CRIMINAL LAW—PRE-INDICTMENT IDENTIFICATION CONFRONTATION —RIGHT TO COUNSEL—*State v. Thomas*, 107 N.J. Super. 128, 257 A.2d 377 (App. Div. 1969).

Defendant was taken into custody at the rear of an apartment building where a woman just minutes before had been robbed of her handbag. Within ninety minutes of the crime, the victim was taken to a nearby police station where defendant, unaccompanied by counsel, was individually presented in a pre-indictment identification confrontation.[1] After initial hesitation by the witness, defendant put on glasses and the witness identified him saying, " 'Well, it is his stature and his build and his height, and I hate to say it but I am sure.' "[2] At the trial the witness identified defendant by substantially the same language as was used in the pre-trial confrontation.[3]

Defendant was convicted of robbery and appealed contending, *inter alia*,[4] that he had a constitutional right to counsel at the pre-trial confrontation, and that absent such representation, any subsequent testimony relating to an identification at such confrontation was inadmissible.[5] The Appellate Division affirmed, holding that a defendant has no constitutional right to counsel at a pre-indictment confrontation

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1 A pre-trial identification confrontation can take various forms such as "a lineup, also known as an 'identification parade' or 'showup,' . . . or presentation of the suspect alone to the witness . . . ." But the same risks to the suspect are present in all of the forms. United States v. Wade, 388 U.S. 218, 229-30 (1967). An individual presentation of a suspect, as in *Thomas*, is often called a "showup" as distinguished from a presentation of a suspect in a group or line of persons which is normally called a "lineup."

2 State v. Thomas, 107 N.J. Super. 128, 131, 257 A.2d 377, 378 (App. Div. 1969).

3 The witness testified at the trial "that were it not for her observation of the defendant at police headquarters she would not have been able to identify him in court." Brief for Defendant-Appellant at 10-11, State v. Thomas, 107 N.J. Super. 128, 257 A.2d 377.

4 Another contention of defendant was that the circumstances of the pre-trial confrontation were so suggestive as to deprive him of due process of law. The Appellate Division rejected this contention and held "that the identification process employed was not unreasonable or suggestive." 107 N.J. Super. at 133, 257 A.2d at 379. The defendant also contended that the in-court identification should have been excluded since it was tainted by the alleged illegal pre-trial confrontation. Brief for Defendant-Appellant at 12, State v. Thomas, 107 N.J. Super. 128, 257 A.2d 377. However, since the court decided that the pre-trial confrontation was not illegal, it was unnecessary to decide this point.

5 Unless defendant objects at the trial to introduction of evidence relating to his identification, either in-court or extra-judicially, he may not be permitted to raise this issue on appeal for the first time. State v. Dessureault, 104 Ariz. 380, 453 P.2d 951 (1969); People v. Davis, 270 Cal. App. 2d 928, 76 Cal. Rptr. 242 (Ct. App. 2d Dist. 1969); People v. Armstrong, 268 Cal. App. 2d 341, 74 Cal. Rptr. 37 (Ct. App. 2d Dist. 1968); People v. Rodriguez, 266 Cal. App. 2d 766, 72 Cal. Rptr. 310 (Ct. App. 3d Dist. 1968).

for identification, where such confrontation occurred shortly after the crime and shortly after defendant was taken into custody in the immediate vicinity of the crime,[6] even though in this case the identification was made in a police station.

In a series of recent opinions, the Supreme Court of the United States has construed the sixth amendment guarantee of assistance of counsel to apply to "critical" pre-trial stages of criminal proceedings and not just to the trial itself.[7] In *Powell v. Alabama*,[8] the Court enunciated the right to counsel during the period from arraignment to trial. In *Hamilton v. Alabama*,[9] that right was extended to those arraignments where certain rights or defenses of an accused might be lost. *Escobedo v. Illinois*[10] held that the right to counsel exists prior to arraignment "where an investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect"[11] who is subjected to interrogation in police custody. The Court has also ruled[12] that an individual who is subjected to custodial police interrogation has the right to presence of counsel, either retained or appointed, before and during any questioning, unless he intelligently waives this right.

Recently, the Court considered the accused's right to counsel with regard to another aspect of police investigation—pre-trial identification. In its trilogy of "lineup" decisions—*United States v. Wade*,[13] *Gilbert v. California*[14] and *Stovall v. Denno*[15]—the Court held that "a post-indictment pretrial lineup at which the accused is exhibited to

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6 107 N.J. Super. at 134-35, 257 A.2d at 380.

7 Annot., 18 L. Ed. 2d 1420 (1968). The applicability of the sixth amendment procedural rights to state prosecutions was settled in Anders v. California, 386 U.S. 738 (1967); Gideon v. Wainwright, 372 U.S. 335 (1963).

8 287 U.S. 45 (1932).

9 368 U.S. 52 (1961). Under Alabama law, the defense of insanity must be pleaded and motions to quash the indictment based upon systematic exclusion of a particular race of people from the grand jury must be made at the arraignment. Thus the Court said that the arraignment in such jurisdiction was a critical stage in a criminal proceeding at which an accused had a right to the presence of counsel. *Id.* at 53-54.

10 378 U.S. 478 (1964).

11 Annot., *supra* note 7, at 1428.

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

13 388 U.S. 218 (1967).

14 388 U.S. 263 (1967).

15 388 U.S. 293 (1967). *Stovall* concerned the question of legality of a pre-trial identification confrontation based upon denial of due process of law which "is a recognized ground of attack upon a conviction independent of any right to counsel claim." *Id.* at 302. *Accord*, Bowen v. State, 5 Md. App. 713, 249 A.2d 499 (Ct. Spec. App. 1969).

identifying witnesses[16] is a critical stage of the criminal prosecution"[17] which entitles the accused to the aid of counsel.[18]

The conduct of a pre-trial identification confrontation in violation of the accused's right to counsel makes such confrontation illegal and affects the admissibility of later in-court identifications[19] by witnesses who have had such confrontations. The prosecution must show that the in-court identification is independent of the illegal lineup before the in-court identification can be received.[20] A per se exclusionary rule applies with respect to the illegal extra-judicial confrontation itself.[21]

Although the holdings of *Wade* and *Gilbert* related only to post-indictment lineups, the language of these decisions may be broad

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16 Where the accused is known by the witness prior to the commission of the crime, subsequent identifications of the accused by the witness to assure police that they have arrested the right person do not fall within the identification confrontations covered by *Wade*. *In re* McKelvin, 258 A.2d 452 (D.C. Ct. App. 1969); State v. Williams, 6 N.C. App. 14, 169 S.E.2d 231 (Ct. App. 1969).

17 Gilbert v. California, 388 U.S. 263, 272 (1967).

18 The right to counsel under the *Wade* rules also applies to juvenile proceedings. *In re* T., 1 Cal. App. 3d 344, 81 Cal. Rptr. 655 (Ct. App. 2d Dist. 1969); *In re* McKelvin, 258 A.2d 452 (D.C. Ct. App. 1969).

19 Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197, 42 U.S.C. § 3701 (1968). Tit. II § 3502 was designed to make the in-court identification of an accused by an eyewitness admissable regardless of the legality of any earlier extra-judicial confrontation by such witness. This is to modify the holdings of *Wade* and *Gilbert*. 20 Am. Jur. *Proof of Facts* 16 (Supp. 1969). *But see* United States v. Kinnard, 294 F. Supp. 286 (D.D.C. 1968), for an opinion that the language of this section of the Act cannot be given a literal interpretation when prior extra-judicial identification confrontations have occurred.

20 United States v. Wade, 388 U.S. 218, 240-41 (1967); Gilbert v. California, 388 U.S. 263, 272-73 (1967). The Court said in *Wade* that the proper test to be applied in determining the admissibility of an in-court identification following an illegal, extra-judicial identification was essentially the "fruit of the poisonous tree" doctrine enunciated in Wong Sun v. United States, 371 U.S. 471 (1963). The *Wade* Court said that the factors to be considered include

> the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification.

388 U.S. at 241. After an illegal, pre-trial identification by photographs, an in-court identification must be tested just as if a physical confrontation had occurred. People v. Lawrence, 276 Cal. App. 2d 359, 81 Cal. Rptr. 91 (Ct. App. 4th Dist. 1969).

21 United States v. Wade, 388 U.S. 218, 240-41 (1967); *accord*, State v. Vaughn, 19 Ohio App. 2d 76, 249 N.E.2d 844 (Ct. App. 1969). *See also* Miranda v. Arizona, 384 U.S. 436, 468-69 (1966), which indicates that an analogous per se exclusionary rule also applies to evidence obtained from interrogation of a defendant prior to the defendant specifically being given the *Miranda* bundle of warnings, regardless of defendant's actual knowledge of his rights or other factors indicating fairness.

enough to include any pre-trial identification confrontation.[22] Thus, there has been some predictable variation[23] among jurisdictions regarding the point in the criminal pre-trial proceedings at which the right to assistance of counsel becomes applicable.

Decisions have ranged from holding that the *Wade* rules apply only to post-indictment confrontations,[24] as was specifically the case in *Wade*, to diverse variations of the rule[25] encompassing even the pre-trial examination of photographs.[26] In light of these variations, *State v.*

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22 388 U.S. at 227, 235-37. "The rule applies to any lineup . . . regardless of when the identification occurs, in time or place, and whether before or after indictment or information." *Id.* at 251 (dissenting opinion).

23 Black, *The Supreme Court 1966 Term*, 81 HARV. L. REV. 69, 180-81 (1967).

24 State v. Fields, 104 Ariz. 486, 455 P.2d 964 (1969); State v. Dessureault, 104 Ariz. 380, 453 P.2d 951 (1969); People v. Palmer, 41 Ill. 2d 571, 244 N.E.2d 173 (1969).

25 *See* Nelson v. Peyton, 415 F. 2d 1154 (4th Cir. 1969) (right to counsel begins when accusatorial process begins); People v. Cruz, 415 F.2d 336 (9th Cir. 1969) (pre-indictment lineup may require right to counsel); Mason v. United States, 414 F.2d 1176 (D.C. Cir. 1969) (right to counsel for identification confrontation at a preliminary hearing); Young v. United States, 407 F.2d 720 (D.C. Cir. 1969), *cert. denied*, 394 U.S. 1007 (1969) (no right to counsel at a fresh, on-the-scene identification a few minutes after the crime); Rivers v. United States, 400 F. 2d 935 (5th Cir. 1968) (right to counsel in most, if not all, confrontations after arrest); United States v. Davis, 399 F.2d 948 (2d Cir. 1968), *cert. denied*, 393 U.S. 987 (1968) (right to counsel does not attach as soon as suspicions are aroused); United States v. Kinnard, 294 F. Supp. 286 (D.D.C. 1968) (right to counsel even at an on-the-scene identification within 45 minutes of the crime); United States v. Wilson, 283 F. Supp. 914 (D.D.C. 1968) (right to counsel at stationhouse identification 2 days after the crime but before indictment); Cox v. State, 219 So. 2d 762 (Fla. D. Ct. App. 1969) (right to counsel applied to viewing of a video tape of the accused being booked which was used in lieu of a lineup); Joyner v. State, 7 Md. App. 692, 257 A.2d 444 (Ct. Spec. App. 1969) (right to counsel may attach to pre-indictment as well as post-indictment identification confrontation); Watson v. State, 7 Md. App. 225, 255 A.2d 103 (Ct. Spec. App. 1969) (right to counsel applies to pre-indictment as well as post-indictment lineups); Smith v. State, 6 Md. App. 59, 250 A.2d 285 (Ct. Spec. App. 1969) (right to counsel applies to any lineup, pre-indictment or post-indictment, not subject to meaningful later review); Bowen v. State, 5 Md. App. 713, 249 A.2d 499 (Ct. Spec. App. 1969) (no right to counsel at an identification confrontation at a preliminary hearing because the judicial atmosphere eliminates likelihood of prejudice to defendant); Maiden v. State, — Nev. —, 442 P.2d 902 (1968) (no right to counsel at an identification confrontation before a grand jury); State v. Griffin, 4 N.C. App. 397, 167 S.E.2d 28 (Ct. App. 1969) (no right to counsel at lineup where defendant was not accused of the crime in question, nor was he even a suspect, but was being used as a "filler" in a lineup); State v. Park, 18 Ohio App. 2d 76, 246 N.E.2d 912 (Ct. App. 1968) (right to counsel at any pretrial confrontation where the absence of counsel might derogate from defendant's right to a fair trial).

26 Thompson v. State, — Nev. —, 451 P.2d 704 (1969). *But see* United States v. Collins, 416 F.2d 696 (4th Cir. 1969) (no right to counsel at photograph viewing in absence of showing of unfairness. Dissenting opinion, however, said that there was a right to counsel at such viewing.); United States v. Conway, 415 F.2d 158 (3d Cir. 1969); United States v. Bennett, 409 F.2d 888 (2d Cir. 1969); McGee v. United States, 402 F.2d 434 (10th Cir. 1968), *cert. denied*, 394 U.S. 908 (1969); People v. Lawrence, 276 Cal. App. 2d 359, 81 Cal. Rptr. 91 (Ct. App. 4th Dist. 1969); Thompson v. State, 6 Md. App. 50, 250 A.2d 304

Thomas is another link in the case-by-case development[27] of the application of the *Wade* rules.

Thomas is a case of first impression[28] in New Jersey concerning the right to counsel at a pre-trial identification confrontation to which *Wade* and *Gilbert* apply.[29] The earlier case of *State v. Satterfield*[30] appears inapposite as controlling precedent because at the time of the confrontation there in question there was no specific complaint to the police.

There have, however, been a limited number of cases factually comparable to *Thomas* in other jurisdictions. In *Smith v. State*,[31] it was held that there was no right to counsel in an identification confrontation at a police station, approximately 2½ hours after a robbery, when the confrontation was not staged by the police but was, in fact, a "happenstance" confrontation. In *State v. Bratten*,[32] the witness, who had been robbed approximately five hours earlier, was called to the scene of an automobile accident by police to confront the suspects. The court held that in such a confrontation, away from a police station and "shortly" after the crime, the chance for misidentification was slight and thus the right to counsel did not apply. However, the court said that such cases require a case-by-case scrutiny.[33]

In *Commonwealth v. Bumpus*,[34] police officers arrived at the scene of a crime within ten minutes of its commission. Within thirty minutes, they apprehended defendant in the vicinity, relying on a description given by the witness. The court held that the identification by the witness when defendant was returned to the scene was

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(Ct. Spec. App. 1969); State v. Keel, 5 N.C. App. 330, 168 S.E.2d 465 (Ct. App. 1969) (defendant was previously known by the witness).

27 For a view that a case-by-case development of *Wade* is not desirable see United States v. Kinnard, 294 F. Supp. 286, 289 (D.D.C. 1968).

28 Brief for Defendant-Appellant at 15, State v. Thomas, 107 N.J. Super. 128, 257 A.2d 377. The unreported case of *State v. Palmer*, Docket No. A-941-67 (decided February 17, 1969) involved a question of due process in the pre-trial confrontation. Brief for State-Appellee at 12-13, State v. Thomas, 107 N.J. Super. 128, 257 A.2d 377. The earlier reported cases of State v. Matlack, 49 N.J. 491, 231 A.2d 369 (1967); State v. Hodgson, 44 N.J. 151, 207 A.2d 542 (1965); and State v. Woodard, 102 N.J. Super. 419, 246 A.2d 130 (App. Div. 1968), involved confrontations before the effective date of *Wade*.

29 Under *Stovall*, the holdings of *Wade* and *Gilbert* were given prospective application only for identification confrontations conducted after June 12, 1967. 388 U.S. at 296.

30 103 N.J. Super. 291, 247 A.2d 144 (App. Div. 1968).

31 6 Md. App. 23, 249 A.2d 732 (Ct. Spec. App. 1969). *See also* State v. Gatling, 5 N.C. App. 536, 169 S.E.2d 60 (Ct. App. 1969).

32 245 A.2d 556 (Del. Super. Ct. 1968).

33 *Id.* at 558.

34 354 Mass. 494, 238 N.E.2d 343 (1968), *cert. denied*, 393 U.S. 1034 (1969).

reasonable, and that the events "were substantially continuous";[35] hence, there was no right to counsel. In *State v. Boens*,[36] defendant, apprehended within fifteen minutes of a robbery attempt, was "voluntarily" returned to the scene of the crime for a confrontation with the witness. The court held that this "on-the-scene" identification was not such a critical stage as required the right to counsel. Similarly, *People v. Colgain*[37] held that defendant had no right to counsel at an "in-the-field" identification occurring at the scene of an automobile accident within five or six blocks of a robbery and within minutes of its commission. The court said that where defendant was "apprehended so close in proximity to the time and place of the crime itself, the exigencies of the situation and over-riding public policy . . . [made] it neither practical nor necessary to afford counsel. . . ."[38]

A different position was taken in *People v. Martin*.[39] In *Martin*, defendant, fitting the description of a suspect in a robbery occurring 1½ hours earlier, was taken to a police station for identification after a car in which he was a passenger was stopped. The court held that the "dangers inherent in a 'compelled confrontation' were present"[40] even though the confrontation occurred shortly after the robbery and defendant was not under formal arrest. However, since it was not clear whether the apprehension was in the immediate vicinity of the crime, defendant was entitled to counsel.

Federal courts which have considered the issue of right to counsel at "on-the-scene" identification are in conflict. In *Russell v. United States*,[41] the witness reported a housebreaking to police within three or four minutes of its occurrence and furnished a description of the suspect. Defendant was picked up in the vicinity shortly thereafter and returned to the scene for identification. In holding that no right to counsel existed at such a confrontation, the court said that such prompt confrontations present "substantial countervailing policy considerations" against the requirement for counsel by assuring reliability and promoting the expeditious release of innocents.[42] *Russell* cautioned,

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35 *Id.* at —, 238 N.E.2d at 344-45.

36 8 Ariz. App. 110, 443 P.2d 925 (Ct. App. 1968). *See also* People v. Moore, 104 Ill. App. 2d 343, 244 N.E.2d 337 (App. Ct. 1st Dist. 1968).

37 276 Cal. App. 2d 147, 80 Cal. Rptr. 659 (Ct. App. 4th Dist. 1969).

38 *Id.* at —, 80 Cal. Rptr. at 664.

39 273 Cal. App. 2d 724, 78 Cal. Rptr. 552 (Ct. App. 1st Dist. 1969).

40 *Id.* at —, 78 Cal. Rptr. at 556.

41 408 F.2d 1280 (D.C. Cir. 1969), *cert. denied*, 395 U.S. 928 (1969).

42 The court stated that

> [t]his conclusion [the admissibility of the defendant's identification] does not rest on a determination that McCann's [witness's] identification was in fact espe-

however, that its holding applied only to "those on-the-scene identifications which occur within minutes of the witnessed crime."[43] Contrarily, the court in *United States v. Clark*,[44] observed that the immediacy of the confrontation was not the controlling factor in determining the right to counsel.[45] However, it is doubtful that the confrontation in *Clark* could reasonably be considered as an "on-the-scene" confrontation inasmuch as nearly seven hours had elapsed between the crime and the confrontation in question.

Although *Thomas* finds support in other jurisdictions and appears to be the desirable position, the opinion does not adequately support the holding. *Thomas* is considerably weakened by the court's heavy reliance on *People v. Palmer*,[46] which involved an identification confrontation more than two weeks after the commission of the crime. This can hardly be called an "on-the-scene" confrontation. *Palmer* held that the *Wade* rules "apply only to post-indictment confrontations,"[47] a position that the court in *Thomas* did not accept, even in its dicta. In *Thomas*, the court said that "[w]e do not suggest that the right to counsel cannot exist in pre-indictment identification proceedings . . . nor do we hold that the right to counsel applies only to post-indictment proceedings."[48] The *Thomas* court also cited *Trask v. State*[49] as supporting its position. However, the confrontation in *Trask* was before the effective date of *Wade* and *Gilbert* and the court's comment regarding the accused's right to counsel at a pre-indictment lineup was dictum. *Thomas* should have relied more heavily on *Russell*, because its reasoning appears to be the most logical approach to the problems encountered in applying the *Wade* rules.[50]

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cially reliable. It rests instead on a *general rule* that it is not improper for the police immediately to return a freshly apprehended suspect to the scene of the crime for identification by one who has seen the culprit minutes before.

Id. at 1284 (emphasis added).

43 *Id.* at 1284 n.20. *Russell* substantially overrules the specific holding, if not the personal opinion of the presiding judge, in *Kinnard*, in which the court reluctantly held that the right to counsel existed at an "on-the-scene" identification occurring forty-five minutes after the commission of the crime.

44 289 F. Supp. 610 (E.D. Pa. 1968).

45 The court stated that "[t]he *significant characteristic* shared by the confrontations there [in *Wade* and *Gilbert*], i.e. a *live confrontation* between witnesses and the defendant, is shared as well . . . here. . . ." *Id.* at 625 (emphasis added).

46 41 Ill. 2d 571, 244 N.E.2d 173 (1969).

47 *Id.* at 572, 244 N.E.2d at 174.

48 107 N.J. Super. at 135, 257 A. 2d at 380.

49 247 A.2d 114 (Me. Sup. Jud. Ct. 1968).

50 *Thomas* lists *Russell* as supporting its position, but no reliance on the reasoning of *Russell* appears to be made. 107 N.J. Super. at 134, 257 A.2d at 380. However, the prosecution did rely extensively on *Russell* in its brief. Brief for State-Appellee at 13-15, State v. Thomas, 107 N.J. Super. 128, 257 A.2d 377.

It is unlikely that the Supreme Court intended *Wade* and *Gilbert* to apply only to post-indictment confrontations. The test of "criticality" utilized by the Court in these cases is a functional test rather than a test based on specific, well-defined steps in the criminal proceeding. The right to counsel applies "whenever necessary to assure a meaningful 'defence' "[51] and a critical stage is "any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial."[52] If the formality of arrest, arraignment, or indictment were required to make the right to counsel applicable, the accused's rights could easily be circumvented by delaying such formality.[53] The language of *Wade* "leaves room for the modification of the *Wade* rule in cases involving prompt confrontations."[54] The Court in *Wade* indicates that consideration might be given to "substantial countervailing policy considerations," or situations where notice to counsel might prejudicially delay the confrontation.[55]

There appear to be "substantial countervailing policy considerations" in what amount to "on-the-scene" identification confrontations. Such confrontations promote fairness of identification procedures by assuring reliability and providing for the expeditious release of innocents.[56] The daily routine of police work needs more flexibility than could be allowed by a strict application of the *Wade* rules to "on-the-scene" confrontations.[57] "On-the-scene" confrontations, "dictated by the exigencies of the immediate situation, serve a salutary purpose" and no one should be "entitled to suppress any evidence so obtained."[58] Furthermore, "the rights of a suspect are subject to limitations arising out of society's interest in police activity. . . ."[59]

The Court in *Wade* indicated that the right to counsel did not extend to all police activity, "such as systematized or scientific analyzing of the accused's fingerprints, blood sample, clothing, hair, and the

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51 United States v. Wade, 388 U.S. 218, 225 (1967).

52 *Id.* at 226.

53 People v. Furnish, 63 Cal. 2d 511, 516, 407 P.2d 299, 302-03, 47 Cal. Rptr. 387, 390-91 (1965).

54 Russell v. United States, 408 F.2d 1280, 1283 (D.C. Cir. 1969), *cert. denied*, 395 U.S. 928 (1969).

55 388 U.S. at 237.

56 Russell v. United States, 408 F.2d 1280, 1283-84 (D.C. Cir. 1969), *cert. denied*, 395 U.S. 928 (1969).

57 United States v. Kinnard, 294 F. Supp. 286, 289 (D.D.C. 1968).

58 State v. Boens, 8 Ariz. App. 110, 114, 443 P.2d 925, 929 (Ct. App. 1968); *accord*, People v. Colgain, 276 Cal. App. 2d 147, 80 Cal. Rptr. 659 (Ct. App. 4th Dist. 1969).

59 Wise v. United States, 383 F.2d 206, 209 n.7 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 964 (1968).

like."[60] Prompt, "on the scene" confrontations offer "countervailing policy considerations" as substantial as those offered by other activities which are exempt from the right to counsel. Until the Supreme Court provides more specific guidelines regarding the application of the *Wade* rules to "on-the-scene" confrontations,[61] courts should remain flexible and should consider such cases on a case-by-case basis. Such factors as the immediacy of the confrontation to the crime,[62] the relative location of the apprehension to the crime scene,[63] the adequacy of the description of the suspect given by the witness prior to the apprehension,[64] the surroundings of the confrontation locale,[65] and whether the confrontation was arranged by the police or was in fact a "happenstance" confrontation,[66] should be considered to determine the reasonableness[67] and fairness[68] of the confrontation. Such case-by-case consideration is analagous to the consideration given to the admissibility of an in-court identification following an illegal, extra-judicial confrontation.[69] This method of analysis will provide the type of review required to prevent the derogation from a fair trial with which the Court in *Wade* was concerned.[70]

Thomas has at least marked a desirable outer limit to the application of the *Wade* rules to pre-trial identification confrontations. Yet, *Thomas* has properly maintained a flexible attitude toward the application of the *Wade* rules, which will permit the suggested case-by-case consideration of future cases. In the face of the uncertainity regarding the coverage of *Wade* and *Gilbert*, this seems the most reasonable approach.

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60 388 U.S. at 227.

61 It is not known if a case involving this issue is now pending before the Court. Certiorari was denied in *Young*, *Russell* and *Davis*, each of which held that there was no right to counsel in an "on-the-scene" identification confrontation. This may at least be an indication that the Court felt that the reasoning in these cases was appropriate.

62 People v. Colgain, 276 Cal. App. 2d 147, 80 Cal. Rptr. 659 (Ct. App. 4th Dist. 1969). *See* Russell v. United States, 408 F.2d 1280 (D.C. Cir. 1969); Bates v. United States, 405 F.2d 1104 (D.C. Cir. 1968); Commonwealth v. Bumpus, 354 Mass. 494, 238 N.E.2d 343 (1968). *But see* United States v. Clark, 289 F. Supp. 610 (E.D. Pa. 1968).

63 People v. Colgain, 276 Cal. App. 2d 147, 80 Cal. Rptr. 659 (Ct. App. 4th Dist. 1969). *See* Russell v. United States, 408 F.2d 1280 (D.C. Cir. 1969); Commonwealth v. Bumpus, 354 Mass. 494, 238 N.E.2d 343 (1968).

64 Russell v. United States, 408 F.2d 1280 (D.C. Cir. 1969); Commonwealth v. Bumpus, 354 Mass. 494, 238 N.E.2d 343 (1968).

65 State v. Bratten, 245 A.2d 556 (Del. Super. Ct. 1968).

66 Smith v. State, 6 Md. App. 23, 249 A.2d 732 (Ct. Spec. App. 1969).

67 Commonwealth v. Bumpus, 354 Mass. 494, 238 N.E.2d 343 (1968).

68 Russell v. United States, 408 F.2d 1280, 1284 (D.C. Cir. 1969).

69 United States v. Wade, 388 U.S. 218, 224 (1967).

70 *See* Tyler v. State, 5 Md. App. 265, 246 A.2d 634 (Ct. Spec. App. 1968).