \textit{Wade} retroactively.

44. 388 U.S. 263 (1967).

45. The Court applied a prophylactic rule and stated:

Only a per se exclusionary rule as to such [identification] testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup.


In addition, the right to counsel often is inapplicable to on-the-scene confrontations occurring shortly after the offense, because of exigent circumstances. United States v. Perry, 449 F.2d 1026 (D.C. Cir. 1971); United States v. Wilson, 435 F.2d 403 (D.C.
Wade decision most of the circuit courts construed the case broadly and held the right to counsel applicable to preindictment confrontations.\textsuperscript{46}

In 1972, however, the Supreme Court in Kirby \textit{v. Illinois} restricted the right to counsel to those identification procedures occurring after the initiation of "adversary judicial criminal proceedings."\textsuperscript{47} In a plurality opinion,\textsuperscript{48} which turned upon a technical construction of the term


If a witness' Wade-tainted identification testimony is erroneously admitted at trial, the conviction is not automatically reversed upon appeal. If the prosecution can establish beyond a reasonable doubt that the admission of the testimony was harmless, the conviction will stand. United States v. Wade, 388 U.S. 218, 242 (1967); see Chapman v. California, 386 U.S. 18 (1967); \textit{Fed. R. Crim. P.} 52(b).

In addition, if a witness' recognition of the accused is from a source independent of that of a Wade-tainted corporeal identification, such as an adequate opportunity to observe the offender during the crime, the witness' in-court identification of the accused is permissible. United States \textit{v.} Wade, 388 U.S. 218, 241 (1967). \textit{See} Simmons \textit{v. United States}, 390 U.S. 377 (1968) (independent source rule and photographic identifications).


The testimony of a witness that he saw the accused commit or participate in the commission of the crime for which the accused is being tried shall be admissible in evidence in a criminal prosecution in any trial court ordained and established under article III of the Constitution of the United States.


\textsuperscript{47} 406 U.S. 682, 689 (1972). Kirby was identified in a show-up. \textit{Id.} at 684. \textit{See note 7 supra.}

\textsuperscript{48} Justice Stewart announced the judgment of the Court in an opinion in which Chief Justice Burger, and Justices Blackman and Rehnquist joined. Justice Powell, in a
"criminal prosecution" in the sixth amendment, Justice Stewart stated that the right arose with
the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.

... It is this point ... that marks the commencement of the "criminal prosecutions" to which alone the explicit guarantees of the Sixth Amendment are applicable. The plurality rejected Kirby's argument that establishing a fixed stage at which the right to counsel attached exalted form over substance, and stated:

The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified.

concurring opinion, merely stated, "As I would not extend the Wade-Gilbert per se exclusionary rule, I concur in the result reached by the Court." Id. at 691. Justices Douglas and Marshall joined in Justice Brennan's dissent, while Justice White dissented separately, stating only that Wade and Gilbert "govern this case and compel reversal of the judgment" denying the right to counsel. Id. at 705.

49. See note 1 supra.

50. 406 U.S. at 689-90 (footnote omitted). In a concurring opinion, Chief Justice Burger stated:

I agree that the right to counsel attaches as soon as criminal charges are formally made against an accused and he becomes the subject of a "criminal prosecution."

Id. at 691. In joining in the technical construction of the sixth amendment term "criminal prosecution," the Chief Justice was entirely consistent with his construction of the term in his dissenting opinion in Coleman v. Alabama, 399 U.S. 1, 21 (1970), in which he stated:

If the Constitution provided that counsel be furnished for every "critical event in the progress of a criminal case," that would be another story, but it does not. In contrast to the variety of verbal combinations employed by the majority to justify today's disposition, the Sixth Amendment states with laudable precision that: "In all criminal prosecutions, the accused shall ... have the Assistance of Counsel." (Emphasis added). The only relevant determination is whether a preliminary hearing is a "criminal prosecution," not whether it is a "critical event in the progress of a criminal case."

Id. at 23 (emphasis original).

51. Defendant's brief, quoting Escobedo v. Illinois, 378 U.S. 478, 486 (1964), argued that "[i]t 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." Brief for Petitioner at 12, Kirby v. Illinois, 406 U.S. 682 (1972). See notes 30-32, 34 supra and accompanying text.

52. 406 U.S. at 689.
To establish the initiation of formal proceedings as the point at which the right to counsel attached, Justice Stewart found it necessary to distinguish Escobedo, which had applied an accusatory-focus analysis under the critical stage test. Justice Stewart reasoned that Escobedo was essentially a fifth amendment rather than a right to counsel case and that the Court had limited the Escobedo holding to its facts. Thus, the Wade-Gilbert rule, extending the right to counsel to pretrial corporeal identification procedures, and the Kirby decision, precluding that right in preformal charge procedures, established a clear federal standard to be applied in corporeal identification cases.

B. Kirby v. Illinois: Constitutional and Practical Analysis

One pre-Kirby commentator suggested that the right to counsel at pretrial corporeal identification proceedings is a mere extravagance. Analysis suggests, however, that the right to counsel at all in-custody corporeal identification proceedings is a practical necessity and the logical conclusion of the pre-Kirby cases.

In establishing a right to counsel at corporeal identification procedures, Justice Brennan's opinion in Wade recognized that the "inherent

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53. Id. at 689. See notes 30-32, 34 supra and accompanying text.
54. 406 U.S. at 689.
56. See Read, supra note 45, at 367. Professor Read felt that local police regulations would be more useful than the presence of counsel, and discussed several representative regulations. Id. at 396-402. See also Murray, The Criminal Lineup at Home and Abroad, 1966 Utah L. Rev. 610, 627-28 (proposed model statute); American Law Institute, A Model Code of Pre-Arraignment Procedure (Official Draft No. 1, July 15, 1972).
dangers" in the "vagaries of eyewitness identification" are a leading cause of injustice. Although the defendant in *Wade* had been identified in a postindictment lineup, the Court emphasized that it would "scrutinize any pre-trial confrontation." In *Stovall v. Denno*, decided the same day as *Wade*, the Court held that *Wade* did not apply retroactively to a defendant identified in a preindictment showup, but there was no implication that the preindictment factual setting of the case was of any significance to the decision. Thus *Kirby*, in limiting the right to counsel to lineups taking place after the bringing of formal charges, varied from the *Wade-Gilbert* rationale.

*Kirby* further deviated from precedent by applying a rigid distinction between preindictment and postindictment cases in the Sixth Amendment context. Arguably, *Massiah v. United States* and *Hoffa v. United States* established such a distinction. But the preindictment, postindictment dichotomy represented by the *Massiah* and *Hoffa* decisions was consistent with the *Escobedo* accusatory-focus analysis and is distinguishable from the formalistic approach taken in *Kirby*.

58. 388 U.S. at 235.
59. Id. at 228-29.
60. Id. at 219.
61. Id. at 227 (emphasis original).
63. 377 U.S. 201 (1964).
64. 385 U.S. 293 (1966).
65. In *Massiah* v. United States, 377 U.S. 201 (1964), the Supreme Court held that an indicted person's right to counsel was denied when law enforcement agents elicited incriminating statements from him during a conversation with an informant overheard by the agents by means of an eavesdropping device. In *Hoffa* v. United States, 385 U.S. 293 (1966), the Court rejected a similar Sixth Amendment argument from a person who was merely under investigation. Although the cases arguably distinguish the preindictment and postindictment phases, another distinction seems more persuasive. See note 66 infra.
66. In *Massiah*, the defendant had been indicted, i.e., accusations had focused upon him, see note 65 supra. In *Hoffa*, however, the investigation had not yet focused upon the defendant. 385 U.S. at 309-310. Since *Escobedo* held that the right to counsel attaches only after accusation has focused upon an individual, the cases are simply consistent with *Escobedo* and should not be construed as having established a rigid distinction between preindictment and postindictment time periods.
67. The use of the *Escobedo* accusatory-focus analysis to distinguish *Massiah* and *Hoffa* from *Kirby* should not be criticized because of *Kirby*'s treatment of *Escobedo*. Although *Kirby* distinguished *Escobedo* on two grounds, see text accompanying notes 54-55 supra, it did so incorrectly. Note, *The Pretrial Right to Counsel*, 36 Stan. L. Rev. 399, 411-12 (1974); 2 Am. J. Crim. L. 98, 105 (1973). First, in stating that *Escobedo* was a Fifth Amendment rather than a Sixth Amendment case, the Court in *Kirby* linked *Escobedo* to *Miranda v. Arizona*, 384 U.S. 436 (1966), which expanded the right to counsel to in-custody interrogation in order to protect the accused's Fifth Amendment rights and thus encompassed the *Escobedo* holding, which established the right to counsel
Although Kirby attempted to distinguish Escobedo, it effectively avoided the crucial sixth amendment constitutional basis upon which the Court had decided Wade: that the right to counsel at corporeal identification proceedings is necessary to protect the right "meaningfully" to confront identifying witnesses at trial.68 Because the formalistic Kirby approach restricts the right to counsel to identification proceedings taking place after the filing of formal charges, and because without counsel present at the lineup the defense cannot accurately reconstruct the event at trial,69 Kirby fails to protect the right to confrontation of an accused identified in a preformal charge proceeding.

The logical conclusion of the pre-Kirby cases—Wade, Gilbert, and Stovall, building upon the Escobedo accusatory-focus framework—is that the right to counsel should extend to any pretrial corporeal identification confrontation.70 Kirby, although it retained the right to counsel in

at such interrogation only upon the request of the accused, see text accompanying note 32 supra. The Kirby decision's limited construction of Escobedo might have been appropriate if Wade had not favorably cited Escobedo for the proposition that a prearraignment right to counsel does exist. United States v. Wade, 388 U.S. 218, 225 (1967). Second, notwithstanding Kirby, Escobedo is currently regarded as a valid sixth amendment precedent by both federal, see note 2 supra, and state courts, see notes 85 & 86 infra and accompanying text.

Justice Stewart's opinion in Kirby further distinguished Escobedo by asserting that Johnson v. New Jersey, 384 U.S. 719 (1966), had limited Escobedo to its facts. In Johnson, however, the Court did no more than refuse to apply Escobedo retroactively. 384 U.S. at 732. Moreover, in Miranda, decided one week prior to Johnson, the Court stated that "[w]e have undertaken a thorough reexamination of the Escobedo decision and the principles it announced, and we reaffirm it." 384 U.S. at 442.

68. See notes 39-41 supra and accompanying text.
69. See note 39 supra and accompanying text.
70. A "floodgates" argument could be made that if the right to counsel is extended to all pretrial identification procedures, it must also be extended to searches and seizures. Since Escobedo and Miranda extended the right to counsel to pretrial in-custody interrogations, and Wade, citing Escobedo, extended sixth amendment rights to pretrial identification procedures, it could be argued that if a criminal investigation has focused on the accused he would have a right to counsel in the search and seizure context. At least one state court, however, has rejected that contention. McGowan v. State, — Ind. App. —, 296 N.E.2d 667 (1973). More important, the fourth amendment, through its warrant and probable cause requirements, offers sufficient protection to suspects subjected to search. U.S. CONST. amend. IV provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Supreme Court has expressed a strong preference for searches made under warrant. See, e.g., United States v. Ventresca, 380 U.S. 102 (1965). Only under exigent circumstances will the Court permit searches made without a warrant. Ker v. California, 374
the postformal charge context,\textsuperscript{71} offers only an illusory protection to the accused. Under \textit{Kirby}, the police can avoid the requirements of \textit{Wade} simply by delaying the filing of formal charges until the suspect has been viewed in a lineup.\textsuperscript{72} Because of the great danger of misidentification at any identification proceeding,\textsuperscript{73} the extension of the right to counsel to all pretrial corporeal identification proceedings is a practical necessity under our system of justice.

\section*{C. The State Responses to Wade and Kirby}

Prior to the Supreme Court's decision in \textit{Kirby}, at least thirteen states construed \textit{Wade} broadly and established a preindictment, preinformation right to counsel at state corporeal identification proceedings.\textsuperscript{74} Five

U.S. 23 (1963). Furthermore, the specificity required in a search warrant permits no exercise of discretion on the part of law enforcement officials executing the warrant. Marion v. United States, 275 U.S. 192 (1927). Only a disinterested magistrate, rather than a law enforcement official, can issue a search warrant. Coolidge v. New Hampshire, 403 U.S. 443 (1971). Thus, in a search under a warrant, a suspect has far greater protection from police abuses than he does in an identification procedure.

Since searches may be conducted without warrants only in exigent circumstances, such as a search incident to arrest, Harris v. United States, 331 U.S. 145 (1947), searches without warrant protection occur only in situations in which sixth amendment protection would be equally impracticable.


72. In People v. Fowler, 1 Cal. 3d 335, 344, 461 P.2d 643, 650, 82 Cal. Rptr. 363, 370 (1969) (emphasis original), the California Supreme Court stated:

\begin{quote}
[W]e think it clear that the establishment of formal accusation as the time wherein the right to counsel at lineup attaches could only lead to a situation wherein substantially all lineups would be conducted prior to indictment or information. We cannot reasonably suppose that the high court, recognizing that the same dangers of abuse and misidentification exist in all lineups, would announce a rule so susceptible of emasculation by avoidance.
\end{quote}

See Commonwealth v. Richman, 458 Pa. 167, 320 A.2d 351, 361 (1974) (Eagen, J., concurring). However, after the \textit{Kirby} decision, California restricted the right to counsel to lineups taking place after formal charges have been filed. See People v. Chojnacky, 8 Cal. 3d 759, 505 P.2d 530, 106 Cal. Rptr. 106 (1973).

73. \textit{See} notes 37-38 \textit{supra} and accompanying text.

states, however, foreshadowed Kirby and refused to apply the right until an indictment or information had been filed. Of the states faced with the sixth amendment issue since the decision in Kirby, a substantial majority has restricted its application to corporeal identification proceedings occurring after the filing of formal charges. Relying upon Kirby,
thirteen of these states have restricted the right to counsel without discussing the merits of the issue.77 Four of these states had previously held that the right to counsel attached at corporeal identification proceedings even when they occurred before the filing of formal charges.78

Although Kirby expressly stated that the right to counsel at corporeal identification proceedings attached only after “the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment,”79 one state purporting to apply the Kirby rationale extended the sixth amendment to all lineups held after arrest. The Pennsylvania Supreme Court determined that “adversary judicial criminal proceedings” were initiated at arrest. The court justified its conclusion by reasoning that the Kirby


The author does not mean to imply that these state courts did not consider the merits of the issue in formulating the state rules. Rather, the lack of reasoning in the opinions is noted to illustrate the impact of the Kirby precedent, as a federal standard, upon the states. Indeed, in People v. O’Roy, 29 Cal. App. 3d 656, 105 Cal. Rptr. 717 (1973), a California court considered the right to counsel issue on its merits, and, stating that it was bound by the Kirby ruling, overruled several well-reasoned pre-Kirby decisions.


79. 406 U.S. at 689; see note 50 supra.

language did not establish "an all inclusive rule" but left the line-drawing to the states.\textsuperscript{80} In a plurality opinion,\textsuperscript{81} the court stated, "We are convinced that it would be artificial to attach conclusionary significance to the indictment in Pennsylvania."\textsuperscript{82} One other state court has indicated in dictum that, even after Kirby, the right to counsel attaches at arrest.\textsuperscript{83}

Although Kirby expressly rejected Escobedo,\textsuperscript{84} four states have applied the accusatory-focus analysis. Even so, those states have held that Kirby limited the right to counsel to corporeal confrontations occurring after formal charges have been filed.\textsuperscript{85} For example, the Maine Supreme Court interpreted Kirby as holding that "the Sixth Amendment right to

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\textit{Id. at 361.}
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\textsuperscript{81} Justice Nix wrote the plurality opinion, joined by two other justices. In a concurring opinion, Justice Eagen, joined by one other justice, asserted that Kirby was not amenable to the broad interpretation imposed upon it by the plurality. Justice Eagen, however, rejected Kirby on policy grounds, stating:

The artificial distinction drawn by the plurality in Kirby, between post-charge and pre-charge lineups is unwise and infringes upon the protections society should grant an accused. To force an accused to stand alone against the full force and investigative powers of organized society, until he is actually charged with the commission of the crime, is an outrageous injustice. The accused's liberty is equally jeopardized by a pre-charge lineup, as it is by a post-charge lineup. Thus, I consider the line as laid down in Kirby to be arbitrary and unfounded. To follow the constitutional mandate of Kirby would be to encourage the law-enforcement personnel of this Commonwealth to hastily conduct all lineups prior to the institution of the "adversary judicial criminal proceedings"... Thus, it is my strong feeling that the superior procedure is to grant the right to counsel at all lineups subsequent to arrest...

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\textit{Id. at 353.}
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\textsuperscript{82} In State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974), the North Carolina Supreme Court construed N.C. Gen. Stat. § 7A-451(b)(2) (1972). Prior to the Kirby decision, the section had been construed as establishing a right to counsel at all lineups held after arrest. State v. Bass, 280 N.C. 435, 186 S.E.2d 384 (1972). Although the Henderson court asserted that Kirby narrowed prior interpretations of the provision, it applied the accusatory-focus analysis and reasoned that, since the warrant had not been served upon the defendant until after the showup, the right to counsel did not apply to that investigatory stage. 285 N.C. at 11, 203 S.E.2d at 17.

\textsuperscript{83} See text accompanying notes 53-55 supra. Jackson v. State, 17 Md. App. 167, 174 n.4, 300 A.2d 430, 435 n.4, cert. denied, 268 Md. 749 (1973), stated:

[I]t is patent in Kirby that an "adversary judicial proceeding" is not attained merely by the focusing of an investigation on an accused... The focusing of an investigation on an accused invokes the right to counsel with respect to self-incrimination but not with respect to pre-trial confrontations.

counsel [does] not apply to a police-arranged investigatory confrontation.\textsuperscript{86}

Several states, although following the majority view, have questioned Kirby on policy grounds.\textsuperscript{87} A Missouri court stated:

\textbf{[I]f Wade . . . [and] Gilbert . . . have any validity for the reasons designated therein . . . then on principle the same reasons should obtain and carry over, absent exigent circumstances, to a lineup conducted after arrest especially when the investigation has focused upon the arrestee as suspect. Once he has been identified by the victim, preinformational or post-informational, to a large extent he has had his trial. While I recognize society's need for early detection of criminal activities, I fail to see in what significant way its societal needs are abridged by permitting the accused, absent exigent circumstances, to have counsel present at this critical juncture.}\textsuperscript{88}

Of the states that have reconsidered the policies underlying the Kirby decision, only one has rejected Kirby outright. The Michigan Supreme Court, after an extensive analysis of the danger of misidentification at any identification proceeding,\textsuperscript{89} continued, despite the Kirby decision,\textsuperscript{90} to apply the broad pretrial right to counsel established after Wade.\textsuperscript{91}

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\textsuperscript{86} State v. Rowe, 314 A.2d 407, 412 (Me. 1974) (emphasis added).  
\textsuperscript{89} We strongly feel that better procedures require that before a line-up is conducted, the suspect be given the right to contact an attorney of his choice, or be informed that one will be called if he is unable to hire one, for in this suggestion, lies the ultimate safeguard against the abuses which Stovall and Foster attempt to negate. Foster v. California, 394 U.S. 440, 442 (1969), rendered inadmissible a witness' testimony about his identification of a suspect in an unduly suggestive corporeal identification proceeding. Whether such a proceeding is unnecessarily suggestive depends upon the "totality of the circumstances." Stovall v. Denno, 388 U.S. 293, 302 (1967). But see the discussion of the independent source rule, note 45 supra.  
\textsuperscript{90} In State v. Taylor, 60 Wis. 2d 506, 210 N.W.2d 873, 882 (1973), the Supreme Court of Wisconsin asserted that although Kirby would be applied in Wisconsin, "we nevertheless believe it is good police practice and in the interest of justice to afford such counsel [at all pretrial lineups] where practicable."  
\textsuperscript{93} For a discussion of the application of the Wade, Gilbert, Stovall trilogy, see
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Although Michigan is unlikely to extend the right to counsel to precustody corporeal identifications, it has firmly established a right to counsel upon arrest.

IV. POSSIBLE STATE ALTERNATIVES TO KIRBY

The most obvious alternative available to the states is to refuse to follow the Kirby decision. In protecting the right of accused persons, states may adopt higher standards than those required by the Supreme Court. State courts could review the policy grounds upon which the Court decided Kirby and find that:

The artificial distinction drawn by the plurality in Kirby, between postcharge and pre-charge lineups is unwise and infringes upon the protections society should grant an accused. To force an accused to stand alone against the full force and investigative powers of organized society, until he is actually charged . . . is an outrageous injustice. . . . [I]t is a meaningless distinction to postpone the granting of the right to counsel at lineups until the "official" initiation of the judicial criminal process.

Following the lead of Michigan, states could thus establish a broad postarrest right to counsel at identification confrontations. In addition, the


92. In People v. Lee, 391 Mich. 618, 218 N.W.2d 655 (1974), the Michigan Supreme Court refused to extend the right to counsel to precustody photographic identification procedures. In view of the court's reliance upon People v. Anderson, 389 Mich. 155, 205 N.W.2d 461 (1973), a photographic identification case, in establishing the postarrest right to counsel, see note 89 supra, Michigan is unlikely to create a precustody right to counsel at corporeal identification procedures.


94. Cooper v. California, 386 U.S. 58 (1967). Several states, for example, have extended fifth amendment protection to nontestimonial evidence. E.g., Aldrich v. State, 220 Ga. 132, 137 S.E.2d 463 (1964) (refusal of truck driver to drive truck on weight scales within fifth amendment protection); Allen v. State, 183 Md. 603, 39 A.2d 820 (1944) (fifth amendment justifies suspect's refusal to try on hat found at scene of crime); Davis v. State, 131 Ala. 10, 31 So. 569 (1902) (comment on defendant's refusal to permit his shoe to be compared to footprint at scene of crime violates fifth amendment). But see note 36 supra.


Escobedo accusatory-focus analysis could provide a conceptual framework for the extension of the sixth amendment to suspects who have not yet been arrested, but who are nonetheless the focus of criminal investigations. At least one state adopted this approach prior to Kirby,\(^9\) and several states, although they recognize no right to counsel in preindictment confrontations, recognize the validity of the accusatory-focus analysis despite Kirby's rejection of Escobedo.\(^8\)

With the exception of Michigan, the states have demonstrated an unwillingness to reject Kirby outright. It is possible, however, to establish a postarrest right to counsel without refuting Kirby. As the Pennsylvania Supreme Court\(^9\) reasoned, the Kirby limitation upon the sixth amendment—"the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment"\(^10\)—may be viewed as a less-than-inclusive rule, leaving individual state procedure to determine when criminal proceedings begin. Since adversary judicial proceedings may begin at arrest, that could be the point at which the right to counsel attaches under Kirby.\(^101\) This construction of Kirby, however, is not readily

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\(^{98}\) See sources cited notes 85 & 86 supra and accompanying text.


Kirby only instructs us to limit [the Wade] rule where the limitation would benefit the interest of society in the prompt and purposeful investigation of an unsolved crime. In light of Pennsylvania's procedure, we find no countervailing benefit where the lineup occurs after arrest.

Id. at —, 320 A.2d at 353.

Apparently, Missouri has also interpreted Kirby as leaving to state procedure the determination of what constitutes the initiation of adversary judicial proceedings. In Arnold v. State, 484 S.W.2d 248 (Mo. 1972), the Missouri Supreme Court relied upon early Missouri precedent to establish that the first step in the institution of a formal criminal charge under state procedure is the filing of a complaint. The court held that the right to counsel under Kirby attaches at that stage of the proceedings.

\(^{100}\) Kirby v. Illinois, 406 U.S. at 682, 689 (1972).

\(^{101}\) Justice Eagen, concurring in Commonwealth v. Richman, 458 Pa. 167, 320 A.2d 351 (1974), felt that Justice Nix had applied a strained construction of Kirby and stated:

It is clear in my mind that the [Kirby] plurality used the . . . terms [formal
available to the large number of states that have already determined that Kirby applies upon the filing of formal charges.102

One other prophylactic approach could be applied consistent with the Kirby rationale. The McNabb-Mallory rule103 provides that after arrest, an accused must be brought before a magistrate for arraignment "without unnecessary delay."104 Since Kirby expressly stated that arraignment is a point at which the right to counsel attaches,105 the McNabb-Mallory rule, if applicable in the identification context, offers substantial protection to the sixth amendment rights of an accused.106 Although the Supreme Court adopted the McNabb-Mallory rule primarily to avoid lengthy police interrogation resulting in coerced confessions,107 several

charge, preliminary hearing, indictment, information and arraignment] as synonyms. . . . Jurisdictions vary on the terminology they employ to refer to the time when the accused is formally charged and when their adversary proceedings initiate; and thus the reason for including the five different terms. . . . Thus, I believe it is ludicrous to say that under the Kirby test we can draw the Wade-Gilbert line at arrest.

Id. at —, 320 A.2d at 359 (footnote omitted).

Justice Eagen then rejected Kirby on policy grounds, see note 107 infra and accompanying text.

102. See cases cited note 76 supra.


104. Although McNabb established the right of the accused to be presented promptly to a magistrate for arraignment, Mallory, which upheld Fed. R. Crim. P. 5(a), is a more applicable precedent in federal cases. Fed. R. Crim. P. 5(a) provides:

An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith . . .

Congress, by Title II of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 3501(c) (1970), attempted to abolish the McNabb-Mallory rule. The constitutionality of this provision has been questioned. See also note 45 supra.

105. See text accompanying note 100 supra. For a persuasive argument that a criminal prosecution begins at arraignment, see Grano 788-89, quoting F. Miller, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 14 (1969).

106. Although the McNabb-Mallory rule is only a federal standard and therefore not binding upon the states, almost every jurisdiction has adopted the rule. Grano 786. For a list of the state provisions, see AMERICAN LAW INSTITUTE, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, App. 1(c) (Official Draft No. 1, July 15, 1972). Although the McNabb-Mallory rule may have been abolished by the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 3501(c) (1970), the section is arguably unconstitutional, see note 45 supra, and, even if it were constitutional, it would not prevent state adoption of procedures similar to the McNabb-Mallory rule. See Cooper v. California, 386 U.S. 58 (1967).
post-\textit{Wade} decisions applied the rule to exclude trial testimony about corporeal identifications that took place prior to arraignment.\footnote{108} Chief Justice Burger, then judge of the Court of Appeals for the District of Columbia, described the effect of \textit{Wade} upon the application of the \textit{McNabb-Mallory} rule as follows:

[The reason for not \cite{108} previously applying \textit{Mallory} to a lineup identification was that a lineup in the absence of counsel before \textit{Wade} was a perfectly legitimate procedure . . . and that \textit{Mallory} was concerned with improper "interrogation." It was natural for the cases following \textit{Mallory} to concentrate on the exclusion of utterances, but not other forms of evidence. But \textit{Wade} has changed this. Now that the right to counsel is an integral part of the lineup procedure, the warnings that are given at presentment and the opportunity to have counsel appointed are highly relevant to the lineup situation. . . . Since the \textit{Mallory} rule was a response to the protections afforded by prompt presentment, it is appropriately applied to the line-up situation in the wake of \textit{Wade}.\footnote{100}]

Although the Court in \textit{Mallory} stated that the rule "does not call for mechanical or automatic obedience,"\footnote{110} the delay in arraignment must not result from taking a suspect to the police station in order to obtain evidence with which to establish his guilt.\footnote{111} Thus, applying the \textit{McNabb-Mallory} rule to the identification context, law enforcement officials may not postpone the filing of formal charges until after identification confrontations.\footnote{112} The \textit{McNabb-Mallory} rule, which requires a speedy arraignment, coupled with \textit{Kirby}, which requires counsel at postarraignment identifications, should in most cases guarantee an

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\item At 8:00 p.m., a "steady interrogation" began. After an hour and a half, Mallory confessed to rape, but was not taken to a United States Commissioner until the next morning—after he had repeated his confession, dictated the confession to a typist, and been confronted by the complaining witness. 354 U.S. at 450-51.
\item \textit{E.g.}, United States v. Broadhead, 413 F.2d 1351 (7th Cir. 1969); Adams v. United States, 399 F.2d 574 (D.C. Cir. 1968), \textit{cert. denied}, 393 U.S. 1067 (1969). \textit{But see} Williams v. United States, 419 F.2d 740 (D.C. Cir. 1969). In addition, \textit{Mallory} involved a prearraignment confrontation. \textit{See note 107 supra}.
\item 354 U.S. at 455.
\item 111. The Court in \textit{Mallory} limited permissible delay to necessary police administrative tasks, such as booking or the "quick verification" of exculpatory statements made by the accused. \textit{Id.} at 454-55.
\item 112. Application of the \textit{McNabb-Mallory} rule will not extend the right to counsel to on-the-scene identification confrontations, which, even prior to \textit{Kirby}, were exempted as exigent circumstances. \textit{See note 45 supra}.
\end{itemize}
accused the right to counsel at postarrest identification proceedings.113

V. CONCLUSION

The Kirby decision has had a great impact upon the right to counsel at corporeal identification proceedings.114 Because of the ease with which

113. See Grano 742-55. Professor Grano advanced the Betts due process analysis—viewing the circumstances of each case to determine if the presence of counsel in that case was a fundamental right—as an additional constitutional basis for the right to counsel under Kirby. He recommended a five-step analysis of identification procedures:

1. Is the identification procedure prohibited by a prophylactic due process rule?
2. If the identification procedure is not prohibited, does the sixth amendment right to counsel apply? (Kirby's limitation would be accepted).
3. If the sixth amendment does not apply, does due process require the assistance of counsel?
4. Did a violation of a prompt-arraignment statute or rule preclude the defendant from having counsel's assistance at the identification procedure?
5. Did the identification procedure result in a violation of the Stovall-Simmons rule [prohibiting unnecessarily suggestive identification confrontations]?


law enforcement officials can circumvent the limited protection remaining under the Wade rule, it appears that the right to counsel at many federal identification confrontations is dead. With the majority of state courts currently following Kirby, the same fate seems likely at the state level. The state courts, however, do have alternatives. They can apply the McNabb-Mallory rule, broadly interpret the language of Kirby, or reject that decision outright. Through judicial declarations of state constitutional law, promulgation of a curative rule of state criminal procedure, or adoption of broad statutory provisions, the states can preserve the right to counsel at corporeal identification proceedings.


In an extraordinarily well-reasoned and thoroughly researched pre-Ash opinion, the Michigan Supreme Court held that the right to counsel does apply at all pretrial photographic identification procedures. People v. Anderson, 389 Mich. 155, 205 N.W.2d 461 (1973). People v. Jackson, 391 Mich. 323, 217 N.W.2d 22 (1974), continued the Michigan Supreme Court's policy as established in Anderson. Anderson, however, also held that a suspect who is in custody must be identified in a corporeal identification procedure rather than a photographic lineup.

115. See note 72 supra.