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CRIMINAL LAW—Right to Counsel at Preindictment Lineups—Should Wyoming Change Its Position? *Charpentier v. State*, 736 P.2d 724 (Wyo. 1987).

On January 17, 1986, a man cashed an endorsed check at the Norwest Bank in Gillette, Wyoming. The name of the check's original payee was marked out and replaced with the name Tom Charpentier.¹ Thirty minutes later, the teller discovered that the check had been reported stolen. The bank notified the sheriff's office and the teller provided a description of the man who endorsed the check. Later that day, deputies arrested Charpentier for forgery² and placed him in a lineup with four other men. The bank teller viewed the lineup and identified Charpentier as the man who cashed the check at Norwest Bank. Charpentier was not represented by counsel at the lineup. After the identification, a deputy filed a criminal complaint charging Charpentier with forgery and fraud.³

Before trial, Charpentier filed a motion to suppress the identification because the lineup violated his constitutional right to counsel. The district court denied the motion, holding that Charpentier's right to counsel had not attached at the time of the lineup.⁴ The court convicted Charpentier of forgery. The Wyoming Supreme Court affirmed the district court's holding and declined to extend the right to counsel to preindictment lineups.⁵ Citing *Kirby v. Illinois*,⁶ the court held that the right to counsel attaches only at or after the time adversarial judicial proceedings have been initiated against the defendant.⁷

Thus, Wyoming denies an accused the right to counsel in preindictment lineups. This casenote will discuss Wyoming's position, and ultimately disagree with it. The United States Supreme Court has recognized the right to counsel at post-indictment lineups because the presence of counsel is necessary to provide protection against the inherent dangers in eyewitness identification. Preindictment lineups involve essentially the same factors as post-indictment lineups. Consequently, a defendant should also have the right to counsel at preindictment lineups. Whether or not the Wyoming Supreme Court correctly interpreted *Kirby*, it should have used its state constitution to extend the right to counsel to preindictment lineups.

1. *Charpentier v. State*, 736 P.2d 724 (Wyo. 1987).

2. *Id.* Charpentier was advised of his Miranda rights and requested counsel. Brief of Appellant at 4, *Charpentier v. State*, 736 P.2d 724 (Wyo. 1987) (No. 86-210).

3. *Charpentier*, 736 P.2d at 725.

4. *Id.*

5. The court's use of the term preindictment can be misleading. In Wyoming the grand jury system of indictment is rarely used. Wyoming uses a preliminary hearing to bind defendants over to district court.

6. 406 U.S. 682 (1972).

7. *Charpentier*, 736 P.2d at 725.

BACKGROUND

Federal Case Law

The right to counsel is one of the fundamental rights guaranteed by the sixth amendment of the Constitution of the United States.⁸ The United States Supreme Court, in *Powell v. Alabama*,⁹ applied this right to state criminal proceedings. The Court stated that a defendant "requires the guiding hand of counsel at every step in the proceedings against him."¹⁰ *Powell* held that the right to counsel attaches during a "critical period of the proceedings."¹¹ Later cases interpreted the critical period concept to include arraignments,¹² preliminary hearings,¹³ and in-custody interrogation.¹⁴

The sixth amendment also contains a clause allowing the defendant the right to confront the witnesses against him. In *Pointer v. Texas*,¹⁵ the Supreme Court held that the confrontation clause of the sixth amendment is a fundamental right, applicable to the states through the fourteenth amendment.¹⁶ The Court declared that the right of cross-examination is included in the right to confrontation and is essential to a fair trial in the criminal process.¹⁷ In the area of lineup identifications, the two clauses intermix with one another.

In *United States v. Wade*,¹⁸ the Court addressed the issue of whether the defendant had a right to counsel in a pre-trial identification proceeding. Wade was arrested and indicted for a bank robbery. FBI agents arranged a post-indictment lineup without notifying Wade's attorney. Wade participated in the lineup and two bank employees identified him as the robber. At trial, the two employees again identified Wade. Wade's attorney moved for acquittal or, alternatively, to strike the courtroom identifications because the lack of counsel at the lineup violated Wade's sixth

8. U.S. CONST. amend. VI, provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

9. 287 U.S. 45, 68 (1932).

10. *Id.* at 69.

11. *Id.* at 57.

12. *Hamilton v. Alabama*, 368 U.S. 52 (1961). Hamilton was denied counsel at his arraignment. The Supreme Court said arraignment was a "critical stage" in a criminal proceeding and what happens in the arraignment may affect the whole trial. *Id.* at 54.

13. *Coleman v. Alabama*, 399 U.S. 1 (1970). The Supreme Court held that counsel was necessary at a preliminary hearing in order to "protect the indigent accused against an erroneous or improper prosecution." *Id.* at 9.

14. *Miranda v. Arizona*, 384 U.S. 436 (1966). Police questioned Miranda in a room cut off from the outside world. The Supreme Court held that incommunicado interrogation deprived a defendant of the privilege against self-incrimination and held that a defendant has the right to the presence of an attorney when being interrogated. *Id.* at 444-45.

15. 380 U.S. 400 (1965).

16. *Id.* at 403.

17. *Id.* at 404.

18. 388 U.S. 218 (1967).

amendment right to the assistance of counsel. The court denied the motion and convicted Wade.¹⁹

The Court of Appeals for the Fifth Circuit reversed the conviction and ordered a new trial excluding the in-court identification. It held that the lineup was a violation of Wade's sixth amendment rights.²⁰ The United States Supreme Court granted certiorari and reversed and remanded.²¹ The Court held that a right to counsel exists in a post-indictment identification proceeding.²² However, the Court did not want to apply an exclusionary rule before first giving the government a chance to show whether or not the in-court identification existed independently of the lineup identification.²³

The *Wade* Court held that the post-indictment lineup was a critical stage of the prosecution that required a right to counsel.²⁴ The Court held that it must examine "any pretrial confrontation"²⁵ between an accused and his accusers for two reasons. First, the examination would determine whether the presence of counsel was necessary to "preserve the defendant's basic right to a fair trial," including the right to cross-examine witnesses against him.²⁶ The presence of counsel at the lineup is the only way to provide effective cross-examination of the witness about the lineup procedure. Second, *Wade* discussed the dangers inherent in eyewitness identification. The Court stated that such dangers include the possibility of prosecutorial influence on the witness at the lineup. The Court also recognized that a witness rarely recants after identifying a suspect. The Court held that these dangers might seriously detract from the possibility of a fair trial.²⁷

As a companion case to *Wade*, the Supreme Court decided *Gilbert v. California*,²⁸ which also involved a post-indictment lineup. In that case, several eyewitnesses identified Gilbert at a lineup conducted without notice to his counsel. The trial court admitted into evidence the testimony of these witnesses that they had identified Gilbert at the lineup.²⁹ Gilbert was convicted and sentenced to death. The Supreme Court of California affirmed the conviction.³⁰

19. *Id.* at 220.

20. *Id.* at 221. The Court of Appeals for the Fifth Circuit ordered a new trial, holding that "the lineup, held as it was, in the absence of counsel, already chosen to represent appellant, was a violation of his Sixth Amendment rights . . ." *Wade v. United States*, 358 F.2d 557, 560 (5th Cir. 1966).

21. *Wade*, 388 U.S. at 221.

22. *Id.* at 237.

23. *Id.* at 240-41.

24. *Id.* at 237.

25. *Id.* at 227.

26. *Id.*

27. *Id.* at 228-29. "A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification." *Id.* at 228.

28. 388 U.S. 263 (1967).

29. *Id.* at 270.

30. *Id.* at 265.

The United States Supreme Court reviewed the case and declared a *per se* exclusionary rule that applies to testimony directly resulting from an illegal lineup, such as the in-court testimony of the witnesses as to their identification of Gilbert at the lineup.³¹ The Court created the *per se* exclusionary rule to ensure that law enforcement authorities would uphold the defendant's right to counsel.³²

In its analysis, the *Gilbert* Court applied the *Wade* holding. The Court held that the denial of the right to counsel at the pretrial identification violated Gilbert's sixth amendment rights.³³ The Court also held that in-court identifications were inadmissible unless the witnesses demonstrated that the source of the identifications was independent of the lineup. Because the trial court failed to determine the origin of the in-court identifications, the Court held that admission of the identifications constituted reversible error.³⁴

Both *Wade* and *Gilbert* involved post-indictment lineups. The Supreme Court did not distinguish between pre- and post-indictment lineups, but simply used the term "pretrial." In 1972, five years after *Wade*, the Court addressed preindictment lineups in *Kirby v. Illinois*.³⁵ In that case, police arrested Kirby for possession of stolen goods. Immediately after the arrest, the owner of the goods identified Kirby as one of the men who robbed him. Kirby's counsel did not attend the identification and police did not advise Kirby of a right to the presence of counsel. At trial, the owner testified that he identified Kirby at the police station.³⁶ The trial court convicted Kirby³⁷ and the United States Supreme Court affirmed the conviction.³⁸

The Court held that the right to counsel "attaches only at or after the time that adversary judicial proceedings have been initiated against him."³⁹ The Court defined adversary judicial proceedings as the point when "the government has committed itself to prosecute" and when "the adverse positions of government and defendant have solidified."⁴⁰ Thus, the Court used the "critical period" doctrine. The Court, however, held that the critical period in lineup situations begins after indictment.⁴¹ It refused to apply *Wade* to the preindictment identification because the identification took place before what the Court considered to be the "commencement of any prosecution whatever."⁴²

31. *Id.* at 272-73.

32. *Id.* at 273. "Only a *per se* exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup." *Id.*

33. *Id.* at 272.

34. *Id.*

35. 406 U.S. 682 (1972).

36. *Id.* at 684-85.

37. *Id.* at 686.

38. *Id.* at 691.

39. *Id.* at 688.

40. *Id.* at 689.

41. *Id.* at 690.

42. *Id.*

State Case Law

The Wyoming Constitution contains a provision delineating the criminal suspect's right to counsel⁴³ and the Wyoming Supreme Court has used the "critical period" principle⁴⁴ to establish when the right to counsel accrues. While the Wyoming Supreme Court has discussed the right to counsel under the Wyoming State Constitution and the sixth amendment,⁴⁵ *Charpentier* was a case of first impression on the issue of right to counsel in preindictment lineups.

In *Chavez v. State*⁴⁶ the court addressed the issue of effective assistance of counsel. The *Chavez* court held that a defendant's right to assistance accrues during a "critical period of the proceedings."⁴⁷ In *Chavez* the court defined a "critical period" of the proceedings as "a point in the proceedings in which an important aspect of it occurs or fails to occur."⁴⁸

The Wyoming Supreme Court also discussed the right to counsel in *Auclair v. State*.⁴⁹ In that case, Auclair was convicted of three criminal counts arising from an incestuous relationship. Auclair objected to the admission of a telephone conversation into evidence. The conversation, between Auclair and his daughter, occurred before Auclair's arrest but after issuance of a warrant. On appeal, Auclair alleged a denial of his sixth amendment right to counsel.⁵⁰ Auclair argued that his right to counsel arose upon issuance of the warrant.⁵¹

Relying on *Kirby*, the *Auclair* court disagreed, stating that an adversarial setting was necessary for the right to counsel to accrue.⁵² The court went on to hold that the arrest was the point when adversarial judicial proceedings activate the attachment of the right to counsel.⁵³ The *Auclair* court stated that a defendant becomes a party to the proceedings after the arrest because the arrest notifies the defendant that the state intends to prosecute him.⁵⁴

In *Brown v. State*,⁵⁵ the Wyoming Supreme Court again used the *Kirby* language and held that "[t]he Sixth Amendment right to counsel attaches

43. WYO. CONST. art. I, § 10, states: "In all criminal prosecutions the accused shall have the right to defend in person and by counsel"

44. *Chavez v. State*, 604 P.2d 1341, 1347 (Wyo. 1979) (quoting *Powell*, 287 U.S. at 57).

45. *State v. Heiner*, 683 P.2d 629 (Wyo. 1984); *Brown v. State*, 661 P.2d 1024 (Wyo. 1983); *Auclair v. State*, 660 P.2d 1156 (Wyo. 1983) *cert. denied*, 104 S. Ct. 265; *Chavez v. State*, 604 P.2d 1341 (Wyo. 1979) *cert. denied*, 446 U.S. 984.

46. 604 P.2d 1341.

47. *Chavez*, 604 P.2d at 1347 (quoting *Powell*, 287 U.S. 57).

48. *Chavez*, 604 P.2d at 1347. The Court went on to note what it considered some critical stages for purposes of effective assistance of counsel, including arraignments, preliminary hearings, custodial interrogations, and post-indictment lineups. *Id.* at 1347-48.

49. 660 P.2d 1156 (Wyo. 1983).

50. *Id.* at 1157.

51. *Id.* at 1159.

52. *Id.* at 1163.

53. *Id.*

54. *Id.* at 1161. The *Auclair* court relied on *Kirby* as a foundation for the use of the phrase "adversary judicial proceedings." *Id.*

55. 661 P.2d 1024 (Wyo. 1983).

only when adversary criminal proceedings against an accused have been commenced.”⁵⁶ In that case, Brown was convicted of manslaughter. During a pre-arrest investigation, Brown requested counsel.⁵⁷ Before trial, Brown made a motion to suppress statements made without the presence of counsel. The trial court refused to suppress all but one of the statements.⁵⁸ Brown was convicted. On appeal, Brown argued that his sixth amendment right to counsel began at the point he requested counsel.⁵⁹ The court held that the right to counsel did not attach before Brown’s arrest.⁶⁰

In *State v. Heiner*,⁶¹ the court followed *Brown*, and stated that the right to counsel attaches “only when adversarial criminal proceedings have been commenced against an accused.”⁶² In that case, authorities filed a criminal complaint against Heiner and, pursuant to a warrant issued on that complaint, arrested Heiner for arson.⁶³ Before the filing of the criminal complaint, authorities obtained evidence at the scene of the fire that incriminated Heiner. Heiner filed a motion to suppress that evidence, because it was obtained before he was read his *Miranda* rights. The district court denied the motion.⁶⁴ Although Heiner’s motion concerned only a denial of fifth amendment rights, the district court also suggested the possibility of a sixth amendment denial of the right to counsel. The *Heiner* court held that “evidence obtained . . . prior to the filing of the criminal complaint, [was] not obtained in violation of [the defendant’s] Sixth Amendment right to counsel.”⁶⁵ *Heiner* extended the right to counsel to the filing of a criminal complaint occurring before an arrest.

Kirby is the reigning federal authority on right to counsel in preindictment lineups. But federal courts set only the minimum standard in constitutional guarantees.⁶⁶ The Wyoming Supreme Court has recognized this principle. In *Richmond v. State*,⁶⁷ the court held that “constitutional standards announced by the Supreme Court of the United States are minimal, which rights may be enlarged under State constitutional provisions if justifiable.”⁶⁸ In *Dryden v. State*,⁶⁹ the court explained “that con-

56. *Id.* at 1029.

57. *Id.* at 1027. Brown made the request at his third interview with the investigating officers. Three weeks later, he was arrested and made a statement to the county attorney. *Id.*

58. *Id.* at 1028. The court suppressed the statement made at the third pre-arrest interview because the statement was made after Brown requested an attorney. *Id.*

59. *Id.*

60. *Id.* at 1030.

61. 683 P.2d 629 (Wyo. 1984).

62. *Id.* at 637.

63. *Id.* at 630.

64. *Id.* at 631. The motion dealt with suppression of the evidence obtained at the scene of the crime and also with evidence given by Heiner to an insurance adjuster. The court granted suppression of the evidence given to the insurance adjuster. *Id.*

65. *Id.* at 637.

66. *California v. Ramos*, 463 U.S. 992 (1983). “It is elementary that States are free to provide greater protections in their criminal justice system than the Federal Constitution requires.” *Id.* at 1013-14.

67. 554 P.2d 1217 (Wyo. 1976).

68. *Id.* at 1223.

69. 535 P.2d 483 (Wyo. 1975).

cern for the protection of constitutional rights of an accused is not the peculiar province of the federal courts. The . . . right to advice of counsel [is] firmly established in this state."⁷⁰ The Wyoming Constitution clearly establishes the right to counsel in all criminal prosecutions.⁷¹

Contrary to Wyoming, some states have used their state constitutions to extend the right to counsel to preindictment lineups.⁷² In *Blue v. State*,⁷³ the Alaska Supreme Court addressed the issue of right to counsel at preindictment lineups. In that case, a bartender identified Blue in a lineup two hours after an armed robbery at a bar. At the lineup, police gave Blue *Miranda* warnings but did not advise him of his right to counsel at the lineup.⁷⁴ The state prosecuted Blue and he was convicted on four counts of armed robbery. On appeal, the Alaska Supreme Court held "that a suspect who is in custody is entitled to have counsel present at a preindictment lineup unless exigent circumstances exist so that providing counsel would unduly interfere with a prompt and purposeful investigation."⁷⁵ The fairness of the lineup concerned the Alaska court. The court stated that a defendant needed the presence of counsel to prepare an argument for trial that would protect the defendant's right to confront identifying witnesses.⁷⁶ The Alaska court determined the issue of the right to counsel in preindictment lineups using the right to counsel clause of its state constitution.⁷⁷

The California Supreme Court recognized the right to counsel at preindictment lineups in *People v. Bustamante*.⁷⁸ In that case, Bustamante was arrested for robbery. After the arrest a witness identified him in a lineup. Bustamante requested counsel at the lineup but police denied his request.⁷⁹ Bustamante appealed his conviction, and challenged the admissibility of the witness' in-court identification testimony because the witness based the testimony on a lineup held without the presence of counsel.⁸⁰ The Supreme Court of California held that the California Constitution mandates the right to counsel at a preindictment lineup.⁸¹

The *Bustamante* court based its decision on the unreliability of eyewitness identification and the dangers of suggestiveness in the lineup procedure. The court held that these factors apply to both pre- and post-indictment lineups.⁸² The court stated that a major cause of wrongful con-

70. *Id.* at 491.

71. WYO. CONST. art. I, § 10.

72. Three state courts have relied on state constitutional grounds to grant right to counsel at preindictment lineups. *Blue v. State*, 558 P.2d 636 (Alaska 1977); *People v. Jackson*, 391 Mich. 323, 217 N.W.2d 22 (1979); *People v. Bustamante*, 177 Cal. Rptr. 576, 634 P.2d 927 (1981).

73. 558 P.2d 636 (Alaska 1977).

74. *Id.* at 639.

75. *Id.* at 642 (footnotes omitted).

76. *Id.* at 641.

77. *Id.*

78. 177 Cal. Rptr. 576, 634 P.2d 927 (1981).

79. *Id.* at 930.

80. *Id.*

81. *Id.* at 935-36.

82. *Id.* at 929.

victions was the unreliability of eyewitness identifications.⁸³ It also noted that a witness is unlikely to change his mind once an identification decision is made.⁸⁴ As to the dangers of suggestiveness, the court pointed out the difficulty in reproducing the identification procedure at trial to discover the presence of any suggestiveness.⁸⁵ The *Bustamante* court also believed the *Kirby* decision inconsistent with the spirit of the earlier opinion of *Wade*.⁸⁶ The court concluded that the principles behind the holding in *Wade* did not differentiate between pre- and post-indictment lineups.⁸⁷ Therefore, the court stated that use of the state constitution to uphold right to counsel in preindictment lineups would maintain consistent principles in protecting such rights.⁸⁸

PRINCIPAL CASE

Unlike Alaska and California, the Wyoming Supreme Court did not extend the *Kirby* rule to include preindictment lineups. Instead, the court relied on *Kirby* to affirm Charpentier's conviction, basing its holding almost entirely on the language in *Kirby*. The court held that Charpentier was not entitled to counsel at a preindictment lineup because that right accrues only when adversarial judicial proceedings have been initiated against the defendant.⁸⁹ The court held that the lineup took place before the commencement of any prosecution and therefore Charpentier was not entitled to counsel.⁹⁰ The *Charpentier* court listed various cases in which it had applied this same rationale in deciding when the right to counsel accrues.⁹¹ None of the listed cases, however, dealt with preindictment lineups.⁹²

The *Charpentier* dissent argued that the right to counsel in a preindictment lineup is necessary to avoid the possibility of a miscarriage of justice through mistaken identification.⁹³ The dissent also concluded that under Wyoming law a criminal prosecution commences at arrest.⁹⁴ The dissent stated that the Wyoming court may establish broader safeguards than the minimum federal standards,⁹⁵ and overcome the limitations that *Kirby* puts on the right to counsel.

ANALYSIS

To analyze *Charpentier*, it is necessary to take a thorough look at the problems all lineup identifications pose. The need to look for an alternative to the *Kirby* rule then becomes obvious.

83. *Id.* at 933.

84. *Id.*

85. *Id.* at 934.

86. *Id.* at 935.

87. *Id.* at 931.

88. *Id.* at 935.

89. *Charpentier*, 736 P.2d at 725 (quoting *Kirby*, 406 U.S. at 688-90).

90. *Charpentier*, 736 P.2d at 725.

91. *Id.*

92. *Id.* The cases listed are discussed in the state case law section of this note.

93. *Charpentier*, 736 P.2d at 727 (Urbigkit, J., dissenting) (quoting *Wade*, 388 U.S. at 228-29).

94. *Charpentier*, 736 P.2d at 727.

95. *Id.* at 726.

The lineup deals exclusively with the ability of a witness to identify the person who committed the crime. Various factors make this eyewitness identification inherently dangerous and unfair. A major factor involves the degree of suggestiveness used when the prosecution presents the suspect to the witness. The prosecution, in all probability, believes that the suspect is guilty and may project these feelings to the witness. One example of prosecutorial suggestiveness involves eye movement of the police towards the suspect in the lineup. The witness may be uncertain about his choice, and may choose the suspect the police are looking at. After a witness has made an identification in a lineup, the witness is unlikely to change his mind.⁹⁶ An attorney can bring out in cross-examination the possibility that prosecutorial influence helped the witness make the identification, or he could object on the record to such influence.

Physical characteristics of the lineup may also contribute to a witness' selection. A lineup containing three Caucasians and one Hispanic, where the perpetrator had been described as Hispanic, would naturally lead the witness to choose the Hispanic. In addition, factors such as facial expression and posture may also affect the identification.⁹⁷

A suspect may not perceive the differences in physical characteristics that an attorney would. In addition, a suspect may not notice improper influences on a witness. The suspect will be under a great deal of stress in a confrontation with potential accusers and may not remember what happened at the lineup. Thus the presence of an attorney would preserve the details of the lineup for trial.

Observing the details of the lineup makes it possible for the attorney to prepare the defense's cross-examination. When an accused is denied counsel at a lineup, he is unable to effectively examine the identification at trial. This denies the accused the right to effective cross-examination and without effective cross-examination the accused is denied the right to confront the witnesses against him.⁹⁸ The right to confrontation of witnesses is essential to a fair trial in a criminal prosecution.⁹⁹

The dangers discussed above are potentially present in any lineup. The United States Supreme Court and the Wyoming Supreme Court differentiate between pre- and post-indictment lineups. In reality, no difference exists between the two. Both involve the identification of an alleged criminal and both involve the same dangers. After an arrest, the police believe they have caught the guilty party. The basic purpose of the lineup is to gather evidence to support that belief,¹⁰⁰ or in other words, to make an I.D. Once a witness makes an identification, in either a pre- or post-indictment lineup, the accused will be tried and the witness who made

96. *Wade*, 388 U.S. at 229; N. SOBEL, *EYEWITNESS IDENTIFICATION* (1972) (revised, 1988) § 1.3, Pg. 1-6.

97. A. YARMEY, *THE PSYCHOLOGY OF EYEWITNESS TESTIMONY* 155 (1979).

98. *Wade*, 388 U.S. at 235.

99. *Pointer*, 380 U.S. at 404.

100. *Kirby*, 406 U.S. at 699 (Brennan, J., dissenting).

the identification will testify. Therefore, the right to a fair trial at which the defendant can meaningfully cross-examine the witness applies to both pre- and post-indictment lineups.

The underlying rationale of the holding in *Wade* supports the proposition that no difference exists between pre- and post-indictment lineups. The Court stated that it should "scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial . . ." ¹⁰¹ Since the facts of the *Wade* case involved a post-indictment lineup, the *Kirby* Court held that the right to counsel was limited to post-indictment lineups, essentially ignoring the principles of the *Wade* decision. ¹⁰²

Nevertheless, *Kirby* is the controlling federal law, based on the sixth amendment. States are free, however, to extend greater constitutional protections than the federal constitution. ¹⁰³ The Wyoming Supreme Court acknowledged the fact that constitutional standards established by the United States Supreme Court are minimal. ¹⁰⁴ Therefore, the Wyoming Supreme Court may provide greater constitutional safeguards than the United States Supreme Court.

The Wyoming Supreme Court could extend *Kirby* by applying the state constitution. Other states have relied on their state constitutions to extend the right to counsel to preindictment lineups. ¹⁰⁵ Both the Alaska and California Constitutions have due process of law sections. ¹⁰⁶ Both states also have sections that grant a defendant the right to counsel. ¹⁰⁷ The Supreme Courts in both Alaska and California have used these portions of their constitutions to mandate a right to counsel in preindictment lineups. The Wyoming Constitution also contains a section pertaining to due process ¹⁰⁸ and a section directing the right to counsel. ¹⁰⁹ The language of all three state constitutions is basically the same. ¹¹⁰ The Wyoming Supreme Court could have utilized Wyoming's Constitution to overcome the effects of the *Kirby* decision.

In *Charpentier*, the Wyoming Supreme Court followed the *Kirby* holding. ¹¹¹ As stated above, however, the court need not limit itself to following *Kirby*'s conclusions, and in fact, has not done so. In *Auclair*, ¹¹² and

101. *Wade*, 388 U.S. at 227.

102. *Kirby*, 406 U.S. at 704 (Brennan, J., dissenting).

103. *Ramos*, 463 U.S. at 1014.

104. *Richmond*, 554 P.2d at 1223.

105. *Blue*, 558 P.2d at 642; *Bustamante*, 634 P.2d at 933.

106. ALASKA CONST. art. I, § 7; CAL. CONST. art. I, § 7.

107. ALASKA CONST. art. I, § 11; CAL. CONST. art. I, § 15.

108. WYO. CONST. art. I, § 6.

109. WYO. CONST. art. I, § 10.

110. WYO. CONST. art. I, § 10 states: "In all criminal prosecutions the accused shall have the right to defend in person and by counsel . . ."; ALASKA CONST. art. I, § 11 states: "In all criminal prosecutions, the accused shall have the right . . . to have the assistance of counsel for his defense." CAL. CONST. art. I, § 15 states: "The defendant in a criminal case has the right . . . to have the assistance of counsel for the defendant's defense . . ."

111. *Charpentier*, 736 P.2d at 725.

112. 660 P.2d 1156 (Wyo. 1983).

Brown,¹¹³ the court used arrest, not indictment, as the point when right to counsel accrues. And in *Heiner*,¹¹⁴ the court used the criminal complaint as the point when right to counsel accrues. In *Heiner*, the criminal complaint was issued *before* Heiner's arrest. The *Charpentier* court used *Heiner* in the majority opinion as support for its holding,¹¹⁵ even though in *Heiner* the court had already gone beyond *Kirby*. By following *Kirby* in *Charpentier*, the court deprived Charpentier of the right to effectively confront the witnesses against him.

There are many reasons why the Wyoming Supreme Court must concern itself with the right of a defendant at any lineup. The Wyoming Supreme Court in *Auclair* and *Brown* considered the critical confrontation stage to be the arrest.¹¹⁶ In *Heiner*, the court considered it to be the criminal complaint.¹¹⁷ A lineup can occur after any of these points and still be a preindictment lineup. This means that even though a defendant is confronted with probable prosecution, he is still denied the right to have counsel present.

Because lack of counsel at preindictment lineups unfairly prejudices the accused, Wyoming needs to change the law to protect a defendant's right to a fair trial. Wyoming should adopt the position taken by Alaska and California. Both California and Alaska guarantee the right to counsel at preindictment lineups. However, the right to counsel allowed by the courts includes safeguards to protect the prosecution.¹¹⁸ The state has a legitimate concern in the prompt investigation of crimes and holding a lineup soon after the commission of a crime is a logical and prudent method to preserve evidence. But a suspect also needs protection in the lineup.¹¹⁹ The Alaska and California courts balanced the legitimate state interests against the interests of the accused and allowed police to dispense with the counsel requirement in exigent circumstances.¹²⁰ Wyoming should follow this approach. When circumstances call for immediate identification procedures and counsel cannot be present, identification should proceed without counsel. In any other circumstances, to avoid unfairness to the defendant, counsel should be present.

CONCLUSION

The Wyoming Supreme Court's existing rule concerning right to counsel in preindictment lineups denies the defendant rights allowed under the Wyoming State Constitution. The inherent dangers of eyewitness iden-

113. 661 P.2d 1024 (Wyo. 1983).

114. 683 P.2d 629 (Wyo. 1984).

115. *Charpentier*, 736 P.2d at 725.

116. *Auclair*, 660 P.2d at 1161; *Brown*, 661 P.2d at 1029.

117. *Heiner*, 683 P.2d at 637.

118. *Blue*, 558 P.2d at 642; *Bustamante*, 634 P.2d at 935.

119. *Blue*, 558 P.2d at 641.

120. *Id.* at 642; *Bustamante*, 634 P.2d at 935. In *Blue* exigent circumstances were found to be present. The lineup was held late at night and police were making an effort to hold the lineup while memories were fresh. Waiting until the next day in order to provide counsel might have precluded the police effort. *Blue*, 558 P.2d at 642.

tification necessitate the presence of counsel to protect the accused. Absent counsel, the accused is unable to adequately confront witnesses against him. The court gives the right to counsel at post-indictment lineups. The preindictment lineup is no different than the post-indictment lineup. The same dangers are present at both. The Wyoming Supreme Court should follow other states which have required counsel at preindictment lineups with their state constitutions. When exigent circumstances direct that a lineup be held immediately, counsel may not be required. In any other circumstances, constitutional rights demand that the right to counsel extend to preindictment lineups.

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