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

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."

2. It is generally accepted that the expansion of the constitutional rights of the accused from 1961 to 1972 was of revolutionary proportion. *See* Rivers v. United States, 400 F.2d 935, 939 (5th Cir. 1968); Grano, Kirby, Biggers, *and* Ash: *Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?*, 72 MICH. L. REV. 717, 719 (1974) [hereinafter cited as Grano]; Note, *Police Coercion of Witnesses*, 1973 WASH. U.L.Q. 865; 2 AM. J. CRIM. 98, 107 (1973).

A wide range of rights, formerly available only to defendants in federal courts, was extended during the 1960's to defendants in state prosecutions. Benton v. Maryland, 395 U.S. 784 (1969) (ban against double jeopardy); Duncan v. Louisiana, 391 U.S. 145 (1968) (sixth amendment right to jury trial); Washington v. Texas, 388 U.S. 14 (1967) (right to compulsory process); Klopfer v. North Carolina, 386 U.S. 213 (1967) (right to speedy trial); Miranda v. Arizona, 384 U.S. 436 (1966) (right to counsel during custodial interrogations); Pointer v. Texas, 380 U.S. 400 (1965) (sixth amendment right to confrontation); Malloy v. Hogan, 378 U.S. 1 (1964) (fifth amendment applied to states); Ker v. California, 374 U.S. 23 (1963) (standards governing federal searches and seizures also govern states); Mapp v. Ohio, 367 U.S. 643 (1961) (fourth amendment exclusionary rule applied to states).

3. Gideon v. Wainwright, 372 U.S. 335 (1963).

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.

5. Tomkins v. Missouri, 323 U.S. 485 (1945). *See also* Kitchins v. Smith, 401 U.S. 847 (1971); Gibbs v. Burke, 337 U.S. 773 (1949).

6. Carnley v. Cochran, 369 U.S. 506 (1962); Johnson v. Zerbst, 304 U.S. 458 (1938). A waiver cannot be made knowingly and intelligently unless it is made with full awareness of the consequences. Von Moltke v. Gillies, 332 U.S. 708 (1948).

7. Gilbert v. California, 388 U.S. 263 (1967) (right to counsel at post indictment

expansion of the right to counsel in the identification context ceased, when in *Kirby v. Illinois*[8] 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[9] analysis, rather than by formulating and applying a precise sixth amendment test.[10] In 1932, in *Powell v. Alabama*,[11] the Court held that "ignorant and illiterate"[12] defendants had a

lineups applicable to the states); United States v. Wade, 388 U.S. 218 (1967) (right to counsel applicable to postindictment lineups). For a discussion of the *Wade-Gilbert* rule, see notes 36-45 *infra* and accompanying text.

There are two kinds of corporeal identification procedures—lineups and showups. In a lineup, a group of persons including the suspect is viewed by a witness or witnesses who are asked to identify the offender. P. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 27-28 (1965) [hereinafter cited as WALL]. In a showup, a lone suspect is presented to a witness or witnesses for the purpose of identifying him as the offender. *Id.* at 40-41. The showup procedure hints at the suspect's guilt by the very nature of the confrontation. Young, *Due Process Consideration in Police Showup Practices*, 6 CRIM. L. BULL. 373, 377-78 (1970). Although the Supreme Court has noted that the use of showups "has been widely condemned," Stovall v. Denno, 388 U.S. 293, 302 (1967) (footnote omitted), the Court rejected the argument that showups are per se inadmissible in Neil v. Biggers, 409 U.S. 188 (1972), holding that showup identification procedures are permissible so long as identification is reliable in "the totality of the circumstances." *Id.* at 199.

8. 406 U.S. 682 (1972). *See* notes 48-55 *infra* and accompanying text. Many commentators have viewed *Kirby* as a severe limitation upon the accused's sixth amendment rights. *See, e.g.*, Note, *The Pre-Trial Right to Counsel*, 26 STAN. L. REV. 399, 418 (1974); 2 AM. J. CRIM. L. 98, 107 (1973); 4 LOYOLA U. (of Chicago) L.J. 213, 226 (1973).

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.

10. Grano 742.

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

12. *Id.* at 52. The defendants in *Powell* were seven black youths. They were

"fundamental right" to counsel.[13] Since the accused "required the guiding hand of counsel at every step in the proceedings,"[14] due process mandated the extension of the right to counsel to the period between the time of arraignment and the time of trial.[15]

In *Betts v. Brady*,[16] however, the Court held that the *Powell* precedent applied only to special circumstances in which the accused was intellectually incapable of defending himself.[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.[18]

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

13. *Id.* at 68.

14. *Id.* at 69.

15. *Id.* at 57. The Court explained that:

> [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.

Id. at 57, *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:

> [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. *Id.* at 457. Justice Roberts concluded that:

> [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.

Id. at 472.

18. *Id.* at 471, 473. Justice Roberts listed the state constitutional and statutory provisions regarding the right to counsel, in addition to state case law. *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*,[19] 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. Wainwright*[22] expressly overruled *Betts*[23] 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 right[26] are critical

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tion according to a state majority rule approach.

In a number of post-*Betts* cases, however, the Supreme Court found special circumstances requiring the appointment of counsel. In Gallegos v. Nebraska, 342 U.S. 55 (1951), for example, the Supreme Court again asserted that the right to counsel was not mandatory in state noncapital cases unless the absence of counsel would deny the accused "the essentials of justice." *Id.* at 64 (footnote omitted). *See* McNeal v. Culver, 365 U.S. 109 (1961) (right to counsel for uneducated, mentally ill, indigent defendant); Palmer v. Ashe, 342 U.S. 134 (1951) (right to counsel for mentally ill defendant); Wade v. Mayo, 334 U.S. 672 (1948) (right to counsel for eighteen year old); Grano 743 & n.154; Note, *supra* note 8, at 399 n.2.

19. 368 U.S. 52 (1961).

20. The only language concerning the capabilities of the defendant in Justice Douglas's opinion in *Hamilton* was a statement that "[o]nly the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently." *Id.* at 55. The opinion made no reference to any intellectual, psychological, or educational handicap of the defendant.

21. *Id.* at 53-54. The Court held that, in Alabama, arraignment is a critical stage requiring counsel. Justice Douglas stated:

> Whatever may be the function and importance of arraignment in other jurisdictions, we have said enough to show that in Alabama it is a critical stage in a criminal proceeding. . . . Available defenses may be as irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes.

Id. at 54 (footnote omitted). For a conceptual analysis of the critical stage test as a functional analysis expanding upon a stage-of-proceeding "chronological baseline," see Note, *supra* note 8, at 401-03.

22. 372 U.S. 335 (1963).

23. *Id.* at 339.

24. *See, e.g.*, Argersinger v. Hamlin, 407 U.S. 25 (1972).

25. Mempa v. Rhay, 389 U.S. 128 (1967).

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 interrogations[29] 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]

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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.*

28. Coleman v. Alabama, 399 U.S. 1 (1970).

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.*

30. 378 U.S. 478 (1964).

31. *Id.* at 479.

32. *Id.* at 490-91.

33. Miranda v. Arizona, 384 U.S. 436 (1966).

34. The *Miranda* Court may have intended to limit the *Escobedo* accusatory-focus analysis by using the term "in-custody" interrogation and stating: "This is what we meant in *Escobedo* when we spoke of an investigation which had focused on an accused." Miranda v. Arizona, 384 U.S. 436, 444 n.4 (1966). Several state courts have recently applied *Escobedo* accusatory-focus rationale in identification cases. *E.g.*, People v. Lowe, — Colo. —, 519 P.2d 344 (1974); Godbee v. State, 232 Ga. 259, 206 S.E.2d 432 (1974); State v. Northup, — Me. —, 303 A.2d 1 (1973); State v. Easthope, 29 Utah 2d 400, 510 P.2d 933 (1973).

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*[35] extended the right to counsel to include pretrial identification procedures in federal cases.[36] Justice Bren-

Young, 194 Kan. 242, 398 P.2d 584 (1965); Carson v. Commonwealth, 382 S.W.2d 85 (Ky. 1964), *cert. denied*, 380 U.S. 938 (1965); Johnson v. State, 238 Md. 140, 207 A.2d 643 (1965); Commonwealth v. O'Leary, 347 Mass. 387, 198 N.E.2d 403 (1964); State v. Owens, 391 S.W.2d 248 (Mo. 1965); Rainsberger v. State, 81 Nev. 92, 399 P.2d 129 (1965); State v. Lanzo, 44 N.J. 560, 210 A.2d 613 (1965); Sanders v. Cox, 74 N.M. 524, 395 P.2d 353, *cert. denied*, 379 U.S. 978 (1965); People v. Combs, 19 App. Div. 2d 639, 241 N.Y.S.2d 104 (1963); McLean v. Maxwell, 2 Ohio St. 2d 226, 208 N.E.2d 139 (1965); State v. Neely, 239 Ore. 487, 398 P.2d 482 (1965); Commonwealth v. Patrick, 416 Pa. 437, 206 A.2d 295 (1965); Moorer v. State, 244 S.C. 102, 135 S.E. 2d 713, *cert. denied*, 379 U.S. 860 (1964); Cooper v. Commonwealth, 205 Va. 883, 140 S.E.2d 688 (1965); Pettit v. Rhay, 62 Wash. 2d 515, 383 P.2d 889 (1963); Sparkman v. State, 27 Wis. 2d 92, 133 N.W.2d 776 (1965).

35. 388 U.S. 218 (1967). Prior to *Wade*, courts considered corporeal identification procedures merely investigatory stages and therefore not requiring the presence of counsel under the accusatory-focus analysis of *Escobedo*. Caldwell v. United States, 338 F.2d 385 (8th Cir. 1964), *cert. denied*, 380 U.S. 984 (1965); *see* Anonymous v. Baker, 360 U.S. 287 (1959); *In re* Groban, 352 U.S. 330 (1957); United States v. Curry, 354 F.2d 163 (2d Cir. 1965), *cert. denied*, 385 U.S. 873 (1966).

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)(2,3), 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[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."[38]

The Court noted that when counsel is absent at the identification stage, the defense can seldom accurately reconstruct the lineup at trial,[39] and

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> 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.

Id., rule 41.1(l)(3), 52 F.R.D. 409, 466-67 (1971). The Supreme Court has hinted that nontestimonial identification procedures upon less-than-probable cause might be permissible. *See* Davis v. Mississippi, 394 U.S. 721, 727 (1969):

> 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.

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).

37. 388 U.S. at 235. One commentator has stated: "It is an article of faith within the legal profession that eyewitness testimony is unreliable." Pulaski, Neil v. Biggers: *The Supreme Court Dismantles the* Wade *Trilogy's Due Process Protection*, 26 STAN. L. REV. 1097, 1097 n.1 (1974), *citing* N. SOBEL, EYE-WITNESS IDENTIFICATION 5-12 (1972); McGowan, *Constitutional Interpretation and Criminal Identification*, 12 WM. & MARY L. REV. 235, 238-39 (1970). The distorting influence of a sudden brief encounter with a total stranger, engaged in an often violent criminal act, upon a witness' perception and recollection of the event is well documented. Pulaski, *supra* at 1097; Levine & Tapp, *The Psychology of Criminal Identification*, 121 U. PA. L. REV. 1079, 1097-1100 (1973). *See* WALL 19-23. *See also* Grano 749, *citing* Doob & Kirshenbaum, *Bias in Police Lineups—Partial Remembering*, 1 J. POLICE SCI. & ADMIN. 287 (1973) (description of a Canadian empirical study of misidentification by eyewitnesses describing a suspect). For a thorough analysis of the legal and scientific problems with eyewitness identification, see People v. Anderson, 389 Mich. 155, 205 N.W.2d 461 (1973).

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. . . .
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> . . . .
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> 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 *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, *Gilbert v. California*,[44] the holding of *Wade* was applied to the states.[45] After the

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

Id. at 230-31 (footnotes omitted).

40. *Id.* at 229.

41. *Id.* at 232, 235.

42. *Id.* at 219.

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

Id. at 273. The *Wade-Gilbert* rule is not without limitation, however. An accused generally may waive his right to counsel. Carnley v. Cochran, 369 U.S. 506 (1962); Von Moltke v. Gillies, 332 U.S. 708 (1948); Johnson v. Zerbst, 304 U.S. 458 (1938). The specific right to counsel at a pretrial corporeal identification may be waived, provided the waiver is voluntary and knowingly and intelligently made. *See, e.g.*, Taylor v. Swenson, 458 F.2d 593, 596-97 (8th Cir. 1972); Hayes v. State, 46 Wis. 2d 93, 98, 175 N.W.2d 625, 628 (1970).

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.[46]

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

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Cir. 1970); United States v. Sanchez, 422 F.2d 1198 (2d Cir. 1970); Russell v. United States, 408 F.2d 1280 (D.C. Cir.), *cert. denied*, 395 U.S. 928 (1969). State courts have recognized this on-the-scene exception. *See, e.g.*, State v. Salcido, 109 Ariz. 380, 509 P.2d 1027 (1973); Brand v. Wofford, 230 Ga. 750, 199 S.E.2d 231 (1973); State v. Smith, 261 La. 608, 260 So.2d 641 (1972).

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); 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 v. Wade, 388 U.S. 218, 241 (1967). *See* Simmons v. United States, 390 U.S. 377 (1968) (independent source rule and photographic identifications).

In a legislative attempt to overrule *Wade*, Congress passed Title II of the Omnibus Safe Streets and Crime Control Act of 1968, 18 U.S.C. § 3502 (1970):

> 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.

This provision has not yet been challenged, although in Read, *Lawyers at Lineups: Constitutional Necessity or Avoidable Extravagance?*, 17 U.C.L.A.L. REV. 339, 359-60 (1969), the author viewed the Act as a clearly unconstitutional legislative attempt to overrule a constitutional interpretation by the Supreme Court. *See also* Burt, Miranda *and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81, 123-25.

46. *See, e.g.*, Wilson v. Gaffney, 454 F.2d 142 (10th Cir. 1972); Virgin Islands v. Callwood, 440 F.2d 1206 (3d Cir. 1971); 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. 1970); United States v. Ayers, 426 F.2d 524 (2d Cir. 1970); United States v. Broadhead, 413 F.2d 1351 (7th Cir. 1969); Rivers v. United States, 400 F.2d 935 (5th Cir. 1968). In Wilson v. Gaffney, *supra* at 144, the Court of Appeals for the Tenth Circuit stated:

> In both *Wade* and *Gilbert* the lineups were conducted after indictments . . . [here,] the lineup occurred before petitioner had been formally charged. But surely the assistance of counsel . . . does not arise or attach because of the return of an indictment . . . . Every reason set forth by the Supreme Court in *Wade* . . . for the assistance of counsel post-indictment has equal or more impact when projected against a pre-indictment atmosphere.

47. 406 U.S. 682, 689 (1972). Kirby was identified in a showup. *Id.* at 684. *See* note 7 *supra*.

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,[49] 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.
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> . . . .
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> . . . It is this point . . . that marks the commencement of the "criminal prosecutions" to which alone the explicit guarantees of the Sixth Amendment are applicable.[50]

The plurality rejected Kirby's argument that establishing a fixed stage at which the right to counsel attached exalted form over substance,[51] 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.[52]

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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.[53] Justice Stewart reasoned that *Escobedo* was essentially a fifth amendment rather than a right to counsel case[54] and that the Court had limited the *Escobedo* holding to its facts.[55] 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.[56] 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.[57]

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

53. *Id.* at 689. *See* notes 30-32, 34 *supra* and accompanying text.

54. 406 U.S. at 689.

55. *Id., citing* Johnson v. New Jersey, 384 U.S. 719 (1966). *See* note 67 *infra.*

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).

In People v. Fowler, 1 Cal. 3d 335, 461 P.2d 643 (1969), 82 Cal. Rptr. 363, a pre-*Kirby* case, the California Supreme Court held that Oakland Police Department Regulations did not, despite their imposition of procedural safeguards, eliminate the reasons for considering lineups as a critical stage of the criminal process. The court stated:

> Even if we assume for purposes of argument that these regulations provide substantive standards which *if followed* would insure a fair lineup, the United States Supreme Court has made it clear that a constitutionally adequate substitute for the presence of counsel at the lineup, in order to preserve a meaningful confrontation at trial, must provide for a means whereby the defendant can have an opportunity at trial to effectively reconstruct the procedure by which he was identified in a pre-trial lineup. [Citing *Wade.*] The regulations in question do not provide such a means.

Id. at 348, 461 P.2d at 653, 82 Cal. Rptr. at 373 (emphasis original).

57. *See* Sobel, *Assailing the Impermissible Suggestion: Evolving Limitations on the Abuse of Pre-Trial Criminal Identification Methods*, 38 BROOKLYN L. REV. 261, 274-75 (1971).

dangers"[58] in the "vagaries of eyewitness identification" are a leading cause of injustice.[59] Although the defendant in *Wade* had been identified in a postindictment lineup,[60] the Court emphasized that it would "scrutinize *any* pre-trial confrontation."[61] In *Stovall v. Denno*,[62] 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 signficance 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*[63] and *Hoffa v. United States*[64] established such a distinction.[65] But the preindictment, postindictment dichotomy represented by the *Massiah* and *Hoffa* decisions was consistent with the *Escobedo* accusatory-focus analysis[66] and is distinguishable from the formalistic approach taken in *Kirby*.[67]

58. 388 U.S. at 235.

59. *Id.* at 228-29.

60. *Id.* at 219.

61. *Id.* at 227 (emphasis original).

62. 388 U.S. 293 (1967).

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 informer 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*, 26 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

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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 pre-arraignment 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,[71] offers only an illusory protection to the accused. Under *Kirby*, the police can avoid the requirements of *Wade* simply by delaying the filing of formal charges until the suspect has been viewed in a lineup.[72] Because of the great danger of misidentification at any identification proceeding,[73] the extension of the right to counsel to all pretrial corporeal identification proceedings is a practical necessity under our system of justice.

C. *The State Responses to* Wade *and* Kirby

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

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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.

71. Kirby v. Illinois, 406 U.S. 682, 689-90 (1972).

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:

> [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.

See Commonwealth v. Richman, 458 Pa. 167, 320 A.2d 351, 361 (1974) (Eagen, J., concurring). However, after the *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. *See* notes 37-38 *supra* and accompanying text.

74. People v. Fowler, 1 Cal. 3d 335, 461 P.2d 643, 82 Cal. Rptr. 363, (1969); State v. Singleton, 253 La. 18, 215 So. 2d 838 (1968); Commonwealth v. Guillory, 356 Mass. 591, 254 N.E.2d 427 (1970); Palmer v. State, 5 Md. App. 691, 249 A.2d 482 (1969); People v. Hutton, 21 Mich. App. 312, 175 N.W.2d 860 (1970); Thompson v. State, 85 Nev. 134, 451 P.2d 704, *cert. denied*, 396 U.S. 893 (1969); State v. Wright, 274 N.C. 84, 161 S.E.2d 581 (1968), *cert. denied*, 396 U.S. 934 (1969); State v. Isaacs, 24 Ohio App. 2d 115, 265 N.E.2d 327 (1970); Commonwealth v. Whiting, 439 Pa. 205, 266 A.2d 738, *cert. denied*, 400 U.S. 919 (1970); *In re* Holley, 107 R.I. 615, 268 A.2d 723 (1970); Martinez v. State, 437 S.W.2d 842 (Tex. Crim. App. 1969); State v. Hicks, 76 Wash. 2d 80, 455 P.2d 943 (1969); Hayes v. State, 46 Wis. 2d 93, 175 N.W.2d 625 (1970).

states, however, foreshadowed *Kirby* and refused to apply the right until an indictment or information had been filed.[75] 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.[76] Relying upon *Kirby*,

75. State v. Fields, 104 Ariz. 486, 455 P.2d 964 (1969); Perkins v. State, 228 So. 2d 832 (Fla. 1969); People v. Palmer, 41 Ill. 2d 571, 244 N.E.2d 173 (1969); State v. Walters, 457 S.W.2d 817 (Mo. 1970); Buchanan v. Commonwealth, 210 Va. 664, 173 S.E.2d 792 (1970).

76. Cole v. State, 52 Ala. App. 447, 293 So. 2d 871 (1974); Giles v. State, 52 Ala. App. 106, 289 So. 2d 673 (1974); Houston v. State, 49 Ala. App. 403, 272 So. 2d 610 (1973); Sims v. State, 51 Ala. App. 183, 283 So. 2d 635 (1973); State v. Taylor, 109 Ariz. 518, 514 P.2d 439 (1973); State v. Flynn, 109 Ariz. 545, 514 P.2d 466 (1973); State v. Rodriquez, 110 Ariz. 57, 514 P.2d 1245 (1973); State v. Money, 110 Ariz. 18, 514 P.2d 1014 (1973); State v. Salcido, 109 Ariz. 380, 509 P.2d 1027 (1973); State v. Delvecchio, 109 Ariz. 35, 504 P.2d 936 (1972); State v. Branch, 108 Ariz. 351, 498 P.2d 218 (1972); Crawford v. State, 254 Ark. 253, 492 S.W.2d 900 (1973); People v. Chojnacky, 8 Cal. 3d 759, 505 P.2d 530 (1973), 106 Cal. Rptr. 106; People v. O'Roy, 29 Cal. App. 3d 656, 105 Cal. Rptr. 717 (1973); People v. Faulkner, 28 Cal. App. 3d 384, 104 Cal. Rptr. 625 (1972); Lynch v. State, 293 So. 2d 44 (Fla. 1974); Ashford v. State, 274 So. 2d 517 (Fla. 1973); Chaney v. State, 267 So. 2d 65 (Fla. 1972); Hunt v. Hopper, 232 Ga. 53, 205 S.E.2d 303 (1974); Brand v. Wofford, 230 Ga. 750, 199 S.E.2d 231 (1973); Mitchell v. Smith, 229 Ga. 781, 194 S.E.2d 414 (1972); Hudson v. State, 229 Ga. 565, 193 S.E.2d 7 (1972); West v. State, 229 Ga. 427, 192 S.E.2d 163 (1972); State v. Sadler, 95 Idaho 524, 511 P.2d 806 (1973); State v. Grierson, 95 Idaho 155, 504 P.2d 1204 (1972); People v. Johnson, 55 Ill. 2d 62, 302 N.E.2d 20 (1973); People v. Mueller, 54 Ill. 2d 189, 295 N.E.2d 705, *cert. denied*, 414 U.S. 1044 (1973); People v. Reese, 54 Ill. 2d 51, 294 N.E.2d 288 (1973); People v. Burbank, 53 Ill. 2d 261, 291 N.E.2d 161 (1972); People v. Patrick, 53 Ill. 2d 201, 290 N.E.2d 227 (1972); Daniels v. State, — Ind. App. —, 312 N.E.2d 890 (1974); Auer v. State, — Ind. App. —, 289 N.E.2d 321 (1972); Williamson v. State, 201 N.W.2d 490 (Iowa 1972); State v. Jackson, 199 N.W.2d 102 (Iowa 1972); State v. Oskey, 213 Kan. 564, 517 P.2d 141 (1973); State v. Jackson, 212 Kan. 473, 510 P.2d 1219 (1973); State v. Daniel, — La. —, 297 So. 2d 417 (1974), *aff'd sub nom.* Daniel v. Louisiana, 420 U.S. 31 (1975); State v. Rowe, 314 A.2d 407 (Me. 1974); State v. Emery, 304 A.2d 908 (Me. 1973); State v. Northup, 303 A.2d 1 (Me. 1973); State v. Boyd, 294 A.2d 459 (Me. 1972); Foster v. State, 272 Md. 273, 323 A.2d 419 (1974) (dictum); Jackson v. State, 17 Md. App. 167, 300 A.2d 430 (1973); Booth v. State, 16 Md. App. 524, 298 A.2d 478 (1973); Commonwealth v. Stanley, — Mass. —, 292 N.E.2d 694 (1973); Commonwealth v. Kudish, — Mass. —, 289 N.E.2d 856 (1972); Commonwealth v. Lopes, — Mass. —, 287 N.E.2d 118 (1972); State v. Carey, 296 Minn. 214, 207 N.W.2d 529 (1973); Hobson v. State, 285 So. 2d 464 (Miss. 1973); Allen v. State, 274 So. 2d 136 (Miss. 1973); Chandler v. State, 272 So. 2d 641 (Miss. 1973); State v. Richardson, 495 S.W.2d 435 (Mo. 1973); State v. Jenkins, 494 S.W.2d 14 (Mo. 1973); Arnold v. State, 484 S.W.2d 248 (Mo. 1972); State v. Jordan, 506 S.W.2d 74 (Mo. Ct. App. 1974); State v. Gray, 503 S.W.2d 457 (Mo. Ct. App. 1973); State v. Tidwell, 500 S.W.2d 329 (Mo. Ct. App. 1973); Shields v. State, 491 S.W.2d 6 (Mo. Ct. App. 1973); Reed v. Warden, 89 Nev. 141, 508 P.2d 2 (1973); Baker v. State, 88 Nev. 369, 498 P.2d 1310 (1972); Spencer v. State, 88 Nev. 392, 498 P.2d 1335 (1972); People v. Blake, 35 N.Y.2d 331, 320 N.E.2d 625, 361 N.Y.S.2d 881

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*

(1974); People v. Parrish, 70 Misc. 2d 577, 333 N.Y.S.2d 631 (Nassau Co. Ct. 1972); State v. Tingler, 31 Ohio St. 2d 100, 285 N.E.2d 710 (1972); State v. Sheardon, 31 Ohio St. 2d 20, 285 N.E.2d 335 (1972); Stewart v. State, 509 P.2d 1402 (Okla. Crim. App. 1973); Chandler v. State, 501 P.2d 512 (Okla. Crim. App. 1972); State v. McLeod, 260 S.C. 445, 196 S.E.2d 645 (1973); Nichols v. State, 511 S.W.2d 269 (Tex. Crim. App. 1974); Lane v. State, 506 S.W.2d 212 (Tex. Crim. App. 1974); Ward v. State, 505 S.W.2d 832 (Tex. App. 1974); Evans v. State, 499 S.W.2d 123 (Tex. App. 1973); Yancy v. State, 491 S.W.2d 891 (Tex. App. 1973); Ellingsworth v. State, 487 S.W.2d 108 (Tex. Crim. App. 1972); Turner v. State, 486 S.W.2d 797 (Tex. Crim. App. 1972); Jones v. State, 63 Wis. 2d 97, 216 N.W.2d 224 (1974); State v. Russell, 60 Wis. 2d 712, 211 N.W.2d 637 (1973); Laster v. State, 60 Wis. 2d 525, 211 N.W.2d 13 (1973); State v. Taylor, 60 Wis. 2d 506, 210 N.W.2d 873 (1973).

77. Giles v. State, 52 Ala. App. 106, 289 So. 2d 673 (1974); Lynch v. State, 293 So. 2d 44 (Fla. 1974); State v. Grierson, 95 Idaho 155, 504 P.2d 1204 (1972); Auer v. State, — Ind. App. —, 289 N.E.2d 321 (1972); State v. Jackson, 199 N.W.2d 102 (Iowa 1972); State v. Jackson, 212 Kan. 473, 510 P.2d 1219 (1973); State v. Edgecombe, 275 So. 2d 740 (La. 1973); Commonwealth v. Lopes, — Mass. —, 287 N.E.2d 118 (1972); State v. Carey, 296 Minn. 214, 207 N.W.2d 529 (1973); Chandler v. State, 272 So. 2d 641 (Miss. 1973); State v. Sheardon, 31 Ohio St. 2d 20, 285 N.E.2d 335 (1972); State v. McLeod, 260 S.C. 445, 196 S.E.2d 645 (1973); Turner v. State, 486 S.W.2d 797 (Tex. Crim. App. 1972).

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.

78. *Compare* State v. Singleton, 253 La. 18, 215 So. 2d 838 (1968), Commonwealth v. Guillory, 356 Mass. 591, 254 N.E.2d 427 (1970), State v. Isaacs, 24 Ohio App. 2d 115, 265 N.E.2d 327 (1970), and Martinez v. State, 437 S.W.2d 842 (Tex. Crim. App. 1969), *with* State v. Edgecombe, — La. —, 275 So. 2d 740 (1973), Commonwealth v. Lopes, — Mass. —, 287 N.E.2d 118 (1972), State v. Sheardon, 31 Ohio St. 2d 20, 285 N.E.2d 335 (1972), Turner v. State, 486 S.W.2d 797 (Tex. Crim. App. 1972).

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.[80] In a plurality opinion,[81] the court stated, "We are convinced that it would be artificial to attach conclusionary significance to the indictment in Pennsylvania."[82] One other state court has indicated in dictum that, even after *Kirby*, the right to counsel attaches at arrest.[83]

Although *Kirby* expressly rejected *Escobedo*,[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.[85] For example, the Maine Supreme Court interpreted *Kirby* as holding that "the Sixth Amendment right to

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80. Commonwealth v. Richman, — Pa. —, 320 A.2d 351, 353 (1974).

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 . . . .

Id. at 361.

82. *Id.* at 353.

83. 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.

84. *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.

85. People v. Lowe, — Colo. —, 519 P.2d 344 (1974) (en banc); West v. State, 229 Ga. 427, 192 S.E.2d 163 (1972); State v. Rowe, 314 A.2d 407 (Me. 1974); State v. Easthope, 29 Utah 2d 400, 510 P.2d 933 (1973).

counsel [does] not apply to a police-arranged *investigatory* confrontation."[86]

Several states, although following the majority view, have questioned *Kirby* on policy grounds.[87] A Missouri court stated:

> [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.[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,[89] continued, despite the *Kirby* decision,[90] to apply the broad pretrial right to counsel established after *Wade*.[91]

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86. State v. Rowe, 314 A.2d 407, 412 (Me. 1974) (emphasis added).

87. State v. Gray, 503 S.W.2d 457, 460 (Mo. Ct. App. 1973); Chandler v. State, 501 P.2d 512, 519-20 (Okla. Crim. App. 1972); State v. Taylor, 60 Wis. 2d 506, 522, 210 N.W.2d 873, 882 (1973).

88. State v. Gray, 503 S.W.2d 457, 460 (Mo. Ct. App. 1973). Similarly, the Oklahoma Criminal Court of Appeals, in Chandler v. State, 501 P.2d 512, 520 (Okla. Crim. App. 1972), stated:

> [W]e 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*.

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."

89. People v. Jackson, 391 Mich. 323, 338, 217 N.W.2d 22, 27 (1974), relied upon People v. Anderson, 389 Mich. 155, 205 N.W.2d 461 (1973), a photographic identification case, in which the Michigan Supreme Court thoroughly discussed the legal and scientific problems that eyewitness identifications present.

90. People v. Jackson, 391 Mich. 323, 217 N.W.2d 22 (1974); People v. Dates, 52 Mich. App. 544, 546, 218 N.W.2d 100, 101 (1974).

91. For a discussion of the application of the *Wade, Gilbert, Stovall* trilogy, see

Although Michigan is unlikely to extend the right to counsel to precustody corporeal identifications,[92] it has firmly established a right to counsel upon arrest.[93]

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.[94] 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 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 . . . 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.[95]

Following the lead of Michigan, states could thus establish a broad post-arrest right to counsel at identification confrontations.[96] In addition, the

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People v. Hutton, 21 Mich. App. 312, 320-24, 175 N.W.2d 860, 864-66 (1970).

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.

93. People v. Jackson, 391 Mich. 323, 217 N.W.2d 22 (1974); People v. Dates, 52 Mich. App. 544, 218 N.W.2d 100 (1974).

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*.

95. Commonwealth v. Richman, 458 Pa. 167, —, 320 A.2d 351, 361 (1974) (Eagen, J., concurring). *See* People v. Jackson, 391 Mich. 323, 217 N.W.2d 22 (1974), *citing* People v. Anderson, 389 Mich. 155, 205 N.W.2d 461 (1973) (pre-trial right to counsel at photographic identifications); cases cited note 87 *supra*.

96. *See* notes 89, 91 & 93 *supra* and accompanying text. *Compare* People v. Jackson, 391 Mich. 323, 338-39, 217 N.W.2d 22, 27 (1974) (right to counsel at corporeal and photographic identifications before or after filing of formal charges, "independent of any federal constitutional mandate"), *with* People v. Lee, 391 Mich. 618, 625, 218 N.W.2d

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*,[97] 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*.[98]

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[99] 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"[100]—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

655, 658 (1974) (no right to counsel at pre-arrest photographic identification procedure).

97. In State v. Anderson, 117 N.J. Super. 507, 515-16, 285 A.2d 234, 238 (1971), a New Jersey appellate court found the right to counsel applicable to a preformal charge showup because the police had already focused upon the accused and therefore had gone beyond the investigatory stage of the proceedings. *See* State v. Gilliam, 83 N.M. 325, 491 P.2d 1080 (Ct. App. 1971) (dictum). A Maryland court, however, noted that the *Escobedo* accusatory-focus analysis is inconsistent with the *Kirby* rationale. Jackson v. State, 17 Md. App. 167, 174 n.4, 300 A.2d 430, 435 n.4 (1973). *See* note 89 *supra*.

98. *See* sources cited notes 85 & 86 *supra* and accompanying text.

99. Commonwealth v. Richman, 458 Pa. 167, 320 A.2d 351 (1974). The court stated:

> *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* rule[103] 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.*

103. Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943).

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. I(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).

107. The police arrested Mallory in mid-afternoon and subjected him to interrogation.

post-*Wade* decisions applied the rule to exclude trial testimony about corporeal identifications that took place prior to arraignment.[108] Chief Justice Burger, then judge of the Court of Appeals for the District of Columbia, decribed the effect of *Wade* upon the application of the *McNabb-Mallory* rule as follows:

> [T]he reason for not [previously] applying *Mallory* to a lineup identification was that a lineup in the absence of counsel before *Wade* was a perfectly legitimate procedure . . . and that *Mallory* was concerned with improper "interrogation." It was natural for the cases following *Mallory* to concentrate on the exclusion of utterances, but not other forms of evidence. But *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 *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 *Wade*.[109]

Although the Court in *Mallory* stated that the rule "does not call for mechanical or automatic obedience,"[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.[111] Thus, applying the *McNabb-Mallory* rule to the identification context, law enforcement officials may not postpone the filing of formal charges until after identification confrontations.[112] The *McNabb-Mallory* rule, which requires a speedy arraignment, coupled with *Kirby*, which requires counsel at postarraignment identifications, should in most cases guarantee an

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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.

108. *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), *cert. denied*, 393 U.S. 1067 (1969). *But see* Williams v. United States, 419 F.2d 740 (D.C. Cir. 1969). In addition, *Mallory* involved a pre-arraignment confrontation. *See* note 107 *supra*.

109. Adams v. United States, 399 F.2d 574, 580 (D.C. Cir. 1968) (concurring opinion), *cert. denied*, 393 U.S. 1067 (1969).

110. 354 U.S. at 455.

111. The Court in *Mallory* limited permissible delay to necessary police administrative tasks, such as booking or the "quick verification" of exculpatory statements made by the accused. *Id.* at 454-55.

112. Application of the *McNabb-Mallory* rule will not extend the right to counsel to on-the-scene identification confrontations, which, even prior to *Kirby*, were exempted as exigent circumstances. *See* note 45 *supra*.

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]?

114. Subsequent to *Kirby*, the Supreme Court held the right to counsel inapplicable to any photographic identification proceeding. United States v. Ash, 413 U.S. 300 (1973). Prior to *Ash*, the United States Courts of Appeals had unanimously rejected the application of the sixth amendment to photographic identifications. United States *ex rel.* Reed v. Anderson, 461 F.2d 739 (3d Cir. 1972); United States v. Long, 449 F.2d 288 (8th Cir.), *cert. denied*, 405 U.S. 974 (1971); United States v. Serio, 440 F.2d 827 (6th Cir.), *cert. denied*, 404 U.S. 838 (1971); United States v. Fowler, 439 F.2d 133 (9th Cir. 1971); United States v. Williams, 436 F.2d 1166 (9th Cir. 1970), *cert. denied*, 402 U.S. 912 (1971); United States v. Von Roeder, 435 F.2d 1004 (10th Cir. 1970), *cert. denied*, 403 U.S. 934 (1971); United States v. Roustio, 435 F.2d 923 (9th Cir. 1970); United States v. Edwards, 433 F.2d 357 (9th Cir. 1970); Allen v. Rhay, 431 F.2d 1160 (9th Cir. 1970), *cert. denied*, 404 U.S. 834 (1971); United States v. Zeiler, 427 F.2d 1305 (3d Cir. 1970); United States v. Ballard, 423 F.2d 127 (5th Cir. 1970); United States v. Collins, 416 F.2d 696 (4th Cir.), *cert. denied*, 396 U.S. 1025 (1970); Rech v. United States, 410 F.2d 1131 (10th Cir.), *cert. denied*, 396 U.S. 970 (1969); United States v. Bennett, 409 F.2d 888 (2d Cir.), *cert. denied*, 396 U.S. 852 (1969); United States v. Robinson, 406 F.2d 64 (7th Cir.), *cert. denied*, 395 U.S. 926 (1969); McGee v. United States, 402 F.2d 434 (10th Cir. 1968), *cert. denied*, 394 U.S. 908 (1969).

Prior to *Ash*, the majority of state courts similarly denied the right to counsel at photographic identifications. People v. Lawrence, 4 Cal. 3d 273, 481 P.2d 212, 93 Cal. Rptr. 204 (1971); Reed v. State, 281 A.2d 142 (Del. 1971); Staten v. State, 248 So. 2d 697 (Fla. App. 1971); People v. Martin, 47 Ill. 2d 331, 265 N.E.2d 685 (1970), *cert. denied*, 403 U.S. 921 (1971); Crenshaw v. State, 13 Md. App. 361, 283 A.2d 423 (1971); Smith v. State, 6 Md. App. 59, 250 A.2d 285 (1969); Stevenson v. State, 244 So. 2d 30 (Miss. 1971); State v. Brookins, 468 S.W.2d 42 (Mo. 1971); State v. Accor, 277 N.C. 65, 175 S.E.2d 583 (1970); State v. Searcy, 4 Wash. App. 860, 484 P.2d 417 (1971); Kain v. State, 48 Wis. 2d 212, 179 N.W.2d 777 (1970). *But see* Thompson v. State, 85 Nev. 134, 451 P.2d 704, *cert. denied*, 396 U.S. 873 (1969); Commonwealth v. Whiting, 439 Pa. 205, 266 A.2d 738, *cert. denied*, 400 U.S. 919 (1970). With *Ash* having clearly resolved that no right to counsel exists at the federal level, the states are

law enforcement officials can circumvent the limited protection remaining under the *Wade* rule,[115] 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,[116] or adoption of broad statutory provisions,[117] the states can preserve the right to counsel at corporeal identification proceedings.

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likely to reaffirm that holding. *See* People v. Lowe, — Colo. —, 519 P.2d 344 (1974); People v. Moreno, 181 Colo. 106, 507 P.2d 857 (1973); Morrison v. State, 129 Ga. App. 558, 200 S.E.2d 286 (1973); Parsley v. State, — Ind. —, 300 N.E.2d 652 (1973); Sawyer v. State, — Ind. —, 298 N.E.2d 440 (1973); State v. Wallace, — La. —, 285 So. 2d 796 (1973); State v. Higginbotham, 298 Minn. 1, 212 N.W.2d 881 (1973); State v. Huerta, 191 Neb. 280, 214 N.W.2d 613 (1974); Green v. State, 510 S.W.2d 919 (Tex. Crim. App. 1974); Hubgard v. State, 496 S.W.2d 924 (Tex. Crim. App. 1973); White v. State, 496 S.W.2d 642 (Tex. Crim. App. 1973); Holmes v. State, 59 Wis. 2d 488, 208 N.W.2d 815 (1973).

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*.

116. The adoption of rules of procedure avoids problems of retroactivity and preserves a flexibility lacking in constitutional law. Commonwealth v. Richman, 458 Pa. 167, —, 320 A.2d 351, 357 (1974) (Pomeroy, J., concurring).

117. *Cf.* N.C. Gen. Stat. § 7A-451(b)(2) (1969). The statute was extended after *Wade* to establish a broad postarrest right to counsel. State v. Bass, 280 N.C. 435, 186 S.E.2d 384 (1972). After *Kirby*, the statute was amended to require appointment of counsel at a corporeal identification proceeding only "after formal charges have been preferred." N.C. Gen. St. § 7A-451(b)(2) (Supp. 1975).