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The Right to a Lawyer at a Lineup: Support From State Courts and Experimental Psychology

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I. Introduction

The tales of two Texas bank robbery cases, twenty years apart, tell how the right to have counsel present at a lineup [1] started well but ran afoul of an aberrant interpretation of the sixth amendment. The two cases also provide a backdrop for a demonstration of how state courts, armed with a better understanding of the dangers inherent in eyewitness identifications, are struggling to free themselves from the constraints of United States Supreme Court doctrine.

In both cases the robbers wore disguises of dubious value. In 1964, a man with a small strip of tape on each side of his face robbed a bank in Eustace, Texas. In 1985, another holdup man, sporting a shower cap and sunglasses, struck several banks in Houston. Lineups provided the key identification testimony in both cases.

In the first case, *United States v. Wade*,[2] the United States Supreme Court declared that a criminal suspect has a sixth amendment right to a lawyer at a lineup. By the time of the later case of *Foster v. State*,[3] however, state and federal courts were deciding that no such right exists

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1. In a lineup identification proceeding a crime witness views several persons standing in a line and is asked whether any of them is the perpetrator of the offense.

2. 388 U.S. 218 (1967). The companion case of Gilbert v. California, 388 U.S. 263 (1967), also involved a lineup. The holdings in the two cases became known as the *Wade-Gilbert* rule. R. LaFave & J. Israel, Criminal Procedure (1985).

3. 713 S.W.2d 789 (Tex. Ct. App. 1986) (The *Foster* case actually involved a series of bank robberies.)

in the typical lineup. That is true because in *Kirby v. Illinois*,[4] only five years after *Wade*, the United States Supreme Court held that, unless "adversary judicial proceedings"[5] have been initiated against him, an arrested suspect is not entitled to have his lawyer attend a lineup.[6] Shortly afterward, in *United States v. Ash*,[7] the Court held that there is no sixth amendment right to counsel at a photographic display,[8] even after indictment.

With *Ash* it became clear that even the initiation of adversarial criminal proceedings did not mean that defense counsel was to be allowed to attend every phase of the prosecution after that point. The actual proceeding in question must be examined to determine whether it is a confrontation that can be considered a "critical stage"[9] of the prosecution, at which counsel's presence is required. The suspect's counsel need not be permitted to attend a photographic display, reasoned the *Ash* Court, because the suspect is not physically present at such an identification proceeding.[10] The photo array witness interview is not a confrontation. Neither is the array proceeding a critical stage of the prosecution. Because the defendant's attorney could examine the photo array in preparing for trial, the Court believed that such a proceeding did not involve the same dangers of suggestiveness as the lineup and was more easily reconstructed for the purpose of cross-examination at trial.[11]

Given the *Kirby* and *Ash* decisions, it can be expected the police will not wait until after the initiation of formal adversarial proceedings to hold a lineup or photo array,[12] thereby precluding any sixth amendment claim that counsel must be present. In the typical case, they conduct the lineup within twenty-four hours after arrest.[13] The *Wade* case was

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4. 406 U.S. 682 (1972).
5. *Id.* at 688.
6. *Id.* at 691.
7. 413 U.S. 300 (1973).
8. In a photographic display or photo array proceeding a witness is shown a group of photographs and is asked whether the suspect is depicted therein.
9. *Ash*, 413 U.S. at 303.
10. *Id.* at 317.
11. *Id.* at 318-19.
12. People v. Fowler, 1 Cal. 2d 335, 82 Cal. Rptr. 363, 461 P.2d 643 (1969); J. ISRAEL, Y. KAMISAR, W. LAFAVE, CRIMINAL PROCEDURE AND THE CONSTITUTION 350 (Rev. ed. 1989) (lineup before formal proceedings "common practice" after *Kirby*).
13. Whitten & Robertson, *Post-Custody, Pre-Indictment Problems of Fundamental Fairness and Access to Counsel: Mississippi's Opportunity*, 13 VT. L. REV. 247, 249 (1988); Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436, 1442 (1987). *See also* United States v. Wade, 388 U.S. 218, 255 (1967) (White, J., dissenting) ("Identifications frequently take place after arrest but before an indictment is returned or an information is filed.").

unusual in that the suspect had been indicted before the lineup.[14] At the time of Foster's lineup he had not been arrested, let alone formally charged or indicted for the bank robberies; he was already in jail serving a sentence on other offenses.[15] For those reasons the Texas intermediate appellate court accorded him no sixth amendment right to counsel at the lineup, and the court saw no reason to recognize such a right under state law.[16]

Of the state courts that have addressed the issue of the right to counsel at a lineup under state constitutions and statutes, most have simply followed *Kirby*.[17] This article will argue that merely adopting formalistic federal precedent is not the proper way to interpret state constitutional guarantees of counsel, especially in light of psychological research into the dangers of eyewitness and lineup identification conducted since the *Wade* and *Kirby* decisions. Although state right-to-counsel provisions sometimes may be comparable in scope to the federal sixth amendment, "an independent examination of the history, policy, and precedent surrounding relevant state law is necessary before that conclusion can be reached."[18] This article will demonstrate how a conclusion contrary to *Kirby* can be justified in light of (1) new research into the dangers inherent in eyewitness identification in general and in lineups particularly, (2) the nature of the *Kirby* line of cases as an aberration to the sixth amendment's rationale, and (3) precedents from state courts. The main goal is to show how a significant expansion of the right to counsel can rest on a truly independent and adequate state constitutional ground[19]—on a principled basis and not merely as a result-oriented reaction to undesirable federal precedent.[20]

II. Dangers Inherent in Eyewitness Identification

Both jurists and social scientists have observed that the inaccuracy of many eyewitness identifications and the resulting injustices are well-

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14. *Wade*, 338 U.S. at 219.

15. *Foster*, 713 S.W.2d at 790.

16. *Id.* at 791.

17. 406 U.S. 682 (1972); *see, e.g.*, State v. Boyd, 294 A.2d 459 (Me. 1972); People v. Hawkins, 55 N.Y.2d 474, 450 N.Y.S.2d 159, 435 N.E.2d 376 (1982); People v. Delahunt, 121 R.I. 565, 401 A.2d 1261 (1979); State v. Taylor, 60 Wis. 2d 506, 210 N.W.2d 873 (1973).

18. Thomas v. State, 723 S.W.2d 696, 702 (Tex. Crim. App. 1986) (citing State v. Jewett, 146 Vt. 221, 500 A.2d 233 (1985)).

19. Michigan v. Long, 463 U.S. 1032 (1983).

20. *See* State v. Jewett, 146 Vt. 221, 224, 500 A.2d 233, 235 (1985) (recognizing the need for principled bases for independent state constitutional analysis); *See also* Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 Tex. L. Rev. 1141, 1179-80 (1985).

known.[21] "Nor are such statements vague speculations; the documentation is exhaustive, explicit and vast."[22] Even a person who eventually is acquitted of the erroneous criminal charge can be victimized by the resulting trauma to his mind, emotions, reputation, job, and family.[23] The *United States v. Wade*[24] opinion, which recognized a right to counsel at a lineup, but which involved a postindictment proceeding, emphasized the dangers inherent in eyewitness identification. At the time of the *Wade* and *Kirby* decisions, "[t]he unreliability of human perception and memory and their susceptibility to suggestive influence [were] well documented in psychological and legal literature," but there were no scientific studies of the behavior of the eyewitness in the context of the lineup.[25] Not until the end of the 1970's did scientists hold the first conference concentrating solely on the psychology of testimony by eyewitnesses.[26] Since that time, much more study has been applied specifically to the lineup problem, and a better understanding of eyewitness memory has developed.[27]

The results of experimental psychology suggest that many of the common-sense assumptions that guide decisions of the participants in a criminal trial may be erroneous. Professor Yarmey has identified some of those questionable assumptions:[28] (1) Subtle differences in the wording of questions (e.g., asking if the witness saw *the* knife instead of asking if she saw *a* knife) have a great effect on the responses of witnesses,[29]

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21. A. YARMEY, THE PSYCHOLOGY OF EYEWITNESS TESTIMONY 7-10 (1979).

22. People v. Hawkins, 55 N.Y.2d 474, 491, 450 N.Y.S.2d 159, 168, 435 N.E.2d 376, 385 (Meyer, J., dissenting) (citing fourteen sources).

23. J. ISRAEL, Y. KAMISAR, W. LAFAVE, CRIMINAL PROCEDURE AND THE CONSTITUTION 450 (Rev. ed. 1989); Twining, *Identification and Misidentification in Legal Processes: Redefining the Problem*, in EVALUATING WITNESS EVIDENCE, 255, 275-77 (S. Lloyd-Bostock & B. Clifford eds. 1983) (hereinafter LLOYD-BOSTOCK); *see also* Wells & Loftus, *Eyewitness Research: Then and Now*, in EYEWITNESS TESTIMONY (G. Wells & E. Loftus eds. 1984) (citing P. HAIN, MISTAKEN IDENTITY (1976)).

24. 388 U.S. 218 (1967).

25. Levine & Tapp, *The Psychology of Criminal Identification: The Gap from Wade to Kirby*, 121 U. PA. L. REV. 1079, 1087-88 (1973).

26. Wells & Lindsay, *How Do People Infer the Accuracy of Eyewitness Memory? Studies of Performance and a Metamemory Analysis*, in LLOYD-BOSTOCK, *supra* note 23, at 41 (citing Wells, *Eyewitness Testimony: The Alberta Conference*, 4 LAW & HUM. BEHAV. 237 (1980)).

27. *See* Wells & Loftus, *Eyewitness Research: Then and Now*, in EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES (G. Wells & E. Loftus eds. 1984) (hereinafter PERSPECTIVES) (85% of all published writings on eyewitness identification research have emerged since 1978. *Id.* at 3.).

28. A. YARMEY, *supra* note 20, at 7-10 (citing examples and authorities).

29. Loftus & Zanni, *Eyewitness Testimony: The Influence of the Wording of a Question*, 5 BULL. PSYCHONOMIC SOC. 86 (1975).

but many potential jurors fail to recognize the distinction.[30] (2) Testimony given with an air of certainty is treated by the courts as accurate,[31] but studies do not support such an assumption.[32] (3) Courts do not appear to realize how quickly one forgets what has occurred and how complicated the process of forgetting is.[33] (4) Judges who believe that the mind retains more readily the memory of an unusual, startling, or stressful scene than it does the impression of an ordinary occurrence are in error if they think that memory works by simply passively recording, rather than actively reconstructing, events.[34] The human memory is not a smoothly operating mechanical device, "like a videotape recorder."[35] In the pages that follow, this article will deal with the results of experiments illustrating these and other misconceptions.

A. Power of Suggestion

Exposure to new and false information about an event through means of questions containing presuppositions can supplement[36] or even transform[37] memory. "Memory, it appears, is extremely fragile and can be supplemented, altered, or even restructured by as simple an instrument as a strong verb, embedded unnoticed in a question about the event concerned."[38] Experiments show that, if misleading information or suggestions are given to a witness a week or more after the event and just before testing, the accuracy of the witness' memory is drastically reduced.[39] Subjects tend to recall the erroneous information, 80% of

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30. Yarmey & Jones, *Is the Psychology of Eyewitness Identification a Matter of Common Sense?*, in LLOYD-BOSTOCK, *supra* note 22, at 13, 29.

31. Gardner, *The Perception and Memory of Witnesses*, 18 CORNELL L. Q. 391 (1933).

32. *See infra* text accompanying notes 45-50.

33. Gardner, *supra* note 31; Hutchins & Slesinger, *Some Observations on the Law of Evidence-Memory*, 41 HARV. L. REV. 860 (1928).

34. U. NEISSER, COGNITIVE PSYCHOLOGY, 279-305 (1967).

35. Sanders, *Expert Witnesses in Eyewitness Facial Identification Cases*, 17 TEX. TECH. L. REV. 1409, 1427 n.62 (1986) (quoting testimony by Professor Loftus in W. LOH, SOCIAL RESEARCH IN THE JUDICIAL PROCESS: CASES, READINGS AND TEXT at 583 (1984)).

36. Loftus & Ketcham, *The Malleability of Eyewitness Accounts*, in LLOYD-BOSTOCK, *supra* note 23, at 159, 160-63.

37. *Id.* at 163, 168-69; *see also* Loftus, Miller, & Burns, *Semantic Integration of Verbal Information into a Visual Memory*, 4 J. EXP. PSYCHOLOGY: HUM. LEARNING & MEMORY 19, 29 (1978).

38. Loftus & Ketcham, *supra* note 36, at 159. *See also* Loftus, Miller & Burns, *supra* note 36, at 160 (citing Loftus & Palmer, *Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory*, 13 J. VERBAL LEARNING & VERBAL BEHAV. 585 (1974)).

39. Loftus, Miller, & Burns, *supra* note 36, at 163.

them performing incorrectly when tested.[40] Memory for faces, like other memory, is affected by later misleading information.[41] Such studies suggest that in criminal cases, when expected testimony is being reviewed (typically long after a crime has been committed and immediately before trial), witnesses are extremely vulnerable to inadvertent or intentional suggestion by prosecutors.

The *Wade* opinion stressed that eyewitness accuracy can be adversely affected not only by the purposeful scheming of police investigators but also by suggestions given unintentionally: "We do not assume that these risks are the result of police procedures intentionally designed to prejudice an accused. Rather we assume they derive from the dangers inherent in eyewitness identification and the suggestibility inherent in the context of the pretrial identification."[42] The studies suggest that courts have oversimplified the issue of lineup fairness and accuracy. Instead of being a passive viewer, "the victim or witness at a lineup is one 'actor' in a complex social situation."[43]

B. Confidence

The most revealing findings that Professors Wells and Lindsay drew from a series of experiments which they and others performed over several years were that a person's tendency to believe an eyewitness's testimony is strongly related to the confidence of the witness in his identification, as one would expect, but that, contrary to what most people "intuitively believe,"[44] the confidence of an eyewitness is practically worthless as a cue to the witness's accuracy.[45] The latter finding directly contradicts the Supreme Court's notion that the degree of con-

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40. *Id.*

41. *Id.* at 167 (citing Loftus & Greene, *Warning: Even Memory for Faces May be Contagious*, 4 LAW & HUM. BEHAV. 323 (1980). Recognition of voices will almost always be less reliable than memory for faces. Clifford, *Memory for Voices: The Feasibility and Quality of Earwitness Evidence*, in LLOYD-BOSTOCK, *supra* note 22, at 189.

42. United States v. Wade, 388 U.S. 218, 235 (1967).

43. Levine & Tapp, *supra* note 25, at 1110.

44. Wells & Murray, *Eyewitness Confidence*, in PERSPECTIVES, *supra* note 27, at 159 (citing Brigham & Wolfskiel, Opinions of Attorneys and Law Enforcement Personnel on the Accuracy of Eyewitness Identifications (unpublished manuscript, 1982); Deffenbacher & Loftus, *Do Jurors Share a Common Understanding Concerning Eyewitness Behavior?*, 7 LAW & HUM. BEHAV. 15 (1982); Rahaim & Brodsky, Empirical Evidence vs. Common Sense: Juror and Lawyer Knowledge of Eyewitness Accuracy (unpublished manuscript, 1981); Wells, Lindsay, & Ferguson, *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification*, 64 J. APPLIED PSYCHOLOGY 440 (1979)); Yarmey & Jones, *supra* note 30.

45. Wells & Lindsay, *supra* note 26, at 51; Wells & Murray, *supra* note 40, at 163 ("No applicable value" adheres to knowledge of eyewitness confidence).

fidence the witness shows in his identification is an important factor to consider when deciding whether the identification is reliable.[46] Nevertheless, the expression of confidence or certainty on the part of an eyewitness greatly affects how jurors gauge the accuracy of the witness's identification.[47] In one study of mock jury deliberations following a reenactment of a trial, some jurors spontaneously pointed to the confidence of an eyewitness as an indicator of the witness's accuracy.[48]

Jurors and trial judges have no way of learning that a confident witness can be wrong. If, despite a confident eyewitness, the defendant has a truly solid alibi, the government typically has the case dismissed. In this and other ways, jurors and judges are "neatly protected from learning that the confidence of an eyewitness bears no useful relationship to the accuracy of an eyewitness."[49] In light of the experimental studies, the common but erroneous notion that there is a close relationship between the certainty of a witness and the accuracy of the identification should be expunged from our jurisprudence.[50]

C. Passage of Time

The passage of weeks or months may greatly reduce the accuracy of the identification.[51] In one study, the rate of false identification of supposed armed robbers increased from 48% at 2 days, to 62% at 21 days, and to 93% at 56 days.[52] Yet some jurors think that an eyewitness's

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46. *See, e.g.*, Manson v. Brathwaite, 432 U.S. 98 (1977) (confidence of witness a key factor); Neil v. Biggers, 409 U.S. 188 (1972).

47. Wells & Murray, *supra* note 44, at 155 (citing Wells, Ferguson, & Lindsay, *The Tractability of Eyewitness Confidence and Its Implications for Triers of Fact*, 66 J. Applied Psychology 688 (1981)); Wells, Lindsay, & Ferguson, *supra* note 44.

48. Wells, *How Adequate is Human Intuition for Judging Eyewitness Testimony?*, in Perspectives, *supra* note 27, at 256, 266 (citing Hastie, From Eyewitness Testimony to Beyond Reasonable Doubt (unpublished manuscript, 1980)).

49. Wells & Murray, *supra* note 44, at 169.

50. Deffenbacher, *Eyewitness Accuracy and Confidence: Can We Infer Anything About Their Relationship?*, 4 Law & Hum Behav. 243 (1980); Wells & Murray, *supra* note 44 (citing Leippe, *Effects of Integrative Memorial and Cognitive Processes on the Correspondence of Eyewitness Accuracy and Confidence*, 4 Law & Hum. Behav. 261 (1980)).

51. Shepherd, *Identification After Long Delays*, in Lloyd-Bostock, *supra* note 23, at 173.

52. Egan, Pittner & Goldstein, *Eyewitness Identification: Photographs vs. Live Models*, 1 Law and Hum. Behav. 199 (1977). *Accord*, Malpass & Devine, *Eyewitness Identification: Line Up Instructions and the Absence of the Offender*, 66 J. Applied Psychology 482 (1981); Malpass & Devine, *Guided Memory in Eyewitness Identification*, 66 J. Applied Psychology 343 (1981).

memory remains accurate over long periods,[53] and others believe that accuracy may increase as time passes.[54]

D. Stress

One classic work described twenty-nine convictions of innocent persons, each conviction resulting from the positive identification of the accused by the victim of a violent crime.[55] One explanation for such mistakes is that, because of the extreme psychological and emotional arousal caused by an armed robbery, the victim/witness of a violent crime may block out stimuli or focus on the weapon, rather than on the face of the culprit.[56] Tests involving potential jurors in Canada and the United States indicated that they had some knowledge of the "weapon focus problem," but their responses also suggested that they believed inaccurate explanations of the phenomenon.[57]

Contrary to common-sense beliefs about the accuracy of eyewitnesses to violent crimes, "there is no empirical support for the notion that relatively high levels of arousal facilitate eyewitness testimony."[58] Jurors, however, have expressed the erroneous opinion that stress enhances the accuracy of an eyewitness.[59] Lay persons apparently widely hold such beliefs, unaware of studies demonstrating that the anxiety that witnesses feel, when they think that their identification will have serious results, serves to destroy any accuracy-confidence relationship.[60]

E. Overbelief

Police officers, judges, and jurors often overestimate the accuracy of persons who claim to have made eyewitness identifications.[61] "Overbelief" of eyewitnesses by judges and jurors is a well-recognized prob-

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53. Wells, *supra* note 48, at 259 (15% erroneously thought eyewitness's memory for faces would be 90-95% accurate several months after first seeing the face).

54. Hastie, *supra* note 48.

55. E. BORCHARD, CONVICTING THE INNOCENT (1932) (describing total of sixty-five wrong convictions). *See also* Cunningham & Tyrrell, *Eyewitness Credibility: Adjusting the Sights of the Judiciary*, 37 ALA. LAW. 563, 564-65 n.2 & n.4 (1976) (citing other sources and examples).

56. E. LOFTUS, EYEWITNESS TESTIMONY § 2.15 (1987).

57. Yarmey & Jones, *supra* note 30, at 21.

58. Deffenbacher, *The Influence of Arousal on Reliability of Testimony*, in LLOYD-BOSTOCK, *supra* note 23, at 247.

59. Hastie, *supra* note 48.

60. Wells & Murray, *supra* note 44.

61. *See* Cunningham & Tyrrell, *supra* note 55 at 575-85; K. ELLISON & R. BUCKHOUT, PSYCHOLOGY AND CRIMINAL JUSTICE 80-82 (1981); Wells, Lindsay, & Ferguson, *supra* note 44, at 441-45 (1979).

lem, established by many researchers.[62] "[M]ost of us do not have experience in trying to remember faces in very stressful situations such as being a robbery victim."[63] Likewise, jurors have no experience in trying to judge the accuracy of another's identification.[64] Nevertheless, "visual identification of the defendant by the victim or the witness often provides the most persuasive evidence, which cannot be overcome by contrary evidence supporting the accused."[65] Even after it has been proven false, eyewitness testimony can continue to persuade a jury.[66]

> The question of how adequately the juror can assess the credibility of eyewitness testimony is an important one since it is the juror or some other intuitive trier-of-fact who runs the risk of the ultimate error, namely believing an inaccurate eyewitness account or disbelieving an accurate eyewitness account. Does the lay person understand the problems of eyewitness memory? Many judges seem to think so as it is common for expert testimony on eyewitness matters to be prohibited by a judge on grounds that the problem of eyewitness memory is something that is intuitively appreciated by the jurors. Data . . . call this assumption into question.[67]

The great degree of trust that police, jurors, and judges place in lineups and eyewitnesses is not supported by the psychological experiments on the subject.[68]

F. Police Officers as Witnesses

In a pair of studies two-thirds of the lay persons,[69] as well as most of the legal professionals and law students,[70] thought that police officers

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62. *See* Lindsay, Wells & Rumpel, *Can People Detect Eyewitness-Identification Accuracy Within and Across Situations?*, 66 J. Applied Psychology 79, 83-85 (1981); Deffenbacher, *supra* note 50, at 250-52; Yarmey & Jones, *supra* note 30, at 13.

63. Sanders, *supra* note 35, at 1439.

64. *Id.* at 1440 (citing Saks & Kidd, *Human Information Processing and Adjudication: Trial by Hueristics*, 15 Law & Soc'y Rev. 123, 126-27 (1980-81)).

65. Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 Stan. L. Rev. 969, 970 (1977).

66. Loftus & Ketcham, *supra* note 36, at 170, (citing Cavoukian, *Eyewitness Testimony: The Ineffectiveness of Discrediting Information* (paper presented at the Amer. Psychological Assoc. annual meeting, 1980)).

67. Wells & Lindsay, *supra* note 26, at 41.

68. A. Yarmey, *supra* note 21, at 159 (citing Goldstein, *The Fallibility of the Eyewitness: Psychological Evidence*, in Psychology in the Legal Process (B. Sales ed. 1977)).

69. Wells, *supra* note 48 (citing Tickner & Poulton, *Watching for People Actions*, 18 Ergonomics 35 (1975)).

70. Yarmey & Jones, *supra* note 30.

make better eyewitnesses than lay persons. Most officers themselves believe that their training and experience make them superior at observing and remembering details, but the psychological studies fail to confirm their assumptions.[71] To the contrary, "experiments suggest that policemen are more prone to committing interpretive errors in their perceptions of people and activities."[72]

G. Race

The usual difficulties inherent in eyewitness identification may be compounded when race becomes a factor.[73] Several reviews of the literature on eyewitnesses have concluded that cross-race identifications are less reliable than when the witness and suspect are members of the same race.[74] In a well-known study,[75] subjects viewed a picture of a white man holding a razor while arguing with a black man. Half of the observers later remembered the black man as holding the razor. Some said he was brandishing it wildly, and others remembered him as threatening the white man.

At least ten studies demonstrate that white Americans are significantly less able to recognize black faces than they are white faces.[76] The cross-race phenomenon may not be limited to white observers. Four studies have indicated that American black observers are significantly less able to recognize white faces than black ones.[77] Similar results have been

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71. A. YARMEY, *supra* note 21 (citing Clifford, *Police As Eyewitness*, 22 NEW SOC. 176 (1976)).

72. *Id.* (citing Verinis & Walker, *Policemen and the Recall of Criminal Details*, 81 J. OF SOC. PSYCHOLOGY 217 (1970)).

73. Luce, *Blacks, Whites, and Yellows: They All Look Alike to Me*, PSYCHOLOGY TODAY 105 (Nov. 1974); Galper, *'Functional Race Membership' and Recognition of Faces*, 37 PERCEPTUAL & MOTOR SKILLS 455 (1973).

74. E. LOFTUS, *supra* note 66, at § 4.11; A. YARMEY, *supra* note 20, at 130-31; B. CLIFFORD & R. BULL, THE PSYCHOLOGY OF PERSON IDENTIFICATION (1978); Wells, *Applied Eyewitness-Testimony Research: System Variables and Estimator Variables*, 36 J. PERSONALITY & SOC. PSYCHOLOGY 1545 (1978); Ellis, *Recognizing Faces*, 66 BRIT. J. PSYCHOLOGY 409 (1975). *But cf.* Lindsay & Wells, *What do We Really Know About Cross-Race Eyewitness Identification?*, in LLOYD-BOSTOCK, *supra* note 23 (arguing that such conclusion is premature).

75. K. Ellison and R. Buckhout, PSYCHOLOGY AND CRIMINAL JUSTICE 101 (1981) (citing Allport & Postman, *The Basic Psychology of Rumor*, 8 TRANS. N.Y. ACAD. OF SCI., Series 11, 147-49 (1945)).

76. Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 938-39 n.18 (1984) (citing studies).

77. Johnson, *supra* note 76, at 939 n.23, 938-39 n.18 (citing Brigham & Williamson, *Cross-Racial Recognition and Age: When You're Over 60, Do They Still "All Look Alike?"*, 5 PERSONALITY & SOC. PSYCHOLOGY BULL. 218 (1979); Galper, *supra* note 73; Luce, *The Role of Experience in Inter-Racial Recognition*, 1 PERSONALITY & SOC. PSYCHOLOGY BULL. 39 (1974); Malpass, Lavigneur, & Weldon, *Verbal and Visual Training in Face Recognition*, 14 PERCEPTION & PSYCHOPHYSICS 285 (1973)).

obtained with African blacks viewing African and European faces.[78] Results have not been uniform, however, as four studies failed to show significant differences in accuracy for black observers of white versus black faces.[79]

Such experiments suggest that "the differential recognition of black faces by white and black observers is a highly probable event, and more likely to result in error if the observer is white."[80] At present, however, the studies do not establish whether or to what extent jurors believe cross-race identifications.[81]

H. Other Physical Characteristics

Characteristics other than race may affect attitudes of observers. Two studies have indicated that, upon conviction for a crime, an unattractive person is likely to receive a longer prison sentence than an attractive person receives.[82] Men with dark complexions are more likely to be suspected as villains,[83] to be regarded as dishonest or hostile.[84]

I. Other Misconceptions

Research has exposed other misconceptions about eyewitness testimony.[85] The opportunity the witness had to view the criminal is considered

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78. Shepherd, Deregowski, & Ellis, *A Cross-Cultural Study of Recognition Memory for Faces*, 9 INT'L J. PSYCHOLOGY 205 (1974).

79. Johnson, *supra* note 76, at 938-39 n.18 (citing Barkowitz & Brigham, *Recognition of Faces: Own Race Bias, Incentive, and Time Delay*, 12 J. APPLIED SOC. PSYCHOLOGY 255 (1982); Cross, Cross, & Daly, *Sex, Race, Age, and Beauty as Factors in Recognition of Faces*, 10 PERCEPTION & PSYCHOPHYSICS 393 (1971); Malpass & Kravitz, *Recognition for Faces of Own and Other Race*, 13 J. PERSONALITY & SOC. PSYCHOLOGY 330 (1969); Chance, Goldstein, and McBride, *Differential Experience and Recognition Memory for Faces*, 97 J. SOC. PSYCHOLOGY 243 (1975)).

80. A. YARMEY, *supra* note 21, at 130 (citing Malpass, *Racial Bias in Eyewitness Identification*, 1 PERSONALITY & SOC. PSYCHOLOGY 42-44 (1974)).

81. Sanders, *supra* note 35, at 1454 n.164 (citing Lindsay & Wells, *supra* note 74). *See also* Brigham & Barkowitz, *Do 'They All Look Alike'? The Effect of Race, Sex, Experience and Attitudes on the Ability to Recognize Faces*, 8 J. APPLIED SOC. PSYCHOLOGY 306 (1978).

82. A. YARMEY, *supra* note 21 (citing Landy & Aronson, *The Influence of the Character of the Criminal and His Victim on the Decisions of Simulated Jurors*, 5 J. EXPERIMENTAL SOC. PSYCHOLOGY 141 (1969); Efran, *The Effect of Physical Appearance on the Judgment of Guilt, Interpersonal Attraction, and Severity of Recommended Punishment in a Simulated Jury Task*, 8 J. OF RES. IN PERSONALITY 45 (1974)).

83. A. YARMEY, *supra* note 21 (citing Berelson & Salter, *Majority and Minority Americans: An Analysis of Magazine Fiction*, 10 PUB. OPINION Q. 168 (1946)).

84. A. YARMEY, *supra* note 21 (citing Secord, *The Role of Facial Features in Interpersonal Perception*, in PERSON PERCEPTION AND INTERPERSONAL BEHAVIOR 300 (R. Tagiuri & L. Petrullo eds. 1958)).

85. *See generally* PERSPECTIVES, *supra* note 27 (citing other studies).

by courts to be an important factor in judging the accuracy of an identification.[86] Yet, two-thirds of the persons studied were not aware that an eyewitness is prone to overestimate the time involved in a crime sequence.[87] Such overestimation of time should undermine judicial confidence in the witness's depiction of the opportunity he had to view the crime and, in turn, reduce the value of "opportunity to view" as a factor in judging eyewitness reliability.

A witness's identification of a person's face in a photographic array is likely to produce an identification of the same person in a lineup, even if the suspect is not guilty,[88] but many people appear not to know that.[89] Some jurors seem to believe that photographic identifications increase the accuracy of later lineup identifications.[90]

The consequences of mistaken identification are most harmful in cases in which the conviction rested heavily on the eyewitness identification. The danger of erroneous identification is made even more acute in cases like *Wade*[91] and *Foster*,[92] in which the perpetrators were disguised, however clumsily, and the lineup participants were asked to don similar disguises. As indicated by the research conducted in the United States, as well as abroad,[93] since the *Wade* and *Kirby* decisions, such an identification procedure presents many possibilities for intentional or inadvertent suggestion and for misidentification.[94] In general "[i]t may be concluded on the basis of experimental evidence that mistaken identity from lineups is often the rule and not the exception."[95]

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86. Neil v. Biggers, 409 U.S. 188 (1972).

87. Wells, *supra* note 48, at 259 (citing Shiffman & Bobko, *Effects of Stimulus Complexity on Brief Temporal Events*, 103 J. Exp. Psychology 156 (1974)).

88. Brown, Deffenbacher, & Sturgill, *Memory for Faces and the Circumstances of Encounter*, 62 J. Applied Psychology 311 (1977).

89. Yarmey & Jones, *supra* note 30, at 22; Wells, *supra* note 48, at 259 (citing Gorenstein & Ellsworth, *Effect of Choosing an Incorrect Photograph on a Later Identification by an Eyewitness*, 65 J. Applied Psychology 616 (1980)).

90. Hastie, *supra* note 48.

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

92. Foster v. State, 713 S.W.2d 789 (Tex. Ct. App. (1986)).

93. Shepherd, *supra* note 51, at 173 ("the fallibility of eyewitnesses has been acknowledged for many years by legal authorities both in the UK and in the USA") *See also* Watson, The Trial of Adolf Beck (1924) (citing 1904 English committee of inquiry as observing that "evidence as to identity based on personal impressions, however bona fide, is perhaps of all classes of evidence the least to be relied upon, and therefore, unless supported by other facts, an unsafe basis for the verdict of a jury"); P. Devlin, *Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases* (1976); B. Clifford & R. Bull, The Psychology of Person Identification (1978).

94. E. Loftus, *supra* note 66.

95. A. Yarmey, *supra* note 21, at 159. *Accord*, Frankfurter, The Case of Sacco

III. Aberrant Nature of Kirby

As noted above, in *United States v. Wade*[96] the United States Supreme Court first recognized a sixth amendment right to council at a lineup. Two bank employees identified Wade in a lineup conducted after indictment but before trial. At trial they again pointed out Wade. On cross-examination, in an attempt to counter the in-court identification, defense counsel asked the witnesses about the pretrial lineup. Wade's counsel unsuccessfully asked the trial judge to strike the courtroom identifications on the ground that the lineup without counsel violated the defendant's sixth amendment right.[97]

The court of appeals reversed the conviction and ordered a new trial at which the in-court identification was to be excluded.[98] The Supreme Court granted review and agreed that Wade had a sixth amendment right to the presence of counsel at the lineup.[99] The Court realized that criminal procedure had changed dramatically since the adoption of the federal Bill of Rights. A pretrial confession or lineup can "settle the accused's fate and reduce the trial itself to a mere formality."[100]

Recognizing that the sixth amendment spoke of the right of the accused to the "[a]ssistance of counsel *for his defence*,"[101] the Court regarded the plain meaning of the provision as guaranteeing the right to counsel "whenever necessary to assure a meaningful 'defence.' "[102] Continuing in that vein, the Court emphasized that a central meaning of the right to counsel is that an accused "need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial."[103] The *Wade* Court saw the accused's right to a fair trial "as affected by his right meaningfully to cross-examine the witnesses

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and Vanzetti 30 (1927) ("The identification of strangers is proverbially untrustworthy"); Frank & Frank, Not Guilty 61 (1957) ("[P]erhaps erroneous identification of the accused constitutes the major cause of the known wrongful convictions").

96. 388 U.S. 218 (1967).

97. *Id.* at 220. Wade also made a fifth amendment self-incrimination claim, but a majority of the Supreme Court rejected it.

98. United States v. Wade, 358 F.2d 557 (5th Cir. 1966).

99. The Supreme Court held, however, that the violation of the right to counsel at the lineup did not make the in-court identification automatically inadmissible. On remand the trial court was to determine whether (1) the in-court identification was independent of the tainted lineup or whether, in any event, (2) the admission of the in-court identification was harmless error. 388 U.S. at 242.

100. 388 U.S. at 224.

101. *Id.* at 225 (quoting the sixth amendment) (emphasis by the Court).

102. *Id.*

103. *Id.* at 226.

against him and to have effective assistance of counsel at the trial itself."[104]

In analyzing the dangers inherent in pretrial identifications, the Supreme Court in *Wade* cited considerable authority for the proposition that "the annals of criminal law are rife with instances of mistaken identification."[105] The Court observed that, once the witness has committed himself to an identification, he is unlikely to change his mind.[106] Because the defense lawyer is not present at the lineup, counsel cannot reconstruct the lineup at trial. That is true because neither witnesses nor lineup participants, including the suspect, are likely to be aware of prejudicial conditions surrounding the lineup.[107] The resulting "inability to effectively reconstruct at trial any unfairness that occurred at the lineup may deprive [the accused] of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification."[108] Thus, the Court in *Wade* saw the presence of counsel at a pretrial lineup as essential to insure the right to a fair trial, the right to meaningful cross-examination at trial, and the right to effective assistance of counsel at trial.

A. Kirby As a Break from Wade

Only five years after *Wade*, however, in *Kirby v. Illinois*,[109] a plurality reinterpreted the *Wade* opinion, basing its decision on the literal wording of the sixth amendment. The police arrested Kirby for a robbery, and they took him to the police station. The victim entered the station and identified Kirby, who was seated at a table.[110] At trial the victim described the station confrontation and again identified Kirby. The Court declined to apply *Wade* to a pre-indictment identification.[111]

The plurality in *Kirby* read the sixth amendment right to counsel recognized in *Wade* as being limited to postindictment lineups, because

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104. *Id.* at 227.

105. *Id.* at 228 (citing E. BORCHARD, *supra* note 55; FRANK & FRANK, *supra* note 95; and other authorities).

106. *Id.* at 229 (quoting Williams & Hammelman, *Identification Parades, Part I*, CRIM. L. REV. 479, 482 (1963)).

107. *Id.* at 230.

108. *Id.* at 232.

109. 406 U.S. 682 (1972).

110. Such one-on-one identification proceedings are called "showups" and generally are disfavored but are not *per se* unconstitutional. *See* Neil v. Biggers, 409 U.S. 188 (1972) (showup suggestive but identification reliable).

111. Justice Powell supplied the crucial fifth vote without explanation of his rationale, except to say that he would not extend *Wade*. 406 U.S. at 691 (Powell, J., concurring). The *Kirby* analysis later was adopted by a majority. Brewer v. Williams, 430 U.S. 387 (1977).

the sixth amendment begins with the words "[i]n all criminal prosecutions."[112] Taking those words literally, Justice Stewart's brief and matter-of-fact opinion for the plurality concluded that the sixth amendment's guarantee of the right to counsel applies only at or after "the initiation of adversary judicial criminal proceedings,"[113] or "the onset of formal prosecutorial proceedings."[114] As examples of such starting points for a "criminal prosecution," the plurality opinion listed "formal charge, preliminary hearing, indictment, information, or arraignment."[115]

The *Kirby* plurality attempted to distinguish *Wade* on the basis of procedural posture. The confrontation in *Kirby* was arranged before the commencement of formal criminal proceedings, but the lineup in *Wade* was conducted after indictment. Justice Stewart, while declaring that "[t]he initiation of judicial criminal proceedings is far from a mere formalism,"[116] however, gave no practical reason for concluding that the sixth amendment did not require counsel at Kirby's showup, to protect his rights later at trial, but did require counsel at Wade's lineup, to protect those same trial rights.

In direct contradiction to the *Kirby* plurality, Justice Brennan, the author of the *Wade* opinion, denied that the postindictment wording in *Wade* was anything but descriptive. "*Wade* and *Gilbert*,[117] of course, happened to involve post-indictment confrontations. Yet even a cursory perusal of the opinions in those cases reveals that nothing at all turned upon that particular circumstance."[118] Brennan further noted that even the dissenting justices in *Wade* read his opinion in that case as extending to pre-indictment confrontations.[119] For example, Justice White, dissenting in *Wade*, had described Brennan's opinion for the majority as

> [C]reating a new *per se* rule of constitutional law: a criminal suspect cannot be subjected to a pretrial identification process in the absence of his counsel without violating the Sixth Amendment. . . . The rule applies to any lineup, . . . regardless of when the identification occurs, in time or place, and whether before or after indictment or information.[120]

Brennan also observed in his *Kirby* dissent that several state and federal courts had read *Wade* as applying to pre-indictment lineups.[121] Academic

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112. *Id.* at 689-90.
113. *Id.* at 689.
114. *Id.* at 690.
115. *Id.* at 689.
116. *Id.*
117. Gilbert v. California, 388 U.S. 263 (1967).
118. *Kirby*, 406 U.S. at 704 (Brennan, J., dissenting).
119. *Id.* n.13.
120. 388 U.S. at 250-51 (White, J., dissenting in part and concurring in part).
121. 406 U.S. at 704 n.14. *See also* People v. Hawkins, 55 N.Y.2d 474, 490 n.3,

commentators had done the same.[122] Many commentators have been "critical of the *Kirby* decision and have sided with the four dissenters who pointed out that the decision did not square with the rationale of *Wade*."[123] Judicial and academic comments on the *Kirby* opinion have demonstrated the lack of logic in its attempt to distinguish the holding in *Wade*.[124] Perhaps the most stinging academic criticism of the *Kirby* decision was made by Professor Grano, who thoroughly demonstrated that the *Kirby* decision was not faithful to *Wade*, which *Kirby* purported to follow.[125] Grano concluded that "the plurality opinion in *Kirby* seems wrong from every perspective. The opinion misreads precedent so badly that it appears intellectually dishonest."[126] Other critics have been only slightly more kind to the *Kirby* opinion.[127] The *Wade* majority understood that, when an eyewitness identifies a suspect, for all practical purposes the case is over. Just as *Escobedo v. Illinois*[128] and *Miranda v. Arizona*[129] recognized that a confession made to a police officer is an event that really terminates the accused's chances for acquittal, *Wade* made it clear that "[t]he trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation . . . with little or no effective appeal from the judgment there rendered by the witness—'that's the man.' "[130] The witnesses and the suspect are not likely to be alert to the presence of any suggestiveness in the lineup. Unless he is present at the lineup, defense counsel will find it impossible to reconstruct the conditions by means of questioning in court. The inability to establish suggestiveness through questioning

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450 N.Y.S.2d 159, 167 n.3, 435 N.E.2d 376, 384 n.3 (1982) (Meyer, J., dissenting) ("prior to *Kirby* a substantial majority of courts had applied *Wade* to preindictment identification proceedings and required counsel at all lineups.") *Id.*

122. People v. Hawkins, 55 N.Y.2d at 489 n.2, 450 N.Y.S.2d at 167 n.2, 435 N.E.2d at 384 n.2 (1982).

123. W. LaFave, Criminal Procedure 329 (1985).

124. *Hawkins*, 55 N.Y.2d at 488, 450 N.Y.S.2d 166, 435 N.E.2d 383 (Meyer, J., dissenting).

125. Grano, *Kirby, Biggers, and Ash: Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?*, 72 Mich. L. Rev. 717, 725-30 (1974).

126. *Id.* at 730 ("*Kirby* created a new, and previously unsupported limitation on the right to counsel.").

127. *See, e.g.*, R. Young, *Supreme Court Report*, 58 A.B.A.J. 1092 (1972) ("perhaps the least defensible, from a technical point of view, of the court's criminal law holdings during the term"); Note, *Criminal Law—The Lineup's Lament, Kirby v. Illinois*, 22 De Paul L. Rev. 660 (1972-73) (exaltation of form over substance); Woocher, *supra* note 65, at 996 ("removes the protective effects of counsel's presence precisely when the danger of convicting an innocent defendant upon a mistaken identification is greatest").

128. 378 U.S. 478 (1964).

129. 384 U.S. 436 (1966).

130. 388 U.S. at 235-36.

results in the denial of effective confrontation of the witnesses at trial, denial of effective assistance of counsel at trial, and denial of a fair trial. The literal-language approach to the interpretation of the sixth amendment right to counsel, highlighted in *Kirby*,[131] ignores the practical difficulties of recreating the lineup through cross examination, as well as the policies that the counsel guarantee exists to serve.

B. Federal "Literal Language" Rationale

As discussed above, in *Kirby*, the Supreme Court employed a "literal language," "explicit wording," or "plain language" approach to the interpretation of the scope of the sixth amendment right to counsel. The opinion relied on the fact that the sixth amendment begins with the phrase "[i]n all criminal prosecutions." Interpreting that phrase, the *Kirby* plurality announced the following doctrine: "The initiation of judicial criminal proceedings is far from a mere formalism. . . . It is this point . . . that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable."[132]

The *Kirby* opinion thus began to reinterpret the *Wade* and *Gilbert*[133] decisions, while emphasizing that it was relying on the explicit wording of the sixth amendment: "The rationale of those cases was that an accused is entitled to counsel at any 'critical stage of the *prosecution*.' "[134] The opinion of Chief Justice Burger, concurring in *Kirby*, reiterated the express-wording rationale: "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.' "[135]

Thus, it can be seen that *Kirby* articulated and relied upon a literal reading of the phrase "criminal prosecution" as restricting the scope of the *Wade* sixth amendment right to counsel. The *Kirby* plurality took the simplistic explicit-wording approach over the objection of Justice Brennan, the author of *Wade*, who observed in dissent as follows:

> While it should go without saying, it appears necessary, in view of the plurality opinion today, to re-emphasize that *Wade* did not require the presence of counsel at pretrial confrontations

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131. Actually *Wade* also relied on the "plain wording" of the sixth amendment when stressing that the provision guarantees "counsel's assistance whenever necessary to assure a meaningful 'defence.'" *Id.* at 225.

132. 406 U.S. at 689-90.

133. Gilbert v. California, 388 U.S. 263 (1967).

134. 406 U.S. at 690 (emphasis added by Justice Stewart for *Kirby* plurality) (quoting Simmons v. United States, 390 U.S. 377, 382-83 (1968)).

135. *Id.* at 691 (Burger, C.J., concurring).

> for identification purposes simply on the basis of an abstract consideration of the words "criminal prosecutions" in the Sixth Amendment.[136]

Only much later, when the literal-language approach created logical and doctrinal difficulties regarding the other rights in the sixth amendment, did the Court begin to look seriously for an alternative rational, examining the purposes of the sixth amendment guarantees as clues to their scope. Such difficulties appeared in *United States v. Gouveia*,[137] in which case the defendant was a prisoner at a federal prison when a murder of another prisoner occurred. Gouveia was placed in administrative detention for a considerable period before he was indicted for the murder. The court of appeals held that he had a right to appointment of an attorney during administrative detention and before indictment.[138] Noting that *Kirby* did not involve a prison context, the court analogized to the sixth amendment speedy trial right.[139] The Ninth Circuit reasoned that, if an arrest starts a "criminal prosecution" for speedy trial calculations, then administrative detention must serve the same purpose for the attachment of the right to counsel in the prison context.[140] The court of appeals held that, even before indictment, an administratively detained prisoner must either be given counsel within a specified period or be released into the general prison population, so that the prisoner or the lawyer can conduct the pretrial investigation necessary to acquire and preserve evidence for presentation of a defense at trial.[141]

The Supreme Court reversed the Ninth Circuit, holding the circuit court's analogy to the speedy trial right to be inapt.[142] While recognizing that the sixth amendment speedy trial right attaches at the time of arrest, the Supreme Court in *Gouveia* reaffirmed the *Kirby* analysis, holding that the sixth amendment right to counsel does not attach until adversarial judicial proceedings have begun. The Court reviewed the *Kirby* line of cases and pronounced it to be "consistent not only with the literal language of the Amendment, which requires the existence of both a 'criminal prosecutio[n]' and an 'accused,' but also with the purposes which we have recognized that the right to counsel serves."[143] The Court also relied again on the "plain language of the Amendment and its purpose."[144]

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136. *Id.* at 696 (Brennan, J., dissenting).
137. 467 U.S. 180 (1984).
138. 704 F.2d 1116 (9th Cir. 1983).
139. *Id.* at 1120.
140. *Id.* at 1124.
141. *Id.*
142. United States v. Gouveia, 467 U.S. 180 (1984).
143. 467 U.S. at 188.
144. *Id.* at 189.

While reiterating reliance on the literal language or plain wording of the sixth amendment, the *Gouveia* Court shifted the focus to the different purposes served by the speedy trial right and the counsel right in order to justify the difference in results between speedy-trial cases and right-to-counsel cases.[145] The *Kirby* plurality had rested its opinion solely on the first few words of the sixth amendment, "[i]n all criminal prosecutions."[146] Justice Stewart's opinion in that case had not referred to the purposes underlying the sixth amendment right to counsel.

The change to reliance on the underlying purposes of the various guarantees of the sixth amendment was made necessary by the fact that the literal-language rationale of *Kirby*, if applied in any way but selectively and arbitrarily throughout the sixth amendment, would be destructive of well-established doctrine regarding the right to a speedy trial. Brennan, dissenting in *Kirby*, had pointed out that, for speedy-trial doctrinal reasons, the phrase "criminal prosecutions" in the sixth amendment could not have the restrictive effect that the *Kirby* plurality proposed.[147] The phrase directly applied to the speedy trial right, but doctrine regarding that guarantee held that the speedy trial right attached at the time of indictment or arrest, whichever came first.[148] The *Kirby* plurality, however, chose to ignore the logical and doctrinal problems resulting from its plain-language approach.

In *Gouveia*, the Court had to face these shortcomings of *Kirby* and address them, because the Ninth Circuit had analogized to the speedy trial guarantee of the sixth amendment, which, like the right to counsel, is preceded by the words "[i]n all criminal prosecutions." However, rather than employing sound analysis the Court resorted to sleight of hand, directing attention away from the literal-language rationale. The Court recognized the doctrine that the right to a speedy trial attaches at the time of arrest, but the Court announced that the difference between the attachment points of the speedy trial right and the right to counsel is "readily explainable given the fact that the speedy trial right and the right to counsel protect different interests."[149] The former protects a "liberty interest," while the latter protects the accused "during trial-type confrontations with the prosecutor."[150]

What the Court failed to recognize is that, once one begins to rely on the purposes underlying the several guarantees in the sixth amendment,

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145. *Id.* at 190.

146. 406 U.S. at 689-90.

147. 406 U.S. at 698 n.7 (Brennan, J., dissenting).

148. *Id.*; *see also* United States v. Marion, 404 U.S. 307 (1971); Dillingham v. United States, 423 U.S. 64 (1975) (arrest activates speedy trial right).

149. 467 U.S. at 190.

150. *Id.*

in order to justify distinctions among the points in time at which those rights attach, then the literal language, "criminal prosecutions," is no longer relevant in determining the scope of a right. That same phrase applies to every one of the rights in the sixth amendment, but it cannot have a "literal" meaning that is the same for each. If the literal meaning is not the same for each right in the amendment, then there is no literal meaning. Once this is recognized, the *Kirby* rationale is lost, and the courts, freed from the bankrupt "plain language" approach, are called upon to examine the purposes of the right to counsel in order to determine the scope of the right.

According to *Wade*, the right to counsel at a lineup before trial is essential for the protection of rights that come into play later at trial: the rights to meaningful cross-examination and confrontation, to effective assistance of counsel, and to a fair trial.[151] Those same purposes exist for the right to counsel at a pretrial lineup whether or not formal adversarial judicial proceedings have commenced.[152] As Justice Brennan made clear in his *Kirby* dissent, "the initiation of adversarial judicial proceedings is completely irrelevant to whether counsel is necessary at a pretrial confrontation for identification in order to safeguard the accused's constitutional rights to confrontation and the effective assistance of counsel at his trial."[153] *Kirby* is an aberration from *Wade*, and state courts have struggled for years to reconcile the two cases.

IV. State Court Decisions

In 1974, only two years after the *Kirby* decision, some state courts began to define a broader scope for the right to counsel because of the interposition of state law. Others are addressing the issue for the first time only now. The state courts follow two approaches. First, Pennsylvania and Mississippi, like the *Kirby* Court, restrict the right to counsel to critical confrontations occurring after the initiation of judicial criminal proceedings, but they refer to state law for the definition of the initiation

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151. 388 U.S. at 227.

152. *See, e.g.*, People v. Bustamante, 30 Cal. 3d 88, 95, 177 Cal. Rptr. 576, 580, 634 P.2d 927, 931 (1981) (quoting People v. Fowler, 1 Cal. 3d 335, 342, 82 Cal. Rptr. 363, 368-69, 461 P.2d 643, 648-49 (1962)):

> [T]he presence or absence of those conditions attendant upon lineups which induced the high court to term such proceedings 'a critical stage of the prosecution' at which the right to counsel attaches . . . is certainly not dependent upon the occurrence or nonoccurrence of proceedings formally binding a defendant over for trial. A lineup which occurs prior to the point in question may be fraught with the same risks of suggestion as one occurring after that point, and may result in the same far-reaching consequences for the defendant.

153. 406 U.S. at 697.

point. Because those courts retain to some extent the *Kirby* requirement of judicial criminal proceedings and see the federal doctrine and state constitutions or statutes as interacting to determine the attachment of counsel, they may be referred to as the "interactive states." Second, Michigan, Alaska, and California, on the other hand, regard the attachment of the counsel right as independent of the initiation of judicial criminal proceedings. Because they completely reject *Kirby* and independently determine the attachment point of the right to counsel, as guaranteed by the state constitution, those states may be called the "independent states."

A. Interactive States

1. Pennsylvania.—In 1974, the Pennsylvania Supreme Court held that the interplay of federal and state law required the presence of counsel at a pre-indictment lineup. In *Commonwealth v. Richman*,[154] several days after the offense the police arrested a suspect and placed him in a lineup at the police station, where the victim identified him. The Pennsylvania court reviewed the *Wade* and *Kirby* opinions and decided that the later decision left to state law the question of when adversary judicial proceedings began for sixth amendment purposes. The *Richman* court reasoned that the *Kirby* plurality did not intend to supply an exhaustive list of possibilities when it held that the sixth amendment right to counsel attached to confrontations conducted "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information or arraignment."[155]

Relying on an earlier decision interpreting state law,[156] the Pennsylvania court held that an arrest initiates judicial proceedings. The court noted that in Pennsylvania judicial approval of a complaint takes place at the issuance of an arrest warrant,[157] or at the preliminary arraignment in the case of a warrantless arrest. The *Richman* court regarded magisterial approval of a complaint as equal in significance to an indictment for determining the commencement of adversarial judicial proceedings. A person arrested pursuant to a warrant, therefore, was entitled to counsel at a resulting lineup. The same was true for a person placed in a lineup after arraignment following a warrantless arrest.

In *Richman*, however, the lineup was conducted after a warrantless arrest but before arraignment. The Court gave two reasons for not

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154. 458 Pa. 167, 320 A.2d 351 (Pa. 1974).

155. *Id.* at 171, 320 A.2d at 353 (quoting *Kirby*, 406 U.S. at 689).

156. *Id.* (citing Commonwealth v. Whiting, 439 Pa. 205, 266 A.2d 738 (1970)).

157. *See* United States ex rel. Robinson v. Zelker, 468 F.2d 159 (2d Cir. 1972) (arrest warrant commenced formal criminal proceedings requiring counsel at showup).

distinguishing Richman's case from one involving a lineup after arraignment or after arrest on a warrant. First, allowing uncounseled lineups would undermine the Pennsylvania Court's "strong policy requiring warrants whenever feasible."[158] Second, the distinction would encourage police to evade a state law requirement that the suspect be brought before a magistrate for the filing of a complaint "without unnecessary delay."[159]

The Pennsylvania approach was to require counsel at practically all pre-indictment lineups, as a result of the interaction of the sixth amendment and state law. The court did not recognize a right to counsel under state law broader in scope than the guarantee in the sixth amendment.

2. Mississippi.—The Mississippi Supreme Court's approach changed over the years from an embrace of the *Kirby* rule, to purported outright rejection, and later to interaction. Immediately after the *Kirby* decision the Mississippi Supreme Court adopted the federal rule that "the right to counsel did not apply to a pre-indictment lineup."[160] By 1984, however, Mississippi had begun to recognize the interplay between state law and the *Kirby* reasoning. Later the Mississippi court flirted with the idea of an independent standard, only to shift the focus again to state law as the determinative component of an interactive approach.

In *Cannaday v. State*,[161] looking to state procedure for the determination of when formal adversarial proceedings have begun, as Pennsylvania had done ten years earlier,[162] the Mississippi court held that the right to counsel may attach as early as the time when a warrant is issued. Two years later in *Page v. State*,[163] the court reasoned that "[f]or purposes of our state constitutional right to counsel, we define the advent of the accusatory stage by reference to state law."[164] Recognizing that state law defined commencement of prosecution as the point when a warrant was issued, or when the person was "bound over" to wait for a grand jury to decide whether to indict,[165] the *Page* court concluded

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158. 458 Pa. at 173, 320 A.2d at 354. (As support for that policy the *Richman* court cited Wong Sun v. United States, 371 U.S. 471 (1963) for the proposition that "a warrantless arrest is justified only in the face of compelling exigent circumstances which preclude the police from going before a detached magistrate." 458 Pa. at 172-3, 320 A.2d at 354. *Richman* was decided before United States v. Watson, 423 U.S. 411 (1976) (warrantless public arrest may be made in public on probable cause without exigent circumstances)).

159. *Id.* (quoting PA. R. CRIM. P. 130).

160. *See* Livingston v. State, 519 So. 2d 1218, 1220 (Miss. 1988) (citing cases).

161. 455 So. 2d 713 (Miss. 1984) *cert. denied*, 469 U.S. 122 (1985).

162. Commonwealth v. Richman, 458 Pa. 167, 320 A.2d 351 (1974).

163. 495 So.2d 436 (Miss. 1986).

164. *Id.* at 439.

165. MISS. CODE ANN. § 99-1-7 (1972).

that it would be "totally irrational" not to consider such a person to be an accused.[166] In light of state law requiring speedy appearance before a magistrate after arrest,[167] which would constitute the commencement of judicial criminal proceedings, the *Page* decision recognized a right to counsel for a person who has been arrested and released on bond and who has obtained the services of an attorney.[168]

In a footnote the court expressly stated that it relied "exclusively upon state law" and rejected *Kirby* as "wholly unworkable."[169] Because in rural counties the meetings of grand juries to consider indictments were held infrequently, the Mississippi court thought that the *Kirby* approach "would have the right to counsel available to the accused only after many months had passed following arrest."[170] Later the Mississippi court took an approach like the one taken by Pennsylvania in *Richman*, holding that the attachment point of both the federal and state right to counsel is determined by reference to state law. Relying on *Page*, which involved not a lineup but incriminatory statements, the Mississippi Supreme Court decided in *Livingston v. State*,[171] that, given state law defining the commencement of prosecution,[172] a person has a right to counsel at a lineup conducted after he has been arrested on a warrant.[173]

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166. 495 So. 2d at 439.

167. Rule 1.04, Miss. Unif. Crim. R. Cir. Ct. Prac.; Miss. Code Ann. § 99-3-17 (Supp. 1985).

168. 495 So. 2d at 439-40.

169. *Id.* at 440 n.5. The court noted:

> We are very much aware of the fact that a number of recent federal cases have held that the right to counsel secured by the Sixth Amendment to the Constitution of the United States is available only after the initiation of judicial criminal proceeding[s], i.e., indictment and arraignment. Application of this approach to our state constitutional right would be wholly unworkable. . . . [W]e reject the federal approach and for purposes of today's decision rely exclusively upon state law.

(citations omitted).

170. *Id.* At the time it appeared Mississippi was rejecting the *Kirby* judicial-proceedings formulation of the attachment point for the state constitutional right to counsel. The *Page* Court actually disavowed something that *Kirby* had not held—that the right to counsel attached only at or after indictment and arraignment. When the *Kirby* Court spoke of arraignment, however, it did not mean only a hearing before a magistrate occurring after indictment but also earlier proceedings, like the initial appearance before a magistrate after arrest. *See, e.g.*, Michigan v. Jackson, 475 U.S. 625 (1986) (initial appearance or "arraignment" after being arrested and formally charged); Brewer v. Williams, 430 U.S. 387 (1977) (arrest on warrant, arraignment, judicial commitment to jail).

171. 519 So. 2d 1218 (Miss. 1988).

172. Miss. Code Ann. § 99-1-77 (Supp. 1986).

173. 519 So. 2d at 1221. (The Court affirmed the conviction because of several procedural problems concerning the preservation of error. Some of the problems were that (1) the record did not show that counsel was not present at the lineup and (2) at trial no objection was made to the admission of testimony about the lineup.)

The *Livingston* case involved counsel claims under both the federal and state constitutions, but the Mississippi court did not employ a different test for the state provision.

The latest refinement of the Mississippi test, however, regards state law, without reference to or reliance on the federal sixth amendment, as dictating attachment of the right to counsel at the point after arrest when the initial appearance before a magistrate "ought to have been held."[174] That rule prevents the police from postponing the attachment of the right to counsel by delaying the arrestee's appearance in court.

Although earlier Mississippi case law displayed "a trend toward rigid restriction of the access to counsel to post-indictment line-ups, that view has clearly been supplanted by a more recent case espousing an approach based squarely on state law and the initiation of judicial proceedings as defined by statute."[175] The Mississippi approach now resembles that of Pennsylvania, the other interactive state, in that it accepts the *Kirby* judicial-proceedings concept regarding the attachment point for the right to counsel but defines that point by reference to state law.[176] In one context or another those two state courts have held that the right to counsel at a lineup attaches when, as a matter of statute, court rule, or policy, a judicial officer should have become involved in the case, despite the fact that no magistrate had yet been consulted. The result is that in Mississippi and Pennsylvania, the right to counsel at a lineup attaches at a point earlier in the criminal process than any United States Supreme Court opinion has yet recognized. Mississippi has gone beyond Pennsylvania in recognizing such an early counsel right without reliance on the sixth amendment, but Mississippi has not expressly declared that the right under state law is greater in scope.[177]

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174. Magee v. State, 542 So. 2d 228 (Miss. 1989).

175. Whitten & Robertson, *supra* note 13, at 293 n.182 (citing statutory and case authority).

176. Some federal courts have recognized the interactive nature of the *Kirby* approach to the question of when the right to counsel attaches. *See, e.g.*, United States v. Muzychka, 725 F.2d 1061 (3d Cir.), *cert. denied*, 467 U.S. 1206 (1984); Clark v. Jago, 676 F.2d 1099 (6th Cir. 1982), *cert. denied*, 466 U.S. 977 (1984); Lomax v. Alabama, 629 F.2d 413 (5th Cir. 1980), *cert. denied*, 450 U.S. 1002 (1981); United States ex rel. Robinson v. Zelker, 468 F.2d 159 (2d Cir. 1972), *cert. denied*, 411 U.S. 939 (1973); United States ex rel. Sanders v. Rowe, 460 F. Supp. 1128 (N.D. Ill. 1978); United States ex rel. Burton v. Cuyler, 439 F. Supp. 1173 (E.D. Pa. 1977), *aff'd without opinion*, 582 F.2d 1278 (3d Cir. 1978) (all cases following interactive approach).

177. Two other states have moved close to independence on the lineup issue without quite crossing the line. *See* State v. Smith, 547 So. 2d 131 (Fla. 1989) (*ex parte* order compelling accused already in police custody to participate in lineup violates due process under state constitution); People v. Coates, 74 N.Y.2d 244, 544 N.Y.S.2d 992, 543 N.E.2d 440 (1989) (suspect incarcerated and represented by attorney on other charge had right to counsel at lineup ordered by court).

B. Independent States

1. Michigan.—The first state high court to reject *Kirby* completely on state law grounds was the Supreme Court of Michigan in *People v. Jackson*,[178] which involved photographic arrays and a lineup apparently conducted without the presence of counsel. At the time of the identification proceedings Jackson, a suspect in an assault case, was in jail under a sentence for a related offense. For practical purposes he was regarded as under arrest for the assault in question.[179] In *Jackson*, the Michigan court exercised its "constitutional power to establish rules of evidence applicable to judicial proceedings in Michigan courts and to preserve best evidence eyewitness testimony from unnecessary alteration by unfair identification procedures."[180] The *Jackson* decision relied on an earlier opinion by the same court in *People v. Anderson*,[181] involving photographic identifications.

Anderson was decided after *Kirby* but before *United States v. Ash*,[182] the photographic display case discussed above. In *Anderson*, the Michigan Supreme Court came to conclusions contrary to *Kirby* and *Ash*. The Michigan court surveyed the legal and scientific writings on eyewitness identification,[183] extensively analyzed the competing interests of the state and the suspect, and concluded that, independent of federal constitutional doctrine, a suspect is entitled to counsel at a live or photographic identification without regard to whether the "judicial phase of a prosecution" has begun.[184] In *Jackson*, after reviewing *Kirby* and *Ash*, the Michigan Supreme Court expressly rejected those two opinions and reaffirmed the *Anderson* holding on the basis of its supervisory powers, independent of federal constitutional analysis.[185] The *Jackson* court thus

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178. 391 Mich. 323, 217 N.W.2d 22 (1974).

179. *Id. Accord*, People v. Anderson, 391 Mich. 419, 216 N.W.2d 780 (1974) (fact that suspect in custody for different crime did not diminish right to counsel at photo lineup). *But cf.* Foster v. State, 713 S.W.2d 789 (Tex. Ct. App. 1986) ("The fact that the appellant was incarcerated on an unrelated matter at the time of the lineup was not relevant to a determination of his sixth amendment right to counsel for the robbery, the offense for which he was identified at the lineup.") *Id.* at 790.

180. 391 Mich. at 338-39, 217 N.W.2d at 27.

181. 389 Mich. 155, 205 N.W.2d 461 (1973).

182. 413 U.S. 300 (1973).

183. The court attached an appendix to the *Anderson* opinion displaying thorough research. *See* 389 Mich. at 192-220, 205 N.W.2d at 479-95.

184. *Jackson*, 391 Mich. at 339, 217 N.W.2d at 27 (The Jackson court defined the "judicial phase of a prosecution" as "[f]iling of a complaint/issuance of an arrest warrant/preliminary examination/filing of an information or indictment.") *Id.* n.11.

185. *Id.* 391 Mich at 338, 217 N.W.2d at 27-28. The court stated:

> [T]he principles developed in and following the announcement of *Wade*, as to corporeal identifications, and *Anderson*, as to photo showings, shall govern the

mandated that counsel be present at pretrial lineups unless exigent circumstances justified proceeding without counsel.

2. Alaska.—The Supreme Court of Alaska in *Blue v. State*[186] was the first state court to ground the rule requiring counsel at a pre-indictment lineup squarely on the state constitutional right to counsel. In that case police conducted an impromptu lineup in a bar shortly after an armed robbery had occurred in another bar nearby. A victim identified Blue in the lineup. While recognizing that *Kirby* had rejected a sixth amendment claim to a right to counsel at pre-indictment lineups, and that the "pre- and post-indictment distinction ha[d] been widely applied by federal and state courts,"[187] the Alaska Supreme Court stated that it "is not limited by decisions of the United States Supreme Court or by the United States Constitution when interpreting its state constitution."[188] The Alaska court noted that the right to counsel under the state constitution already had been given a broader scope than its sixth amendment analogue.[189]

Balancing the need of the state for prompt and efficient investigation of crimes against the right of the suspect to meaningful cross-examination at a later trial, and relying on Justice Brennan's dissent in *Kirby*,[190] as well as California cases interpreting *Wade*,[191] the *Blue* court held that "a suspect who is in custody is entitled to have counsel present at a pre-indictment lineup unless exigent circumstances exist so that providing counsel would unduly interfere with a prompt and purposeful investigation."[192] The Alaska court found exigent circumstances to be present in *Blue*, so that providing counsel would not have been "practical, reasonable or mandated by [the Alaska] constitution."[193]

3. California.—In *People v. Bustamante*,[194] the California Supreme Court followed Alaska's example and rested its decision on an inde-

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receipt in evidence of identification testimony where the witness has viewed or seen photographs of the suspect without regard to when the judicial phase of the prosecution is commenced.

(footnotes omitted).

186. 558 P.2d 636 (Alaska 1977).

187. *Id.* at 640 n.5.

188. *Id.* at 641.

189. *Id.* (citing Roberts v. State, 458 P.2d 340 (Alaska 1969)).

190. *Id.* at 641-42 n.8 (quoting Kirby v. Illinois, 406 U.S. 682, 696 (1982) (Brennan, J., dissenting)).

191. *Id.* at 642 n.10.

192. *Id.* at 642 (footnotes omitted). The court noted that, although Blue had not been placed under formal arrest, he was in custody. *Id.* n.9.

193. *Id.* at 642 n.11 (The court reversed the conviction on a different ground.) *Id.* at 646.

194. 30 Cal. 3d 88, 177 Cal. Rptr. 576, 634 P.2d 927 (1981). The decision in

pendent state constitutional right to counsel. In reaching that decision the California court re-affirmed its decision in *People v. Fowler*,[195] which was decided after *Wade* but before *Kirby*. In the *Fowler* case, the California court, like some federal courts before *Kirby*,[196] had held that the *Wade* right to counsel extended to pre-indictment lineups. In *Bustamante*, the court revisited *Fowler* and noted the intervening decisions in Alaska, Michigan, and Pennsylvania discussed above.[197]

The *Bustamante* court recognized the unreliability of eyewitness identification and the way the witness becomes "unshakable" once the lineup identification removes his doubts and commits him to the proposition that the defendant is the criminal in question.[198] The California court also noted the extreme difficulty of reproducing the lineup procedure at trial with sufficient precision to reveal improper suggestion.[199] Further examining the role of counsel at a lineup, the *Bustamante* court decided that the counsel requirement would encourage police to adopt and to follow fair procedures.[200] By attending the lineup, the attorney could detect intentionally or inadvertently suggestive aspects of the lineup and could better prepare for cross-examination of the eyewitnesses and for argument at trial.[201] In rejecting *Kirby*, however, the California Court again followed the lead of Michigan and Alaska and held that exigent circumstances could justify proceeding without counsel.[202]

C. Retreat from Independence

Texas.—Texas, the scene of the bank robbery in *Wade*, which was the starting point for the right to counsel at a lineup, recently announced a new rule rejecting the *Kirby* rationale and according counsel at any critical pretrial confrontation, before or after the initiation of formal judicial proceedings, as a matter of state law. Within a year, however,

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Bustamante remains valid, despite Proposition 8, which narrowed the California exclusionary rule to a scope identical to the federal rule, because the conduct in *Bustamante* occurred before passage of the initiative. People v. Houston, 42 Cal. 3d 595, 600 n.3, 230 Cal. Rptr. 141, 142 n.3, 724 P.2d 1166, 1167 n.3 (1986).

195. 1 Cal. 3d 335, 461 P.2d 643, 82 Cal. Rptr. 363 (1969).

196. *Bustamante* at 30 Cal. 3d at 95, 634 P.2d at 931, 177 Cal. Rptr. at 580 (citing Wilson v. Gaffney, 454 F.2d 142 (10th Cir. 1972); United States v. Greene, 429 F.2d 193 (D.C. Cir. 1970)).

197. *Id.* at 96 n.5, 177 Cal. Rptr. at 581 n.5, 634 P.2d at 932 n.5.

198. *Id.* at 98, 177 Cal. Rptr. at 582, 634 P.2d at 933.

199. *Id.* at 99, 177 Cal. Rptr. at 583, 634 P.2d at 934.

200. *Id.*

201. *Id.*

202. *Id.* at 100, 177 Cal. Rptr. at 584, 634 P.2d at 935. *See also* Blue v. State, 558 P.2d 636 (Alaska 1977) (state constitution requires presence of counsel at in-custody lineup).

the Texas court reversed itself and retreated to the *Kirby* rule. Until *Kirby* came along, the Texas Court of Criminal Appeals,[203] like the California Supreme Court,[204] regarded *Wade* as applying the sixth amendment right to counsel to pre-indictment lineups, as well as post-indictment confrontations. In *Martinez v. State*[205] in 1969, the Texas court concluded that *Wade* clearly held "that a criminal suspect cannot be subjected to a pretrial identification process in the absence of counsel without violating the Sixth Amendment."[206]

Since *Kirby* re-interpreted the *Wade* decision, however, the Texas Court of Criminal Appeals has not directly re-addressed the pre-indictment lineup issue as a matter of state law. In the 1986 case of *Foster v. State*[207] discussed above,[208] an intermediate court of appeals in Texas tersely rejected the appellant's claim of a right to counsel, saying that it was "unable to find any basis upon which to interpret our state constitution's right-to-counsel provision as giving a criminal defendant any greater protection than is given by the United States Constitution."[209] The Texas Court of Criminal Appeals currently is reviewing *Foster* to decide the question of whether the Texas Constitution guarantees the right to counsel at a lineup before indictment.

Meanwhile, in *Forte v. State*,[210] the Texas Court of Criminal Appeals appeared to open the door to recognition of a state constitutional right to have counsel present at a lineup before formal judicial proceedings begin. Forte claimed that he had a right to counsel at a breath test administered after his arrest for driving while intoxicated. In 1986, the Court of Criminal Appeals, following *Kirby*, rejected his sixth amendment claim and remanded for consideration of the state constitutional law issue.[211] On remand the intermediate court of appeals held against the state constitutional contention,[212] and the Court of Criminal Appeals agreed.[213] In rejecting the state law claim, however, the Court of Criminal Appeals also unanimously rejected the *Kirby* rationale as a "fiction."[214] The court stated:

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203. The Texas Court of Criminal Appeals is the court of last resort for state criminal cases. The Texas Supreme Court handles civil cases. TEX. R. APP. P. 15, 9, respectively.

204. People v. Fowler, 1 Cal. 2d 335, 82 Cal. Rtpr. 363, 461 P.2d 643 (1969).

205. 437 S.W.2d 842 (Tex. Crim. App. 1969).

206. *Id.* at 846.

207. 713 S.W.2d 789 (Tex. Ct. App. 1986).

208. *See supra* text accompanying notes 1-3.

209. 713 S.W.2d at 790.

210. 759 S.W.2d 128 (Tex. Crim. App. 1988).

211. 707 S.W.2d 89 (Tex. Crim. App. 1986).

212. Forte v. State, 722 S.W.2d 219 (Tex. Ct. App. 1986).

213. Forte v. State, 759 S.W.2d 128 (Tex. Crim. App. 1988).

214. *Id.* at 137 (Two judges dissented but obviously agreed with the majority in rejecting *Kirby*. *See* 759 S.W.2d at 139-40 (Clinton, J. and Teague, J., dissenting)).

> We believe that the basis and rationale of the *Wade-Gilbert* rule and the *Kirby* line of cases become difficult if not impossible to reconcile, especially when one considers the realities of the criminal investigatory procedures utilized by most law enforcement agencies. That is, the same dangers of prejudice which *Wade* and *Gilbert* claimed concern will invariably exist at many stages of a criminal prosecution prior to the onset of formal charges; therefore, the demarcation of formal charges before the right to counsel is triggered is probably arbitrary and capricious.[215]

The court surveyed the decisions of other states and recognized a sharp division on the issue of counsel at breath tests. Concentrating on the opinions of the Supreme Court of Oregon,[216] the Texas court concurred with the Oregon court's "repudiation" of *Kirby* but declined to follow the Oregon reasoning that arrest automatically triggers the right to counsel in breath test cases.[217]

The Texas Court did not believe that the *Kirby* fiction (*i.e.*, the right to counsel begins at the time when adversarial judicial proceedings commence) should be replaced with another fiction that the right to counsel automatically attaches at the time of formal arrest. Eschewing any "artificially created time designation,"[218] the Court of Criminal Appeals insisted on a "more flexible standard."[219] Holding that the right to counsel arises at "critical stage[s]"[220] of the criminal process, the court directed that "each case must be judged on whether the pretrial confrontation presented necessitates counsel's presence so as to protect a known right or safeguard,"[221] such as later rights to a fair trial, to meaningful cross-examination, and to effective assistance of counsel at trial.[222] The *Forte* court thus accepted the *Wade* definition of "critical stages" but rejected the *Kirby* designation of formal adversarial judicial proceedings as the starting point. A critical stage, under the *Forte* reasoning, can occur before judicial criminal proceedings begin. Nevertheless, the court reasoned that, under the Texas Implied Consent Statute,[223] which provides that a driver impliedly consents to a breath test by the act of driving on a public road, Forte had no legal right to revoke his implied consent and to refuse a breath test. For that

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215. *Id.* at 134.
216. *See, e.g.*, State v. Spencer, 305 Or. 59, 750 P.2d 147 (1988).
217. *Forte*, 759 S.W.2d at 137.
218. *Id.* at 138.
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.* at 137-38 (quoting United States v. Wade, 388 U.S. 218 (1967)).
223. TEX. REV. CIV. STAT. ANN. §§ 67011-15 (Vernon Supp. 1984).

reason the suspect had no right that needed protection at the time of the breath test or at a later trial. Consequently, the Court held that the time at which a driver is faced with the decision whether to take a test is not a "critical stage" of the criminal process at which counsel's presence is required. Forte's right to counsel under the Texas constitution, just like the sixth amendment right, "did not attach until the time the complaint was filed."[224]

The analysis employed by the *Forte* court seemed to allow the attachment of the right to counsel at lineups like the one in *Foster*. While it is true that Foster, who was in jail serving a sentence for other offenses, was not formally under arrest for the robberies under investigation,[225] nothing in the *Forte* rationale suggested that the suspect must be the subject of an arrest, let alone a judicial warrant, formal complaint, arraignment, preliminary hearing, information or indictment. The only question is whether the pretrial confrontation itself is a critical stage, in that counsel's presence is needed to protect a known right existing at the confrontation or later in the process. *Wade* clearly regarded all such pretrial lineups to be critical stages. The *Forte* opinion's heavy reliance on *Wade*'s rationale, while rejecting *Kirby*, appeared to make it difficult for the Texas Court of Criminal Appeals to deny the claim made in *Foster* that the right to counsel attaches at a lineup for a person serving a sentence in jail for other offenses.

During the next legislative session, however, in reaction to *Forte* and other decisions, opponents of independent state constitutionalism proposed a sweeping amendment to the Texas Constitution that would have stripped the courts of the authority to construe state constitutional provisions more favorably to criminal defendants than the federal courts have construed the federal Bill of Rights.[226] Although the amendment

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224. 759 S.W.2d at 139 (quoting Forte v. State, 707 S.W.2d 89, 92 (Tex. Crim. App. 1986)). Presumably the Texas Court of Criminal Appeals in *Forte* merely meant that the state counsel right did not theoretically attach before the sixth amendment right in that case. The court adopted the federal critical stage analysis, which requires that, for the right to counsel to come into play, the proceeding at which counsel's presence is requested must be a "confrontation" between the accused and the state. *Id.* at 133 (quoting *Wade*, 388 U.S. at 226-27). Unless the filing of the complaint involved a confrontation that is not mentioned in any of the *Forte* opinions, however, it is difficult to see how the Texas counsel right actually became operative when the complaint was filed. *See* R. Dawson & R. Dix, Texas Criminal Procedure 112 (1984) (complaint may be filed before defendant's first appearance in court). *See also* Lara v. State, 740 S.W.2d 823, 834 (Tex. Ct. App. 1987, *pet. ref'd, cert. denied*, Lara v. Texas, 110 S. Ct. 92 (1989) (right to counsel can fail to "come into play" even though theoretically it has "attached" by way of indictment).

225. *Compare* People v. Jackson, 391 Mich. 323, 217 N.W.2d 22 (1974).

226. *See generally* Dix, *Judicial Independence in Defining Criminal Defendants' Texas Constitutional Rights*, 68 Tex. L. Rev. ____ (1990) (origin and consequences of proposed amendment) (draft of forthcoming article).

died in committee, the Texas Court of Criminal Appeals soon disavowed the *Forte* test in *McCambridge v. State*,[227] another case involving the right to counsel before taking a breath test after arrest for driving while intoxicated. In *McCambridge* the court decided that the *Forte* case-by-case approach was "ambiguous, vague, and thus unworkable."[228] Although remaining critical of *Kirby* as irreconcilable with *Wade* and *Gilbert*,[229] the court retreated to the Kirby "bright-line rule," merely in the interest of consistency, because, as the court simply put it, "[c]onsistency is the objective of any legal standard."[230] The *McCambridge* opinion was so lacking in rationale as "to strongly suggest that the court was almost panicstricken in its haste to disavow what had become a politically-damaging pronouncement."[231] The repudiation of the *Forte* approach made no practical difference in *McCambridge* (the result being that, just as in *Forte*, the right to counsel did not attach until the filing of formal charges),[232] but the overall direction of the *McCambridge* opinion appeared to militate against Foster's claim of the right to counsel at a precharging lineup (although the *McCambridge* holding was limited to "the context of this case").[233] The *Foster* case remains undecided.

V. Conclusion

In finding a state law basis for counsel at a lineup, the state court decisions discussed above relied on the policies underlying the right to counsel and the requirements of state statutes. Two of the courts gave considerable attention to recent psychological and legal writings on eyewitness identification in general and lineups in particular.[234] Recent re-

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227. 778 S.W.2d 70 (Tex. Crim. App. 1989).
228. *Id.* at 75.
229. *Id.* at 75-76.
230. *Id.* at 75.
231. Dix, *supra* note 226.
232. McCambridge v. State, 778 S.W.2d 70, 76 (Tex. Crim. App. 1989).
233. *Id.*
234. People v. Anderson, 389 Mich. 155, 205 N.W.2d 461 (1973); People v. Bustamante, 30 Cal. 3d 88, 177 Cal. Rptr. 216, 634 P.2d 927 (1981); People v. Hawkins, 55 N.Y.2d 474, 450 N.Y.S.2d 159, 435 N.E.2d 376 (1982) (Meyer, J., dissenting). *But see* the majority opinion in *Hawkins*, at 487 n.7, 450 N.Y.S.2d at 166 n.7, 435 N.E.2d 383 n.7:

> I further comment on the multiple nonjudicial sources employed in the dissent. While I, in no measure, intend disrespect to my dissenting colleagues, to the view they express, nor to academic sources generally, I am constrained to note that some of these proffered authorities do not realistically or legally justify the result for which they are advanced. Thus, no item by item response is warranted. Rather, I find confirmation and support for the majority viewpoint in the judicial decisions and analyses of our court and the Supreme Court of the United States.

search continues to cast doubt on the fairness of lineups, even when the subjects of the lineup appear to match the general description of the suspect.[235] State courts should not follow the United States Supreme Court in turning a "deaf ear" to the scientific studies,[236] because they indicate that the courts operate under many misconceptions about eyewitness identification and lineups in particular.[237]

Several states have gone beyond discussion of policy or psychology in analyzing the right to counsel. Courts and commentators in several states have taken the historical approach in interpreting state constitutional rights.[238] Despite the difficulties inherent in the search for original intent,[239] the Texas Court of Criminal Appeals resorted to an examination of the history of the state, as well as its many successive constitutions,[240] as a clue to the intended scope of the present state constitutional provision.[241] Where appropriate sources are available,[242] state courts can

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235. *See, e.g.*, Buckhout, Rabinowitz, Alfonso, Kanellis, & Anderson, *Empirical Assessment of Lineups: Getting Down to Cases*, 12 LAW & HUM. BEHAV. 323 (1988) (using real case photo array of six men, and relying on eyewitness description, 58% of mock witnesses picked photo of defendant, whom they had never seen before, although only one in six should pick same photo if procedure unbiased).

236. *See* Sherwood, *The Erosion of Constitutional Safeguards in the Area of Eyewitness Identification*, 30 HOWARD L.J. 731, 771 (1987) (U.S. Supreme Court's eagerness to ignore empirical and other scholarly authorities).

237. *See supra* text accompanying notes 28-95.

238. *See, e.g.*, State v. Henry, 302 Or. 510, 732 P.2d 9 (1987) (obscenity prosecution precluded by state provision protecting free expression); Harris v. State, 645 S.W.2d 447 (Tex. Crim. App. 1983) (state doctrine of separation of church and state overrides ecclesiastically-based rule against judicial proceedings on Sunday); Utter & Larson, *Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution*, 15 HASTINGS CONST. L.Q. 451 (1988); Ponton, *Sources of Liberty in the Texas Bill of Rights*, 20 ST. MARY'S L.J. 93 (1988).

239. *See, e.g.*, McCabe, *State Constitutions and the "Open Fields" Doctrine: A Historical-Definitional Analysis of the Scope of Protection Against Warrantless Searches of "Possessions,"* 13 VT. L. REV. 179 (1988) (discussing limitations and citing criticism of quest for original intent). *See also* Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 229 (1980) (relegating original intent to factor not of "determinative" weight).

240. *See generally* Eisenhauer v. State, 754 S.W.2d 159, 166-76 (Tex. Crim. App. 1988) (Clinton, J., dissenting) (early Texas constitutional history).

241. Forte v. State, 759 S.W.2d, 134 (Tex. Crim. App. 1988). In *Forte*, a majority of the court appeared to recognize for the first time that the Texans who proposed and ratified the present state constitution in 1875-76 may have been more sensitive to police abuses than were the framers and ratifiers of the federal Bill of Rights in an earlier era. The court noted that Texans had been subjected to an "extremely repressive" Reconstruction government. *Id.* During that period, the governor made "despotic" use of a state police force that he had created and into which he incorporated all local constabularies. *Id.* n.11 (quoting Thomas, *The Texas Constitution of 1876*, 35 TEX. L. REV. 907, 912-13 (1951)). *See generally* S. MCKAY, MAKING THE TEXAS CONSTITUTION OF 1876, 424-26 (1968).

profitably follow the historical approach to the interpretation of the right to counsel at a lineup.

Michigan, Alaska, and California, on the other hand, recognized the exigent circumstances exception as a necessary practical limitation on the scope of the counsel right, designed to safeguard the efficiency and effectiveness of police investigations.[243] Other courts may be expected to take the same cautious approach, although it has been observed that over the last twenty years little or no evidence has been developed to suggest that law enforcement has been seriously impeded by state court decisions recognizing rights greater in scope than those guaranteed by the federal Constitution.[244]

The interactive states, while retaining the federal "formal adversarial judicial proceedings" formula for the attachment of the right to counsel, have ameliorated the Procrustean nature of that prerequisite by identifying the initiation of such proceedings at ever-earlier points in the criminal process, as a matter of state law. Such an approach can, but does not necessarily, result in independent examination of the state constitution or in recognition of rights under state law that are greater in scope than rights secured by the sixth amendment.

The independent states have rejected the federal judicial proceedings prerequisite, while retaining critical stage analysis. They have regarded a pretrial lineup as such a stage, at which counsel's presence is required, as a matter of the court's supervisory powers, state statute, or constitutional provision. That approach can culminate in recognition of a

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In contrast, "[w]hen the [federal Bill of Rights was adopted, there were no organized police forces as we know them today." *United States v. Wade*, 388 U.S. 218, 224 (1967) (citing authorities).

242. Historical sources for interpreting state constitutions can be scarce for a variety of reasons. For example, in a typical fit of fiscal conservatism, the delegates to the Texas Constitutional Convention of 1875 voted (53-31) against efforts to authorize payment to have a public record made of the debates during the proceedings. S. McKay, *supra* note 218, at 77.

243. *See, e.g.*, P. Bobbitt, Constitutional Fate (1982) (explaining alternative approaches to constitutional interpretation), *cited with approval in* State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987); State v. Jewett, 146 Vt. 221, 500 A.2d 233 (1985). *See also* Utter & Pitler, *Presenting State Constitutional Arguments: Comment on Theory and Technique*, 20 Ind. L. Rev. 635 (1987).

244. Marcus, *State Constitutional Protection for Defendants in Criminal Prosecutions*, 20 Ariz. St. L.J. 151, 169 (1988) (citing Galie, *State Constitutional Guarantees and the Alaska Court: Criminal Procedure Rights and the New Federalism, 1960-81*, 18 Gonz. L. Rev. 221, 259 (1983)); People v. Hawkins, 55 N.Y.2d 474, 495, 450 N.Y.S.2d 159, 171, 435 N.E.2d 376, 388 (1982) (Meyer, J., dissenting) (until real problems for law enforcement have been shown to stem from presence of counsel at prearraignment lineups in Alaska, California, Michigan, and Pennsylvania, nothing except speculation weighs in constitutional balance against requiring counsel).

broader scope for the right to counsel under state law than that provided under the sixth amendment.

In light of the psychological studies showing the dangers of lineup identifications, and the widespread legal criticism of the federal formula, it is time for more state courts to examine the interplay between state and federal provisions, or to analyze state constitutions independently, and to "terminate the guardianship"[245] that the federal courts have exercised over the rights of criminal suspects, especially the right to counsel at lineups.

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245. Duncan, *Terminating the Guardianship: A New Role for State Courts*, 19 ST. MARY'S L.J. 809 (1988).