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UNITED STATES v. WADE:

THE PRE/POST INDICTMENT DILEMMA

INTRODUCTION

On June 20, 1967 the Supreme Court handed down the decision of United States v. Wade which guarantees to an accused the right to be represented by counsel at a pre-trial line-up proceeding.

Because the court did not rule on when this right comes into existence, some courts have held that the Wade decision applies only to post-indictment line-ups and others have applied Wade without regard to whether or not there has been a formal indictment. The major purpose of this comment will be to examine the question of whether the right to counsel exists only after an accused has been formally indicted, or whether counsel at line-up proceedings is a requirement without regard to indictment.

A determination of the meaning and application of Wade requires first a look at those cases dealing with the right to counsel decided prior to Wade. Those cases, especially Miranda v. Arizona and Escobedo v. Illinois, because they laid the groundwork for Wade, have had a strong impact on Wade's interpretation.

In reviewing the cases decided subsequent to Wade, which indicate whether indictment is necessary to invoke the Wade rule, most of the discussion will concern lower federal court opinions. However, what appears to be the minority approach of the Illinois Courts in the Wade area will also be reviewed.

Finally the effect of the Title II Omnibus Crime Control Act, which apparently was designed to repeal or drastically modify Wade and its progeny, will be considered, although a

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6 Title II of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.A. §3500. Note this act applies to federal prosecutions and is not binding on the States:

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

7 Id.; United States Code Congressional and Administrative News at 2139. Comment was made that United States v. Wade "struck a harmful blow at the nationwide effort to control crime" by limiting the use of eye-
constitutional confrontation between this law and the Supreme Court decisions has, as yet, not occurred.

DEVELOPMENT BEFORE WADE

Whether Wade applies only after indictment should depend on the objectives and reasons for the decision. These in turn, are best understood by a consideration of the right to counsel cases prior to Wade. An examination of these cases shows that the scope of the right to counsel was increased over the years to include in a number of what are called “critical stages” of the criminal proceedings. The judicial atmosphere that evolved was expressed in Powell v. Alabama, where the court said, “... even the intelligent and educated layman ... requires the guiding hand of counsel at every step in the proceeding against him.”

Until the case of Gideon v. Wainwright in 1963, the sixth amendment right to counsel in criminal prosecutions was not binding on the states. The states were using a “voluntariness — totality of circumstances” approach to protecting the rights of an accused from abuses by police. This test was used primarily in determining whether to admit a confession. The trial judge looked to “all the circumstances surrounding” a confession to determine if it was voluntary. If so the confession was admissible. However, it was extended into the area of police line-ups as well. In the case of a line-up, the trial judge similarly looked to “all the circumstances surrounding” the line-up proceeding to determine if it was fair and impartial. If so, the line-up identification satisfied due process and was admissible.

However, the courts became convinced that the “totality of circumstances” approach did not effectively protect an accused from abuses by police. Such an approach left wide discretion in the judge in determining the fairness of a confession or line-up, and because there were usually no witnesses to the pre-trial

witness testimony. “To counter this harmful effect, the committee adopted that portion of Title II that denies the Federal courts the power to review the final State court and Federal trial court decisions declaring eyewitness testimony to be admissible.”

8 287 U.S. 45 (1932).
9 Id. at 69.
14 Id.
15 KAMISAR, LOCKHART, CHOPER, CONSTITUTIONAL LAW CASES — COMMENTS — QUESTIONS, [hereinafter cited as Kamisar], said:

Whether or not this traditional approach to police interrogation and confessions makes good sense it constitutes very questionable history.
proceeding except the police and the accused, what occurred between police and accused was usually a mystery and became a "swearing contest" as to what had actually happened.\textsuperscript{16} Usually this contest was won by the police.\textsuperscript{17} Moreover, frequently the defendant was inarticulate, which aggravated the difficulties of recreating the tenor and atmosphere of the police questioning or the manner in which the appropriate advice about the suspect's rights might have been or, if properly given, subsequently undermined.\textsuperscript{18}

The procedures used by police to get confessions and incriminating statements had become so effective that major works had been written to record various methods and techniques in interrogations.\textsuperscript{19} Inbau and Reid conclusively indicate a scientifically and psychologically oriented approach to breaking a person's resistance.\textsuperscript{20} These methods, in addition to the police-oriented atmosphere, perhaps exaggerated by the fright and weakness of the individual, created a poor environment for protection of constitutional rights.\textsuperscript{21}

Disturbed by the apparent ineffectiveness of the totality test to curb excesses of police and protect the right of an accused to a fair trial, the court turned to the sixth amendment right to counsel.\textsuperscript{22} Basically the court increased the scope of a person's right to counsel to include many pre-trial procedures to remove some of the secrecy and suspected abuses of these pre-trial confrontations.

The implementation and development of the right to counsel as a procedural safeguard is seen in three cases prior to the first such case in 1936 had the privilege against self-incrimination as it applied to judicial proceedings been the controlling standard. Id. at 617-18; Escobedo v. Illinois, 378 U.S. 478 (1964); Miranda v. Arizona, 384 U.S. 436 (1966); United States v. Wade, 388 U.S. 218 (1967).

\textsuperscript{16} Kamisar at 612. See the brutal beatings in Brown v. Mississippi, 297 U.S. 278 (1936), or the 36 consecutive hours of questioning present in Ashcraft v. Tennessee, 322 U.S. 143 (1944). For a series of cases showing excessive police brutality see Miranda v. Arizona, 384 U.S. 436 (1966) at nn.6 and 7.

\textsuperscript{17} Id.

\textsuperscript{18} Kamisar at 612.

\textsuperscript{19} F. Inbau & J. Reid, Criminal Interrogation and Confessions. This book stresses, among other things, the absolute need for privacy, the requirement that an interrogator "display an air of confidence in the suspect's guilt." The book recommends calling "attention to the subject's physiological and psychological symptoms of guilt" in an effort to "destroy" or "diminish" his confidence in his ability to deceive..." and "...to convince him of the futility of further resistance." Another interesting tactic discussed in this book is "if the subject refuses to discuss the matter under investigation concede to him the right to remain silent, and then proceed to point out the incriminating significance of his refusal."

\textsuperscript{20} Id. at 23, 29, 111.

to Wade: Spano v. New York,\textsuperscript{23} Escobedo v. Illinois\textsuperscript{24} and Miranda v. Arizona;\textsuperscript{25} the holdings and legal reasoning of these cases are important to a proper understanding of Wade because Wade used the reasoning of and relied heavily on these immediately preceding cases. They all deal with the same broad area of protection of the rights of an accused from abuses by police by providing counsel.

In Spano v. New York,\textsuperscript{26} three of the concurring justices wanted to reverse on the right to counsel argument concerning the admissibility of a confession. But the majority said:

We find it unnecessary to reach that contention, for we find use of the confession obtained here inconsistent with the fourteenth amendment under traditional principles.\textsuperscript{27}

The Spano court did recognize however, that:

\ldots as law enforcement officers become more responsible, and the methods used to extract confessions more sophisticated, our duty to enforce federal constitutional protections \ldots becomes more difficult because of the more delicate judgments to be made.\textsuperscript{28}

It is clear that the court was showing its growing disenchantment with the old test.

Escobedo v. Illinois\textsuperscript{29} used the right to counsel as a pre-trial "procedural safeguard" to protect the accused's privilege against self-incrimination. In that case the court held the right to counsel commences "\ldots where \ldots the investigation \ldots has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements.\ldots\textsuperscript{30} No statement elicited by the police during the interrogation may be used against the defendant unless counsel is provided or waived.\textsuperscript{31}

\textsuperscript{23} 360 U.S. 315 (1959).
\textsuperscript{24} 378 U.S. 478 (1964).
\textsuperscript{25} 384 U.S. 436 (1966).
\textsuperscript{26} 360 U.S. 316 (1959).
\textsuperscript{27} Id. at 320.
\textsuperscript{28} Id. The Spano court said:
The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deeprooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves. Accordingly, the actions of police in obtaining confessions have come under scrutiny in a long series of cases. Those cases suggest that in recent years law enforcement officials have become increasingly aware of the burden which they share, along with our courts, in protecting fundamental rights of our citizenry, including that portion of our citizenry suspected of crime. \ldots But as law enforcement officers become more responsible, and the methods used to extract confessions more sophisticated, our duty to enforce federal constitutional protections does not cease. It only becomes more difficult because of the more delicate judgments to be made.

\textsuperscript{29} 378 U.S. 478 (1964).
\textsuperscript{30} Id. at 490-91.
Using the test of when the right to counsel may be invoked it was clear that formal indictment was not relevant.
It would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of the interrogation, the authorities had secured a formal indictment. Petitioners had, for all practical purposes, already been charged with murder.32

The Court went on to reply to what would later be called the law and order argument. The court said in effect that the critical stage of a criminal prosecution when an accused's right to fair treatment at the hands of the authorities could be abused is precisely what invoked the constitutional right to counsel:

It is argued that if the right to counsel is afforded prior to indictment, the number of confessions obtained by the police will diminish significantly, because most confessions are obtained during the period between arrest and indictment, and 'any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.' This argument, of course, cuts two ways. The fact that many confessions are obtained during this period points up its critical nature as a 'stage when legal aid and advice' are surely needed. The right to counsel would indeed be hollow if it began at a period when few confessions were obtained. There is necessarily a direct relationship between the importance of a stage to the police in their quest for a confession and the criticalness of that stage to the accused in his need for legal advice. Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination.33

Hence, in Escobedo the test used to determine whether a right to counsel exists was when the authorities "focus on a particular suspect."34 Once this test is satisfied a "critical stage" of the proceeding arises at which an accused is entitled to counsel. An important thing to note is that the court rejected any notion that satisfaction of this test depended on the occurrence of indictment.35

Two years later in Miranda the Court made a further expansion of "procedural safeguards," again without regard to whether an indictment had been obtained. The Court felt that "[t]he presence of an attorney, and the Miranda warning delivered to an individual, enable the defendant under otherwise compelling circumstances, to tell his story without fear, effectively, and in a way that eliminate the evils in the interrogation process."36 The Court said that once custodial interrogation had

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32 Id. at 485-86.
33 Id. at 488.
35 Id. at 486. "The interrogation here unlike Massiah was conducted before petitioner was formally indicted. But in the context of this case, that fact should make no difference . . . ."
begun the accused had a right to receive the "four Miranda warnings." The Court then defined custodial interrogation as "... questioning initiated by law enforcement officers after a person had been taken into custody or otherwise deprived of his freedom of action in any significant way." It is apparent that the definition of custodial interrogation in no way depends on the period at which a person is indicted. In fact, the Court indicated that third degree types of interrogation almost invariably take place during the period between arrest and preliminary examination, which is before indictment.

The parallel between Wade, Escobedo and Miranda is unmistakable. All three are concerned with pre-trial police procedures. All three were concerned with the subtleties of psychologically oriented interrogations. Finally, each of them was an attempt to counter the secrecy and police dominated atmosphere of their respective pre-trial proceeding. In Escobedo the test used to mark the beginning of a "critical stage" at which counsel was required was "focus on a particular suspect." The Escobedo court clearly rejected the contention that the start of this critical stage depended on the obtaining of an indictment. In Miranda the test of "custodial interrogation" did not require indictment. The critical stage in Wade is the line-up, just as "focus on a particular suspect" and "custodial interrogation" is in Escobedo and Miranda. By analogy, this critical stage should not be dependent on whether an indictment has been procured.

ANALYSIS OF UNITED STATES V. WADE

In Wade, several weeks after the defendant had been indicted for bank robbery and counsel had been appointed to represent him, without notice to his appointed counsel, he was placed in a line-up at which two witnesses identified the defendant as the robber. These prior line-up identifications were elicited on cross-examination after an in-court identification. The Court held that the line-up was a "critical stage" of the prosecution" at which the accused was entitled to the aid of counsel, and both he

Prior to any questioning the person must be warned that he has a right to remain silent, that any statement that he does make may be used as evidence against him, and that he has a right to an attorney, either retained or appointed. Id. at 445-46.

Id. at 444.


E.g., 384 U.S. 436, 446 (1966).

Id. at 445.

See note 32 supra.


and his counsel should have been notified of the impending line-up proceeding.\footnote{Id. at 236; Wade did not establish a per se rule of exclusion. In court identification by a witness to whom the accused was exhibited before trial in the absence of counsel or notification of counsel must be excluded, unless it can be shown that such identification had a source independent of the illegal line-up or that error in its admission was harmless.}

The Court at the outset said, "Neither the line-up itself nor anything shown by this record that Wade was required to do in the line-up violated his privilege against self-incrimination."\footnote{Id. at 221.} The reasoning for its holding dealt purely with the accused's right to counsel and it related particularly to his right to be able to meaningfully cross-examine his witnesses against him.\footnote{Id.; Note, The Right to Counsel at Pre-trial Lineups, 63 NW. U.L. REV. 251, 255 (1968).}

The presence of counsel at such critical confrontation, as at the trial itself, operates to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution.\footnote{United States v. Wade, 388 U.S. 218, 226-27 (1967).}

The Court’s distaste for pre-trial line-ups, confrontations, and other forms of identification procedures referred to in Wade, centered upon unreliability of eye-witness testimony, the secrecy surrounding identification, and the opportunity they supposedly afford for prejudicial police suggestions.\footnote{Id. at 228-30; Note, The Right to Counsel at Pre-trial Lineups, 63 NW. U.L. REV. 251, 253 (1968).} Hence, the main purpose of requiring counsel at the line-up was to enable the attorney to “reconstruct through cross-examination, the circumstances under which he [the accused] was originally identified.”\footnote{Comment, Right to Counsel at Police Identification Proceedings; A Problem in Effective Implementation of an Expanding Constitution, 29 U. PITTS. L. REV. 65, 73 (1967). For detailed analysis of the function of counsel at line-up see Comment, The Right to Counsel During Pretrial Identification Proceedings — An Examination, 47 NEB. L. REV. 740, 748 (1968). For a view of the difficult positions of defendants in attempting to protest the manner of pre-trial identification see People v. Shields, 70 Cal. App. 2d 628, 634-35, 161 P.2d 475, 478-79 (1945); People v. Hicks, 22 Ill. 2d 364, 176 N.E.2d 810 (1961); State v. Hill, 198 Kan. 512, 394 P.2d 106 (1964). See also Note, United States v. Wade: A Case of Mistaken Identity, 1 JOHN MAR. J. PRAC. & PROC. 285 (1968).} In this way, the attorney could point out defects in the line-up proceedings which, if sufficiently unfair, could be violative of "due
process" and otherwise could diminish the weight of such pre-trial identification.

Arguments Against Application of Wade to Pre-indictment Line-ups

The arguments supporting the proposition that Wade applies only to post-indictment situations are few in number and not very convincing. One argument supporting the proposition that Wade applies only to post-indictment situations is that the facts of the Wade decision concerned a post-indictment police line-up. Hence, a strict interpretation of Wade, if limited to its particular fact situation, would dictate that it applied only to a post-indictment situation.

Another argument is that by rejecting the fifth amendment contention, the Wade court could be showing an unwillingness to analogize Wade with the Escobedo and Miranda decisions, which explicitly interweave the defendant's right to counsel with his privilege against self-incrimination. That is, the Court might wish to limit the right to counsel to just post-indictment line-ups, whereas Miranda and Escobedo recognized this right regardless of whether the accused had been formally indicted or not. This distinction in the Court's reasoning could defeat the making of an analogy between Wade and Miranda — Escobedo for some interpreters of Wade.

It must be noted that in one place in the opinion, the Wade Court does appear to limit its holdings to post-indictment line-ups. After speaking about abuses which could occur at a line-up, the Court says:

Since it appears that there is grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial, there can be little doubt that for Wade the post-indictment line-up was [a] critical stage of the prosecution at which he was 'as much entitled to such aid of counsel . . . as at the trial itself.'

This is the only statement by the Court indicating a possible limitation on Wade to post-indictment line-ups. This may have been merely a discussion of a broader rule as it applied to Wade's particular situation. But there is a possibility that the Court

52 See Stovall v. Denno, 388 U.S. 293 (1967), where defendant attempts to attack hospital identification through due-process since no right to counsel exists.
55 See note 48 infra.
58 United States v. Phillips, 427 F.2d 1035, 1037 (9th Cir. 1970):
did intend to limit *Wade* to post-indictment situations as it did not want to extend its position too far and therefore, leave room for the States to develop their own means of conducting fair line-ups.⁵⁹

**Arguments for Application of Wade to Pre-indictment Line-ups**

There seems to be considerably more support for the proposition that *United States v. Wade* applies to both pre and post-indictment line-ups. The most obvious argument is that in *Wade* there is continual reference to the *Escobedo-Miranda* category of cases.⁶⁰ There appears to be an attempt to analogize these decisions dealing with police interrogation to the line-up situation. As stated before, this analogy may not be supportable, since the former cases linked right to counsel with the fifth amendment, whereas, in *Wade*, the fifth amendment argument was rejected.⁶¹ The Supreme Court, however, seems to offer strong support to the view that the analogy is not defeated by this distinction.

Of course, nothing decided or said in the opinions in the cited cases [*Miranda, Escobedo, Hamilton, Massiah*] links the right to counsel only to protection of Fifth Amendment rights. Rather those decisions 'no more than [reflect] a constitutional principle established as long as Powell v. Alabama * * *, Massiah v. *United States*, supra. It is central to the principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage if the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial. The security of that right is as much the aim of the right to counsel as it is of the other guarantees of the Sixth Amendment.⁶² Hence, the Court appears to conceive of *Wade* in the same vein as it did *Miranda* and *Escobedo* and in neither of these cases was there a pre or post-indictment distinction.

Furthermore, the *Wade* Court throughout its entire opinion, except in the one area cited above, never qualifies its statements regarding line-ups to pre or post-indictment. That is, its dis-

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⁶¹ See note 51 *supra*.

discussion of line-ups refers generally to all pre-trial line-ups. Hence, as expressed by one commentator in some of the opinion, the wording of Wade seems to limit the effect of the decision to post-indictment identifications only, these words were probably meant as words of description rather than as words limiting the scope of the Court's opinion.63

A similar strict interpretation of Escobedo was clearly rejected in Miranda.64

This general reference to all line-ups is also evident in the Court's lengthy discussion of the abuses which can and do occur at line-up proceedings.

But the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial. The vagaries of eyewitness identification are well-known: the annals of criminal law are rife with instances of mistaken identification.65

It would not be realistic or logical to say that these abuses could only occur during a post-indictment line-up and not at one which occurs before an indictment.66

The Court was concerned with the potential for prejudice in pre-trial confrontation, not with whether they took place before or after indictment. If the Court decides that constitutional rights have been violated, it is doubtful whether the fact that the accused has not yet been indicted will cause the Court to deny relief.67

Another indication of the Court's intention as to the application and scope of Wade is Justice White's dissenting opinion in Wade. In his dissent, White criticizes the majority for going as far as they did in expanding the breadth of the right to counsel.

The rule applies to any lineup, to any other techniques employed to produce an identification and a fortiori to a face-to-face encounter between the witness and the suspect alone, regardless of when the identification occurs, in time or place, and whether before or after indictment or information.68

From this dissenting opinion, it appears that Justice White, having been part of the Court's deliberations, knew that the majority

63 The Right to Counsel at Pre-trial Lineups, 63 Nw. U.L. Rev. 251, 257-58 (1968).
64 Id.
67 The Right to Counsel at Pre-trial Lineups, 63 Nw. U.L. Rev. 251, 257-58 (1968); 36 U. Chi. L. Rev. 830, 840 (1969). There seems to be no reason to limit Wade and Gilbert as the same problems exist at the pre-indictment stage that exist at the post-indictment stage. The problems are suggestiveness in the line-up proceedings and the fact that this line-up identification is usually stick to by the witness. See 47 Neb. L. Rev. 740, 747 (1968).
intended for this right to counsel to exist whether the line-up was pre-indictment or post-indictment.

Finally, it appears that this pre/post-indictment test is too mechanical to adequately protect an accused's constitutional rights.

Admittedly, limiting the scope of the right to counsel by the application of the simple pre/post-indictment dichotomy would lend itself to easy administration by the Courts. Unfortunately, it would also leave the police in the position to manipulate the applicability of the right to counsel by holding all identification procedures before the indictment thus defeating the aim of the Wade and Gilbert rulings. 69

Thus, while it appears that isolated parts of the Wade opinion can be used to support the proposition that Wade applies only to post-indictment line-ups, it is more logical from the reasoning in Wade and the opinion as a whole to say that application of Wade is not dependent on indictment. This is especially true when considering the judicial atmosphere, created by Escobedo and Miranda, which gave rise to Wade.

INTERPRETATION GIVEN TO WADE BY OTHER COURTS

The "extent of this right [to counsel at pre-trial confrontations] in particular circumstances has yet to be authoritatively determined." 70 Gilbert v. California, 71 decided the same day as Wade, also held that a post-indictment pre-trial line-up at which the accused was exhibited to identifying witnesses was a critical stage of the criminal proceedings entitling the accused to the assistance of counsel. Since this case also dealt with a post-indictment line-up, no light is shed on the pre-indictment situation.

The next Supreme Court case of any significance in this area was Biggers v. Tennessee. 72 This was a rape case where the suspect was identified in a stationhouse identification. While not a line-up identification, it was pre-indictment and no attorney was present. Justice Douglas, who was on the Court when Wade and Gilbert were decided, in a dissenting opinion said, "[t]his procedure of identification violates, of course, United States v. Wade . . . ." 73

In Foster v. California, 74 the defendant could not rely on Wade because of Wade's non-retroactivity; 75 however, in refer-

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70 United States v. O'Connor, 282 F. Supp. 963, 964 (D.D.C. 1968); also, there has been no decision by the Supreme Court explaining Wade.
72 390 U.S. 404 (1967).
73 Id. at 406.
75 Stovall v. Denno, 388 U.S. 293 (1967) held that Wade and Gilbert affect those cases and all future cases which involve confrontation for identification purposes conducted in the absence of counsel after June 12, 1967.
ring to Wade and Gilbert the majority opinion said, "... this Court held that because of the possibility of unfairness to the accused in the way a line-up is conducted, a line-up is a 'critical stage' in the prosecution, at which the accused must be given the opportunity to be represented by counsel." So the Supreme Court, in speaking of its own decision in Wade, does not limit it to post-indictment. This is the extent of the Supreme Court's reference to the Wade case concerning the scope of its applications.

**Federal Appellate Courts**

Every federal circuit which has expressly considered the issues has rejected the post-indictment limitation. The third circuit in the case of United States v. Russell appeared to favor the broad interpretation of Wade, when it agreed with the statement by the fifth circuit in Rivers v. United States which said, "[w]ith Miranda on the books, it is indisputable that most, perhaps all lineups occurring after arrest will fall within the rules announced in Wade and Gilbert."80

In the fifth circuit the leading case is Rivers v. United States cited above. This circuit was the father of the Wade decision and appears anxious to apply Wade to any pre-trial confrontation

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77 United States v. Ayers, 426 F.2d 524 (2nd Cir. 1970); United States v. Russell, 405 F.2d 1119 (3rd Cir. 1969); United States v. Rivers, 400 F.2d 935 (5th Cir. 1968); United States v. Broadhead, 413 F.2d 1351 (7th Cir. 1969); United States v. Ranciglio, 429 F.2d 228 (8th Cir. 1970); United States v. Phillips, 427 F.2d 1035 (9th Cir. 1970); People v. Cruz, 415 F.2d 336 (9th Cir. 1969); United States v. Greene, 429 F.2d 193 (D.C. Cir. 1970); Mason v. United States, 414 F.2d 1176 (D.C. Cir. 1969); Long v. United States, 424 F.2d 799 (D.C. Cir. 1969).
78 405 F.2d 119, 1122 and n.9 (3rd Cir. 1969); see United States v. Zeiler, 427 F.2d 1305, 1307 (3rd Cir. 1970) where the Court said that Wade applied at least to post-indictment line-ups, indicating that it probably applied to more than just post-indictment situations. The Court then went on to extend Wade to pre-trial photographic identification of an accused who is in custody thus again showing an unrestrictive interpretation of Wade. But see United States v. Shannon, 424 F.2d 476 (3rd Cir. 1970) where the court said in dicta, in referring to the Wade decision, "the Supreme Court held that a post-indictment line-up was a critical stage of the criminal proceeding at which the accused was guaranteed the right to counsel." Id. at 477.
79 400 F.2d 935 (5th Cir. 1968).
80 Id. at 939.
81 Wade v. United States, 358 F.2d 557 (5th Cir. 1969). In River v. United States, 400 F.2d 935 (5th Cir. 1968) the court looks with pride at its decision of Wade v. United States.

In Stovall v. Denno the Court recognized that the law enforcement officials of the Federal Government and all 50 states had proceeded on the assumption that counsel was not necessary at a lineup or an out-of-court confrontation. Standing by itself, alone and unaided by specific precedents, was the decision of this Court on Wade v. United States, 5 Cir., 1966, 358 F.2d 557. It foreshadowed a reversal in the line of decisions.

Id. at 939.
after arrest.\textsuperscript{82} Here the confrontation occurred at a hospital and the victim identified the accused from a stretcher immediately after the shooting. The Court held \textit{Wade} applicable and reversed the conviction on the right to counsel issue.\textsuperscript{83}

The ninth circuit case of \textit{United States v. Phillips}\textsuperscript{84} uses \textit{Wade} as authority for its holding that an accused has a right to counsel at a pre-indictment line-up.

Turning to the 'line-up issue,' we note that \textit{United States v. Wade} held that a defendant is entitled to the aid of counsel at any time a 'critical stage' exists, such as a post-indictment line-up. This was a pre-indictment line-up, but we find no different general rules apply between a pre-indictment and a post-indictment line-up. Each must be fair to the ultimate defendant. We hold the defendant was entitled to counsel at either, so as to promote and insure fairness at the confrontation, and a full hearing at the trial on the issue of identification.\textsuperscript{85}

In \textit{United States v. Ayers},\textsuperscript{86} from the second circuit the line-ups were clearly before indictment, yet the Court applied \textit{United States v. Wade}.

We hold, however, that a separate and different warning was required with reference to the lineups. The defendant should have been told that there was to be a lineup for the purpose of possible identification and that he was entitled to have his lawyer or one provided by the State present at the lineup. This is the clear import of the Supreme Court ruling in \textit{United States v. Wade}.\textsuperscript{87} However, because there was an independent source for the identification, the conviction was affirmed.

Also, the appellate court of the eighth circuit made no distinction between pre and post-indictment situations, but affirmed the lower court conviction because there was an independent source of identification.\textsuperscript{88} The line-up occurred the same evening.

\textsuperscript{82} Rivers v. United States, 400 F.2d 989 (5th Cir. 1968). The decisions of the Supreme Court in \textit{Wade} and \textit{Gilbert} put it in terms of right to counsel. They held that confrontations between suspects and witnesses were a 'critical stage' of the criminal proceedings against an accused and counsel must be present at these confrontations unless waived. With \textit{Miranda} on the books, it is indisputable that most, perhaps all, confrontations occurring after will fall within the rules announced in \textit{Wade} and \textit{Gilbert}. We recognize the risk of ever letting a dissenter speak momentarily for the Court as to what it has really held, but Mr. Justice White, dissenting in \textit{Wade} said 'the rule applies to any lineup, to any other techniques employed to produce an identification and a \textit{fortiori} to a face-to-face encounter between the witness and the suspect alone, regardless of when the identification occurs, in time or place, and whether before or after indictment of information.'

\textsuperscript{83} Id.

\textsuperscript{84} 427 F.2d 1035 (9th Cir. 1970).

\textsuperscript{85} Id. at 1037; \textit{see} People v. Cruz, 415 F.2d 336, 337 n.1 (9th Cir. 1969).

\textsuperscript{86} 426 F.2d 524 (2d Cir. 1970).

\textsuperscript{87} Id. at 527.

\textsuperscript{88} \textit{United States v. Ranciglio} and \textit{United States v. Corzine}, 429 F.2d 228 (8th Cir. 1970).
as the arrest, a fact which the Court italicized for emphasis.\textsuperscript{89} Although there was no indictment the Court ruled that these line-up procedures "... violated the constitutional standards set forth in \textit{United States v. Wade}.\textsuperscript{90} In \textit{United States v. Greene},\textsuperscript{91} the U.S. Court of Appeals for the District of Columbia Circuit, held that the right to counsel arises even before arrest.

However, since our decision in \textit{Long v. United States}, it is clear that the Sixth Amendment right to counsel at a pretrial confrontation for purposes of identification does not turn automatically upon the existence \textit{vel non} of legal arrest. In \textit{Mason} the pre-trial confrontation in issue took place after arrest but prior to indictment. It, therefore, nullified any thought that, because \textit{Wade} involved a defendant in custody after indictment, the right to counsel for pre-trial identification purposes attaches only after indictment. On the instant appeal, the Government's position is that the right does not come into being prior to arrest. \textit{Long} building upon \textit{Mason}, negates the proposition.\textsuperscript{92}

\textit{Long v. United States},\textsuperscript{93} cited in \textit{Greene}, applied \textit{Wade} to a pre-arrest, squad room confrontation. The reasoning concerning suggestiveness, however, is an indication of the context in which \textit{Wade} is considered and understood by the lower federal court.

The Supreme Court expressly held its ruling applicable to the informal 'show-up' in which witnesses are confronted by a single suspect. Indeed, the more informal the confrontation procedure the greater is the danger of suggestiveness, and the greater the difficulty of ascertaining at trial the facts of the 'confrontation.' The sources of suggestiveness in an eyewitness identification are subtle, and the suspect is less likely to be alert to the need for safeguards when no formal process has issued against him.\textsuperscript{94}

Finally, \textit{United States v. Broadhead},\textsuperscript{95} which is a seventh circuit case, held that a pre-indictment line-up in the absence of counsel was a "... violation of his Sixth Amendment right to counsel as enunciated in \textit{Wade} and \textit{Gilbert}."\textsuperscript{96} In this case however, the conviction was affirmed because there was an independent source.

So in a vast majority of the Federal Appeals cases, \textit{Wade}
did not apply because it was prospective only. Yet, it was apparent that the Courts discussed Wade, even in pre-indictment situations, and sometimes in pre-arrest confrontations, as though it would have applied had the case been decided after Wade.97 Indictment was not thought to be significant; the rules for line-ups and confrontations were treated generally.98

Federal Trial Courts

The district court decisions are less in number but appear to generally hold Wade applicable to all line-ups, both before and after indictment. There is only one district court decision reported which seems to limit Wade to post-indictment. This is the decision of United States ex rel. Rutherford v. Deegan99 from the District Court of New York. In that case the court could not apply Wade because Wade is not retroactive; yet in speaking of the Wade decision in dicta, it said the Wade decision, "... announced that the sixth amendment requires the presence of counsel when a witness identifies a defendant after his indictment and before his trial."100 Although this is only dicta, it may be an indication as to how the Federal District Court of New York will apply Wade when the opportunity arises. In Bratten v. Delware,101 the court is equivocal as to the significance of indictment. It attacks the problem by a consideration of "criticalness." The case represents a pre-arrest situation which, of course, is also pre-indictment. The court said, "... it appears from these cases [Wade, Gilbert, and Stovall] the Supreme Court considers that a confrontation is a "critical stage" in a criminal prosecution, requiring counsel to be present only when a defendant becomes an "accused" within the rule of Escobedo v. Illinois.102 Hence, it appears that this court feels that Wade should be interpreted in light of Escobedo which ignores any such distinction as pre or post-indictment and, in fact, indicates that whether a person has been formally indicted or not should make no difference.

The remaining district court decisions have clearly utilized the broader interpretation of the Wade decision.103 Two very

99 The most recent decisions of the Supreme Court declare that a suspect has the right to counsel at an identification lineup. United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967). The Court held that a lineup is a critical stage of the prosecution, at which counsel must be present.
100 Id. at 38.
explicit cases in this area are United States v. Clark104 and United States v. Wilson.105 In United States v. Clark, a pre-indictment case, the court said:

The government has urged that Wade and Gilbert are distinguishable from this case because the confrontation here occurred the same day as the robbery whereas the confrontations in those cases took place at a later stage in the prosecution, i.e. in Wade the lineup was conducted forty days after the defendant’s arrest, several weeks after his indictment, and fifteen days after appointment of his lawyer, and in Gilbert the lineup was conducted sixteen days after his indictment and after appointment of counsel. The government makes the related claim that the circumstances surrounding the confrontation in Wade and Gilbert much more clearly reflected ‘(T)he potential for improper influences * * *’ than did the circumstances surrounding this confrontation, . . .106

The court answered this contention by using the “criticalness” language of Miranda and Escobedo and by explaining some of the mechanics of the Wade decision.

Regardless of the relative merit of any of these distinctions which the government advances the Court still must reject its basic argument that the fairness of a confrontation can insulate it from the Wade and Gilbert holdings. This is so because the Court was so concerned with the prejudice to the defendant potentially inherent in all such procedures that it held that fairness to the defendant effectively could be insured only by a uniform rule requiring the presence of counsel at any confrontation which occurred at a ‘critical’ stage of the prosecution. Therefore, a trial court reviewing a challenged pre-trial confrontation is not to inquire whether that confrontation was conducted in a fair or unfair manner, but rather, is to inquire only whether that confrontation occurred at a ‘critical’ stage of the prosecution. If so, regardless of the demonstrated fairness of the confrontation, if defense counsel was not present at the confrontation identification testimony which is the fruit of that confrontation must be barred at trial. Limiting the trial court’s inquiry in this fashion reflected the Court’s belief that even if a particular confrontation was in fact fair the absence of counsel from that confrontation at least in theory might hamper cross-examination and, therefore, deprive the defendant of his right to fair trial.

In the present case it is clear the government’s prosecution of the defendant had reached a ‘critical’ stage . . . . [S]ince the Supreme Court’s oft-cited decision in Powell v. State of Alabama, . . . courts have recognized that pre-trial stages other than indictment are ‘critical,’ if the absence of counsel from such stages would derogate substantially from the defendant’s rights under the Sixth Amendment.107

Hence, the court held conclusively that the defendant’s motion to court held that while the defendant was in custody, although not as yet indicted for the robbery, he was entitled to be informed of the prospect of a show-up at the police station and of his right to have counsel present.

107 Id. at 626-27.
suppress the identifications in the absence of counsel must be granted.\textsuperscript{108}

In \textit{United States v. Wilson} the line-up occurred before indictment and the court held that the stationhouse identification should be suppressed on the basis of \textit{Wade}, saying:

While both \textit{Wade} and \textit{Gilbert} refer to \textit{post-indictment} lineups, a stationhouse identification is an equally critical stage of the prosecution. The majority in \textit{Wade} impliedly recognized this in its reference to the use of substitute counsel where notification and presence of the suspect's own counsel would result in prejudicial delay. Moreover, three members of the Supreme Court expressly stated that the \textit{Wade} standards apply 'whether before or after indictment or information.'\textsuperscript{109}

A final illustrative district court case, \textit{United States v. Pate},\textsuperscript{110} is from a district for the State of Illinois. Here petitioner brought a habeas corpus petition to Federal District court directly from the Circuit Court of Cook County, Illinois. The government moved to dismiss based on the grounds that petitioner failed to exhaust available state remedies.\textsuperscript{111} Petitioner contended that he was deprived of his right to counsel at a line-up conducted after his arrest but before his indictment. He further contended that based on \textit{People v. Palmer}, 41 Ill. 2d 571, 244 N.E.2d (1969), exhausting his state remedies would be futile since Palmer "has determined that the decisions cited above [\textit{Wade, Gilbert, Stovall}] are not binding as to pre-indictment confrontations."\textsuperscript{112}

This court does not find that petitioner's remedies here are clearly ineffective or futile. The Illinois Supreme Court has stated in \textit{Palmer} that \textit{Wade} and \textit{Gilbert} do not apply to pre-indictment confrontations, but in the context of the case such a broad statement was unwarranted. Neither \textit{Palmer} nor \textit{Cesarz} involved in [sic] actual line-up, and \textit{Cesarz} concerned an identification made prior to arrest while the defendant was in a crowd at a motel swimming pool. Since the fact situation alleged here presents a much clearer case, the appeal does not appear to be to clearly futile that exhaustion should be excused. Rather, comity would dictate that federal intervention be withheld and the Illinois Supreme Court be permitted to pass on the merits of petitioner's claim in light of more recent federal decisions and the present fact situation.\textsuperscript{113}

Finally, this court states that the language in \textit{Palmer} regarding \textit{Wade} was merely dictum and there is no guarantee that the court will apply this dictum to the instant case. It says that petitioner should let his claims be passed on by the Illinois Su-

\textsuperscript{108} \textit{Id.} at 630.
\textsuperscript{110} 913 F. Supp. 494 (N.D. Ill. 1970).
\textsuperscript{111} \textit{Id.}
\textsuperscript{112} \textit{Id.}
\textsuperscript{113} \textit{Id.} at 495-96.
Supreme Court “in light of the more recent federal decisions.” These “federal decisions” as indicated above hold Wade applicable to pre and post-indictment line-ups, not just pre-indictment line-ups.

ILLINOIS

Interpretation of Wade by Illinois courts is still controlled by the case of People v. Palmer. In Palmer, the defendant contended that the courtroom identification should not have been admitted on the basis of Wade and Gilbert because the identification in court was the product of a pre-trial confrontation between defendant and victim in the absence of defendant’s counsel. The court answers this contention by distinguishing Wade and Gilbert:

In our opinion these ‘lineup’ decisions apply only to post-indictment confrontations. We reach this decision because of the language of the United States Supreme Court in these cases and the subsequent case of Simmons v. United States.

The court then takes isolated language from Wade and Gilbert to support their opinion, disregarding the reasons and purposes of the Wade and Gilbert opinions and ignoring the basic rationale of the opinion as a whole. Moreover, the Illinois court in Palmer cites Simmons v. United States as a Supreme Court case supporting their view, although Simmons was a photographic identification case and had nothing to do with line-ups. Also, in that case, the defendant did not contend that he had a right to counsel based on Wade, but instead urged the “totality of circumstances” argument. Finally, the quote the court takes from the Simmons case as already discussed, could just as easily support the view that Wade and Gilbert apply to all line-ups, both before and after indictment.

Although the court’s holdings concerning Wade was not necessary to the outcome or determination of the case, and was therefore merely judicial dictum, the Illinois courts, especially the appellate court, have taken this Palmer dictum as the law.

The Supreme Court of Illinois has taken a somewhat ambiguous approach to the indictment question in subsequent cases and thereby weakened Palmer as precedent. In People v. Davis,
the line-up occurred July, 1967 and defendant was not indicted until October, 1967. The Illinois Supreme Court said:

In *Gilbert v. California*, the Supreme Court, referring to *Wade*, stated: 'We there held that a post-indictment pretrial lineup at which the accused is exhibited to identifying witnesses is a critical stage of the criminal prosecution; that police conduct of such a lineup without notice to and in absence of his counsel denies the accused his Sixth Amendment right to counsel and calls in question the admissibility at trial of the in-court identifications of the accused by witnesses who attended the lineup.' While the circumstances of the defendant's viewing by the witnesses called into question their in-court identification of the defendant, the record here permits what the Supreme Court in *Gilbert* referred to as an 'informed judgment' that the witnesses' identifications were based on observations independent of and uninfluenced by their viewing of the defendant at the police station.\(^{123}\)

So in *Davis*, the Illinois Supreme Court ruled out *Wade*’s applicability on the basis of *Palmer*. Yet, the court proceeds to admit the identification saying that there was an “independent source.” This language is precisely the language and reasoning *Wade* uses to determine admissibility of an out-of-court identification.\(^{124}\)

In *People v. Johnson*,\(^{125}\) although it is difficult to determine when the identification occurred, the court again disposed of the case by finding an independent source. In *People v. Johnson*,\(^{126}\) the defendant urged that his pre-indictment line-up was violative of *Wade* because “the State failed to show clear and convincing proof that the victim's identification of defendant was derived from an observation independent of the line-up encounter.”\(^{127}\) The State contended that *Palmer* was authority for the proposition that in Illinois *Wade* only applies to post-indictment identifications. The defendant conceded that *Palmer* was controlling but urged that *Palmer* be overruled. Hence, the court recognized the defendant's contention concerning a violation of *Wade*. Yet, it declined the opportunity to reiterate the *Palmer* interpretation after reporting the attack upon it and merely decided that, “[w]hile the defendant challenges the identification under *Stovall* as well, we are not prepared to find it insufficient and therefore need not discuss the defendant's argument as to *Palmer*.\(^{128}\)

The remainder of the Supreme Court cases from Illinois reject *Wade* because it is prospective only.\(^{129}\) Hence, a study of

\(^{123}\) *Id.* at 517, 261 N.E.2d at 315-16.

\(^{124}\) See note 46 *supra*.


\(^{126}\) *Id.*

\(^{127}\) *Id.* at 291, 259 N.E.2d at 62.

\(^{128}\) *Id.*

\(^{129}\) People v. Derengowski, 44 Ill. 2d 476, 256 N.E.2d 455 (1970); People
the decisions of the Illinois Supreme Court does not produce complete certainty as to the Illinois interpretation of Wade.

However, all of the Illinois appellate court decisions dealing with the indictment issue, conclusively hold that Wade and Gilbert established the principle that a defendant is entitled to have counsel present only at a post-indictment line-up. As authority for this proposition they cite People v. Palmer and follow the same line of reasoning that appeared in the Palmer case.120

**Effect of Title II on Wade**

No discussion of Wade would be complete without mention of the effect on Wade of Title II of the 1968 Omnibus Safe Streets and Crime Control Act.131 This piece of legislation was designed by Congress to significantly modify, if not destroy, the constitutional safeguards developed by the Supreme Court through the Escobedo, Miranda, and Wade decisions.132

The basis for Congressional action in this area, is the authority of Katzenbach v. Morgan, 384 U.S. 641 (1966), where the Supreme Court stated the Congress had independent authority, to which the Courts would defer, to interpret the substantive provisions of the fourteenth amendment.133

Sections 3501 and 3502 are the sections which could affect Wade. Section 3501 appears to be in direct conflict with Miranda by making the Miranda warnings merely factors to consider in deciding on voluntariness, rather than constitutional prerequisites.134 Section 3502 of the Act “appears to be in direct conflict with Wade.”135 That section reads:

The testimony of a witness that he saw the accused commit or participate in the commission of the crime for which the accused is being tried shall be admissible in evidence in a criminal prosecution in any trial court ordained and established under Article III of the Constitution of the United States.136

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131 Title II of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.A. §3500 [hereinafter cited at Title II]. Note this act applies only to federal prosecutions and is not binding on the States.

132 United States Code Congressional and Administrative News at 2139; 1969 Supreme Ct. Rev. 81, 123; Title II.


136 Title II.
The committee report gives the following analysis and criticism as a basis for Section 3502.

The use of eyewitness testimony in the trial of criminal cases is an essential prosecutorial tool. The recent case of United States v. Wade, struck a harmful blow at the nation-wide effort to control crime. The Court held that an in-court identification of the suspect by an eyewitness is inadmissible unless the prosecution can show that the identification is independent of any prior identification by the witness while the suspect was in custody, and while his court appointed lawyer was neither notified nor present. It is incredible that a victim is not permitted to identify his assailant in court. The same is true of eyewitnesses who saw the victim assailed or murdered. The fact that eyewitness might on some occasion prior to trial have identified the accused, without a lawyer for the accused being present, cannot in reason, law, or common-sense justify such a disastrous rule of evidence. Nothing in the Constitution warrants it. To counter this harmful effect, the committee adopted that portion of title II providing that eyewitness testimony is admissible in criminal prosecutions brought in the Federal courts and that portion of title II that denies the Federal courts the power to review the final State court and Federal trial court decisions declaring eyewitness testimony to be admissible.137

The constitutionality of this legislation has not yet been determined. However, when the time comes for a decision, the Court has several alternatives open to it. Faced with apparent conflicts between these judicial decisions and the legislative enactments, the Court may, of course, reassert its earlier holdings in Miranda and Wade and declare the statute invalid to the extent that it conflicts with the decisions. However, the appealing directness of this solution has never sufficed to make it anything more than a last resort; statutes should be upheld if it is at all possible to read them in consonance with the Constitution. The Court has a variety of techniques for finding such compatibility. It may, for example, limit or distinguish its earlier holdings and declare them not inconsistent with the legislature's own declarations. Conversely, it may tailor the statute, by appropriate construction, to accord with its own prior decisions. Finally, the Court may admit the conflict and decide that in this instance its earlier interpretation of the Constitution may be superseded by reason of the conflicting legislative judgment.138

The Harvard Law Review says that "Wade is a stronger case than Miranda for judicial deference to Congressional fact-finding."139 As Wade "... announced a new, unexpected doctrine, based on virtually no prior judicial experience; the conclusion is thus more easily reached that the legislature is at least as well-equipped in this area as the Court to make the necessary factual assessments."140

137 United States Code Congressional and Administrative News at 2139; 1969 Supreme Ct. Rev. 81, 129; Title II.
139 Id. at 1403.
140 Id.
To this writer the conflict between *Wade* and Section 3502 of the 1968 law is more apparent than necessary. While the section was meant to nullify *Wade*, it was apparently based on two erroneous assumptions. The first being that no in-court witness identification would be admissible if there had been a previous line-up where counsel was not present; that the prosecution would almost never be able to persuade the court that the witness's identification was of an “independent source.” In reality the rule of *Wade* has two exceptions to exclusion, “independent source” and “harmless error.” Subsequent cases have shown that the courts have been fair, if not overly liberal, in finding that there had been an independent source although an improper line-up had occurred in the interim, or that the lack of counsel at the line-up was harmless error.

The second assumption was that *Wade* required counsel at any out of court identification. Instead, *Wade* said that to prevent, or at least safeguard, against potential abuses and suggestiveness that can occur at line-up proceedings, an attorney for the accused was required at those line-up proceedings. However, in recognition of the countervailing interest of effective criminal investigation, the requirement was only enforced by making in-court identification, based on improper line-ups, inadmissible.

Hence, the statute can remain as it is, making a line-up identification one small exception to it.

CONCLUSION

The Supreme Court in 1967 recognized that a line-up proceeding is a stage of the criminal prosecution fraught with potential abuses, especially in regard to suggestiveness. It was in *Wade* that the Court decided that counsel would not only be helpful, but was a constitutional necessity.

Since *Gideon v. Wainwright*, judicial history, as fashioned by the Warren Court, has exhibited an ever increasing trend to widen the scope of constitutional protection through the development of the sixth amendment right to counsel at a trial and is now at the stage where this right exists at a police line-up pro-

Rivers v. United States, 400 F.2d 935, 939 n.4 (5th Cir. 1968).
141 United States v. Broadhead, 413 F.2d 1351 (7th Cir. 1969).
142 United States Code Congressional and Administrative News at 2139.
144 Id.
ceeding.\textsuperscript{145} There has never been a reversal of this trend and whenever doubts existed they were resolved in favor of enhancement of an individual's constitutional rights.\textsuperscript{146}

It was this judicial atmosphere that sparked \textit{Wade}'s inception. An understanding of this judicial trend and background indicated that \textit{Wade} was not to be given its most limited interpretation by applying it only to post-indictment line-ups. Unfortunately, the Supreme Court did not clearly indicate whether \textit{Wade} was to be limited to post-indictment line-ups.

Those proponents of a narrow interpretation of \textit{Wade} fear interference with police law enforcement and over protection of the criminal. Hence several states, notably Illinois, are attempting to limit \textit{Wade} to its narrowest interpretation.

Although the facts of \textit{Wade} were post-indictment, the majority of the Court's opinion did not speak in the narrow and limited terms of post-indictment. The Court's concern was with abuses at line-ups which could readily occur before a person was formally indicted as well as after.

It appears that a majority of the Federal Courts have not placed a limited interpretation on \textit{Wade} and have clearly indicated the illogic of requiring counsel only at post-indictment line-ups.

Through the Omnibus Crimes Control Act, the legislative branch of the Federal Government has been motivated to completely obliterate the effect of \textit{Wade}. The constitutionality of this act has yet to be determined. It appears that it is possible for the \textit{Wade} decision and Title II to co-exist through judicial construction.

For the sake of preserving the important safeguard \textit{Wade} provides, it is desirable for \textit{Wade} to be interpreted to cover all line-ups unrestricted by Title II.

\textit{Charles R. Zisa}

\textsuperscript{145} United States v. Wade, 388 U.S. 218 (1967).
\textsuperscript{146} The more conservative Berger Court might at least slow down this trend. \textit{See} Harris v. New York, 39 U.S.L.W. 4281 (1971).