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Criminal Law: The Right to Counsel at Minnesota Lineups

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The Minnesota Supreme Court

1966-1967

The Minnesota Supreme Court Note surveys significant decisions of the 1966-1967 term. The decisions selected were thought to represent new developments in Minnesota law or otherwise to be of interest to members of the Minnesota Bar. The results reached by the court are analyzed and evaluated in terms of their effect upon Minnesota law and are frequently compared with the law of other jurisdictions. While the decisions are discussed individually, they are arranged according to the principal legal issue considered; this arrangement, however, is merely one of convenience, since many of the cases involve issues from several areas of the law.

Criminal Law: The Right to Counsel at Minnesota Lineups

Defendant, arrested on charges of theft by swindle,[1] was compelled to participate in a pretrial lineup which led to his identification and conviction. The major issue raised on appeal was whether defendant had a right to counsel[2] during the lineup procedure. Defendant argued that *Escobedo v. Illinois*[3] insured the right to counsel when an attempt is made to elicit a confession and that, since the purpose of the lineup is similar to that of eliciting a confession—procurement of evidence to be used against the defendant at trial—the right to counsel must be granted.[4] The court affirmed the conviction, *holding* that the right to counsel could not be extended to police lineups. *State v. Garrity*, 151 N.W. 2d 773 (Minn. 1967).

Historically, the sixth amendment was apparently intended to make the right to counsel available only on request by the

1. MINN. STAT. § 609.52 (1965).
2. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense. . . ." U.S. CONST. amend. VI; MINN. CONST. art. 1, § 6.
3. 378 U.S. 478 (1964). The Court held that police refusal to honor defendant's request to consult with his attorney during interrogation procedures was a violation of the sixth amendment right to counsel, and therefore the elicited confession was inadmissible.
4. Brief for Appellant at 18-19, State v. Garrity, 151 N.W.2d 773 (Minn. 1967).

defendant, only in federal proceedings, and only in capital cases.[5] However, the sixth amendment right to counsel has undergone considerable change since its adoption through the application of the right by the Supreme Court as a tool to protect against infringement of other constitutional guarantees. Thus, where procedural due process or the privilege against self-incrimination have been threatened,[6] the presence of counsel has been required to protect these rights.

The desire to protect procedural due process was the basis for the first extension of the right to counsel. In 1932 the Supreme Court held that due process required the states to appoint trial counsel in capital cases where the defendant was unable to adequately conduct his own defense, whether or not he had requested counsel.[7] The Court later found the denial of counsel in a federal noncapital felony case to be a violation of the sixth amendment.[8] The Court refused to apply this extension to the states[9] until 1963 when, in *Gideon v. Wainwright*,[10] it held that the fourteenth amendment secured the right to counsel for a defendant in a state noncapital felony case.

The idea that the presence of counsel is necessary to protect against deprivation of due process also provided the basis for attaching the right to counsel at a time prior to the trial, at the "critical stages" of the criminal proceedings. The purpose of the right is to avoid the inherent dangers of certain pretrial procedures, thus its assertion does not depend upon a showing of actual prejudice.[11] State arraignment procedures have been found to be critical, since it is at that stage of litigation that valuable defenses must be raised or lost.[12] State preliminary hearings have been held to be similarily critical, even though it is

5. *See* W. BEANY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 32-33 (1955); F. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 110-11 (1951); Holtzoff, *The Right to Counsel Under the Sixth Amendment*, 20 N.Y.L.Q. 7-8 (1944).

6. Although the right to counsel has most often rested upon due process and self-incrimination, it has been argued that police identification procedures violate the equal protection clause of the fourteenth amendment. *See* Butler v. Crumlish, 299 F. Supp. 565 (E.D. Pa. 1964), where the court held that requiring a nonbailed suspect to appear in a lineup while exempting a bailed suspect is a denial of equal protection. *But see* Rigney v. Hendrick, 355 F.2d 710 (3d Cir. 1965).

7. Powell v. Alabama, 287 U.S. 45 (1932).

8. Johnson v. Zerbst, 304 U.S. 458, 463 (1938).

9. Betts v. Brady, 316 U.S. 455 (1942).

10. 372 U.S. 335 (1963).

11. Hamilton v. Alabama, 368 U.S. 52 (1961).

12. *Id.*

not mandatory that a plea be made therein.[13]

The Court has also held that the presence of counsel is necessary to the protection of the fifth amendment privilege against self-incrimination,[14] paralleling the development of the right of counsel in the critical stages of criminal proceedings in the "coerced confession" cases.[15] In these cases, the absence of counsel was initially viewed by the Court as an indication of the presence of coercion.[16] However, in 1964 the Court shifted the emphasis, finding the apparent presence of coercion sufficient to warrant a holding that there had been a violation of the right to counsel.[17]

The Minnesota Supreme Court has reluctantly accepted the basic premises of the United States Supreme Court's sixth amendment decisions on right to pretrial counsel,[18] and, in spite

13. White v. Maryland, 373 U.S. 59 (1963) (per curiam).

14. "No person shall be . . . compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend. V; MINN. CONST. art. 1, § 7.

15. Spano v. New York, 360 U.S. 315 (1959); Crooker v. California, 357 U.S. 433 (1958); Cincenia v. Lagay, 357 U.S. 504 (1958); Watts v. Indiana, 338 U.S. 49 (1949).

16. Cases cited note 15 *supra*. The early coerced confession cases were not couched in terms of the fifth amendment. In federal cases, the Court refused to reach the constitutional question, and instead rendered coerced confessions inadmissible under the Court's authority to supervise federal criminal procedures. McNabb v. United States, 318 U.S. 332 (1943).

17. Massiah v. United States, 377 U.S. 201 (1964). *See* Enker & Elsen, *Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois*, 49 MINN. L. REV. 47, 57-58 (1964), for the view that the Court incorrectly placed the emphasis upon the sixth rather than the fifth amendment. The right to counsel to protect fifth amendment rights has been refined in recent cases. Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964). Although the Court did not expressly rest its right to counsel holding on the fifth amendment in *Escobedo*, as it did in *Miranda*, it may be inferred that the fifth amendment privilege provided impetus for the decision.

18. Other states have reacted similarly. *Cf., e.g.*, State v. Richardson, 194 Kan. 471, 399 P.2d 799 (1965); Bean v. State, 81 Nev. 25, 398 P.2d 251 (1965). *But cf.* People v. Dorado, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169 (1965); State v. Neely, 239 Ore. 494, 398 P.2d 482 (1965). *See also* Rothblatt, *Police Interrogation and the Right to Counsel, Post Escobedo v. Illinois: Application v. Emasculation*, 17 HASTINGS L.J. 41 (1965). Statistical data regarding the attitudes of law enforcement officials, prosecutors, and judges toward the right to counsel may be found in Kamisar & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 MINN. L. REV. 1 (1963).

However, the Minnesota Supreme Court has recently extended the right to counsel *at trial* to all misdemeanor actions where the court may impose a jail sentence. State v. Borst, Doc. No. 172½ (filed Dec. 1, 1967).

of *Gideon v. Wainwright*,[19] the Minnesota court has not followed the spirit of the critical stage cases.[20] In *State v. Osgood*,[21] the court stated that the right to counsel in a felony case does not extend to representation in the investigative process following an arrest or in the preliminary hearing required to ascertain whether there is reasonable grounds for believing that the accused has committed a crime.[22] In *State v. Perra*,[23] the court suggested that the Supreme Court rulings that state arraignment procedures and preliminary hearings were a critical stage of the criminal proceedings were limited to capital cases.[24] In 1965, the Minnesota court restricted the application of *Escobedo* by precluding an affirmative denial of a suspect's right to counsel, rather than imposing the duty to inform him of the right.[25] The court has also ruled *Escobedo* inapplicable to certain "investigative" stages,[26]

19. 372 U.S. 335 (1963).

20. *See* State *ex rel.* Lacklineo v. Tahash, 267 Minn. 237, 126 N.W.2d 646 (1964); State v. Osgood, 266 Minn. 315, 123 N.W.2d 593 (1963); State v. Perra, 266 Minn. 545, 125 N.W.2d 44 (1963).

21. 266 Minn. 315, 123 N.W.2d 591 (1963).

22. *Id.* at 323, 123 N.W.2d at 598.

23. 266 Minn. 545, 125 N.W.2d 44 (1963).

24. *Id.* at 555, 125 N.W.2d at 51.

25. State *ex rel.* Rasmussen v. Tahash, 272 Minn. 539, 141 N.W.2d 3 (1965). This position was later shown to be clearly insufficient: "An individual need not make a pre-interrogation request for a lawyer. While such a request affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver." Miranda v. Arizona, 384 U.S. 436, 470 (1966). The Minnesota court, however, made liberal use of the prospective application of *Miranda* permitted by Johnson v. New Jersey, 384 U.S. 719 (1966). *See* State v. Carmichael, 275 Minn. 148, 145 N.W.2d 554 (1966); State *ex rel.* Fruhrman v. Tahash, 275 Minn. 242, 146 N.W.2d 174 (1966); State *ex rel.* Gerberding v. Tahash, 275 Minn. 195, 146 N.W.2d 541 (1966), *rev'd*, 87 S. Ct. 1506 (1967). The reversal in the *Gerberding* case related to the Minnesota court's contention that Jackson v. Denno, 378 U.S. 368 (1964), which held that the determination of whether a confession was voluntary must be made by the court rather than the jury, was also to be applied prospectively.

26. State v. Weber, 272 Minn. 243, 137 N.W.2d 527 (1965). After being escorted to the sheriff's office, the defendant voluntarily confessed to the beating of his stepson. The court ruled the confession admissible, even though obtained while the defendant was in custody and without counsel, on the grounds that the confession was given during the investigation of a possible criminal act. The court relied upon *In re* Groban, 352 U.S. 330 (1957), which held that counsel could be excluded from proceedings investigating the cause of a fire, a situation clearly distinguishable since that decision rested upon the consideration that the purpose of the fire marshall's hearing was not to adjudicate personal responsibility, but to formulate a policy of fire prevention. The court also relied upon Long v. United States, 338 F.2d 549 (D.C. Cir. 1964); Latham v. Crouse, 338 F.2d 658 (10th Cir. 1964); and Procter v. United States, 338 F.2d 533 (D.C. Cir. 1964), in all of which the

and has distinguished "admissions" from confessions.[27]

In the *Garrity* case the court focused on the self-incrimination aspect of the right to counsel issue. Defendant had argued that the lineup was an infringment upon his privilege against self-incrimination to the same extent as was the confession in *Escobedo*, and that therefore, in the absence of counsel, the evidence procured was similarily inadmissible.[28] In dismissing the defendant's claim, the court noted that the absence of counsel is constitutionally relevant only when it deprives the accused of the right to silence or some other right which could have been effectively asserted had counsel been present.[29] Pursuing this premise, the court then found that, unlike compulsion to extort communications, compulsion to examine ordinary physical evidence, as in a police lineup, does not violate the right to silence.[30] It was therefore concluded that since there was no

defendant had either been informed of his right to counsel, or had blurted out the confession before there was an opportunity to do so.

27. State v. Johnson, 152 N.W.2d 529 (Minn. 1967).

28. Brief for Appellant at 18-19. The choice of a self-incrimination rather than a due process defense was somewhat unfortunate, not because of the likelihood of success of the latter, but because of the extreme tenuousness of the former.

29. State v. Garrity, 151 N.W.2d 773, 776 (Minn. 1967). The court relied upon Kennedy v. United States, 353 F.2d 462 (D.C. Cir. 1965), and Schmerber v. California, 384 U.S. 757 (1966), as establishing this premise. In *Kennedy*, defendant's contention that he had a right to counsel at the time he was taken to the scene of the crime to be identified by a victim was rejected on the grounds that there was simply nothing an attorney could have done for him at that point, since the police had the right to proceed. Similar reasoning was adopted by the Supreme Court in *Schmerber*, where the defendant made the same argument concerning the compulsory administration of a blood test.

30. This distinction was originally established in Holt v. United States, 218 U.S. 245 (1910), and was further refined by Wigmore:

> Unless some attempt is made to secure a communication—written, oral or otherwise—upon which reliance is to be placed as involving his consciousness of the facts and the operation of his mind in expressing it, the demand made upon him is not a testimonial one. . . .

8 J. WIGMORE, EVIDENCE § 2265, at 386 (1961). A somewhat different test has been espoused by others, although definitely in a minority. This draws the line between passivity and activity: "Submission may be compelled but not active cooperation." C. MCCORMICK, EVIDENCE § 126, at 265 (1956). *Compare* State v. King, 44 N.J. 346, 209 A.2d 110 (1965) *and* State v. Ramirez, 76 N.M. 72, 412 P.2d 246 (1966), *with* State v. Taylor, 213 S.C. 330, 49 S.E.2d 289 (1948) *and* Beachem v. State, 144 Tex. Crim. 272, 162 S.W.2d 706 (1942). The *Holt*-Wigmore distinction has been accepted in the overwhelming majority of jurisdictions in the case of fingerprints, palmprints, and bare footprints, whether given voluntarily or not. *See* People v. Jones, 112 Cal. App. 68, 296 P. 317 (1931); State v. Rogers, 233 N.C. 390, 64 S.E.2d 572 (1951); Owens v. Commonwealth, 186 Va. 689, 43 S.E.2d 895 (1947). *See generally* Annot., 28

threat to the privilege against self-incrimination, there was no violation of defendant's right to counsel.

Four days prior to the *Garrity* decision, the United States Supreme Court decided *United States v. Wade*,[31] in which it ruled that the denial of counsel at a pretrial lineup was a deprivation of the sixth amendment right to counsel even though it explicitly held that there was no violation of the fifth amendment.[32] There was no reference to a violation of due process.[33] Instead, the inherent dangers of "suggestion,"[34] the likelihood that counsel for the defense would be handicapped at trial by not having access to information regarding what occurred at the lineup, and the potential impact of the identification upon the outcome of the trial prompted the Court to find that the sixth amendment right to counsel may be asserted without reference to other constitutional rights. Recognizing that the critical stage and coerced confession cases were aimed at guaranteeing a "fair trial" and that the presence of counsel at lineups will protect against derogation of that basic right, the Court established the new rule[35] that evidence relating to the identification of a sus-

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A.L.R.2d 1136-40 (1953). The Supreme Court recently renewed its support of the *Holt*-Wigmore distinction in Schmerber v. California, 384 U.S. 757 (1966) (compulsive extraction of blood to determine intoxication), and it has been directly held that police lineups do not violate the privilege against self-incrimination. Caldwell v. United States, 338 F.2d 385 (8th Cir. 1964).

31. 388 U.S. 218 (1967).

32. *Id.* at 221-23.

33. Although the Court referred to the critical stage cases, and cited Powell v. Alabama, 287 U.S. 45 (1932), in support of the "fair trial" aim of the sixth amendment, there was seemingly a concentrated attempt to avoid the use of due process language. Moreover, in Stovall v. Denno, 388 U.S. 293, 301-02 (1967), a companion case where the *Wade* decision was held to be inapplicable because not retroactive, the Court considered an independent claim of deprivation of due process, and found none, even though the *Wade* decision cited the *Stovall* identification procedure as an example of the "suggestive" influences which place the suspect's rights in jeopardy, and therefore require the protection of the presence of counsel. In view of this, it seems apparent that the *Wade* decision could not have rested solely on due process.

34. The Court considered at length instances of police procedures which have a conscious or subconscious "suggestive" effect upon the witness' decision. In *Wade*, several witnesses saw the defendant in the custody of an FBI agent prior to the lineup. In Gilbert v. California, 388 U.S. 263 (1967), another companion case, the lineup was conducted in a large auditorium where one hundred witnesses made wholesale identifications. In *Stovall*, the suspect was presented to the witness alone and in handcuffs. *See* P. WALL, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES 40-65 (1965), which was heavily relied upon by the Court.

35. The Court clearly admitted that the rule was new by refusing

pect in a police lineup occuring after June 12, 1967, in the absence of counsel, will be inadmissible at trial, federal or state,[36] unless it can be established that the courtroom identification had an independent source,[37] or can be considered harmless error.[38]

In the context of the traditional view that the sixth amendment right to counsel must be asserted in the context of another constitutional right, the *Garrity* court's refusal to extend the right to make it applicable to lineup procedures is defensible. Even if the defendant had argued in accordance with the critical stage cases,[39] that there existed an inherent threat to due process that warranted the extension of right to counsel to police lineups generally,[40] it is unlikely that the Minnesota court would find the police lineup stage to be "critical" when the Supreme Court had not yet done so.[41]

Since the *Wade* rule is applicable only to lineups taking place after June 12, 1967, it is not applicable to the *Garrity* case. If it had been applicable, the Minnesota court, despite its seeming reluctance to accept past Supreme Court right-to-counsel holdings, probably would have been obligated to hold that Garrity had been denied his right to counsel. While it is true that Wade was placed in the lineup after indictment whereas with

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to apply it retroactively in *Stovall* because it had not been foreshadowed in previous cases and would seriously disrupt the administration of the criminal law. Stovall v. Denno, 388 U.S. 293, 299-300 (1967).

36. If the doctrine of Gideon v. Wainwright, 372 U.S. 335 (1963), left any doubt that the *Wade* decision would be directly applicable to the states, the holding in Gilbert v. California, 388 U.S. 263 (1967), reversing a state conviction, dispelled it.

37. The Court adopted the Wong Sun v. United States, 371 U.S. 471 (1963), exclusionary test whereby the illegally obtained evidence is inadmissible unless shown to be free from the "taint" of the illegality. In *Gilbert*, however, it was held that evidence introduced by the state regarding the lineup itself, rather than a courtroom identification that might be effected by the prior lineup, was inadmissible *per se*. Gilbert v. California, 388 U.S. 263, 272-73 (1967).

38. The test for determining harmless error was recently established in Chapman v. California, 386 U.S. 18 (1967).

39. White v. Maryland, 373 U.S. 59 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961). *See* text accompanying notes 11-13 *supra*.

40. *See* Comment, *The Right to Counsel During Police Identification Procedures*, 45 TEXAS L. REV. 504, 519-25 (1967), for this argument in detail. For reported instances of error in identification procedures, and the view that there is an inherent danger of such error, *see* E. BORCHARD, CONVICTING THE INNOCENT (1932); J. FRANK & B. FRANK, NOT GUILTY (1957); P. WALL, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES (1965).

41. The Minnesota court has not shown a willingness to move in advance of the United States Supreme Court. *See* text accompanying notes 18-27 *supra*.

Garrity it was prior to indictment,[42] the refusal of the Supreme Court to accept such a distinction in *Escobedo* and *Miranda* is indicative of its likelihood of success.[43] Pre-indictment procedures may be more investigatorial in nature, but the inherent dangers are the same whether the lineup is pre- or post-indictment. Such an artificial distinction would merely enable the police to circumvent the basic concepts of the *Wade* decision. If the *Wade* holding that counsel be allowed at police lineups proves undesirable, more tenable means of avoiding its effect might rest with the Court's suggestion that the basis for regarding the lineup as critical might be removed if Congress, the legislatures, or the local police departments take steps to eliminate the risks and impediments to a suspect's rights in the lineup procedure.[44] The Court did not elaborate upon how stringent the regulation must be;[45] however, since the Court appeared concerned with the basic reliability of eyewitness identifications, apart from the "suggestive" effect of police conduct,[46] it can be assumed that such regulation would have to be extensive.

Whether or not a state court, in a case such as *Garrity*, could dilute the authority of *Wade*, it should, in light of the inherent dangers involved in police lineups, follow the spirit of the *Wade* decision. While it might be argued by some, including the *Garrity* court, that constitutional safeguards may be achieved only at the cost of police efficiency,[47] in the case of lineups such effi-

42. In *Garrity*, the defendant contended that he had not even been arrested, but had been taken into custody on a voluntary basis. Brief for Appellant at 20. The court, however, assumed that he had been arrested. This discrepancy probably rests upon a conflict in the definition of the term. *See* Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest*, 51 J. CRIM. L.C. & P.S. 402, 403-05 (1960).

43. The time at which the right to counsel attaches in *Escobedo*, as refined in *Miranda*, is the point at which the suspect is taken into custody, or otherwise deprived of freedom of action to a substantial degree. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

44. United States v. Wade, 388 U.S. 218, 239 (1967).

45. The Court did refer to a "scientific method" formerly espoused by Wigmore in J. WIGMORE, THE SCIENCE OF JUDICIAL PROOF 541 (3d ed. 1937), which included the use of a library of pre-made films and recordings to be shown along with that of the suspect. United States v. Wade, 388 U.S. 218, 239 n.30 (1967).

46. *See* United States v. Wade, 388 U.S. 218, 254 (1967) (dissenting opinion).

47. Although this most definitely is an important consideration, it is likely that it is often overemphasized. *See* Address by Yale Kamisar, American Psychological Association, Philadelphia, Pa., August 31, 1963, for statistics indicating that the confession cases did not overwhelmingly affect enforcement efficiency.