

ing exemplars, and the like, because there is minimal risk that the absence of counsel might derogate from the defendant's right to a fair trial.³⁹⁶

In *United States v. Ash*,³⁹⁷ the Court redefined and modified its "critical stage" analysis. According to the Court, the "core purpose" of the guarantee of counsel is to assure assistance at trial "when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." But assistance would be less than meaningful in the light of developments in criminal investigation and procedure if it were limited to the formal trial itself; therefore, counsel is compelled at "pretrial events that might appropriately be considered to be parts of the trial itself. At these newly emerging and significant events, the accused was confronted, just as at trial, by the procedural system, or by his expert adversary, or by both."³⁹⁸ Therefore, unless the pretrial stage involved the physical presence of the accused at a trial-like confrontation at which the accused requires the guiding hand of counsel, the Sixth Amendment does not guarantee the assistance of counsel.

Because the defendant was not present when witnesses to the crime viewed photographs of possible guilty parties, and therefore there was no trial-like confrontation, and because the possibilities of abuse in a photographic display are discoverable and reconstructable at trial by examination of witnesses, an indicted defendant is not entitled to have his counsel present at such a display.³⁹⁹

Both Wade and Gilbert had already been indicted and counsel had been appointed to represent them when their lineups were conducted, a fact noted in the opinions and in subsequent ones,⁴⁰⁰ but

³⁹⁶ *Gilbert v. California*, 388 U.S. 263, 265–67 (1967) (handwriting exemplars); *Schmerber v. California*, 384 U.S. 757, 765–66 (1966) (blood samples).

³⁹⁷ 413 U.S. 300 (1973). Justices Brennan, Douglas, and Marshall dissented. *Id.* at 326.

³⁹⁸ 413 U.S. at 309–10, 312–13. Justice Stewart, concurring on other grounds, rejected this analysis, *id.* at 321, as did the three dissenters. *Id.* at 326, 338–344. "The fundamental premise underlying all of this Court's decisions holding the right to counsel applicable at 'critical' pretrial proceedings, is that a 'stage' of the prosecution must be deemed 'critical' for the purposes of the Sixth Amendment if it is one at which the presence of counsel is necessary 'to protect the fairness of the trial itself.'" *Id.* at 339 (Justice Brennan dissenting). Examination of defendant by court-appointed psychiatrist to determine his competency to stand trial, after his indictment, was a "critical" stage, and he was entitled to the assistance of counsel before submitting to it. *Estelle v. Smith*, 451 U.S. 454, 469–71 (1981). Constructive notice is insufficient to alert counsel to psychiatric examination to assess future dangerousness of an indicted client. *Satterwhite v. Texas*, 486 U.S. 249 (1987) (also subjecting *Estelle v. Smith* violations to harmless error analysis in capital cases).

³⁹⁹ 413 U.S. at 317–21. The due process standards are discussed under the Fourteenth Amendment, "Criminal Identification Process," *infra*.

⁴⁰⁰ *United States v. Wade*, 388 U.S. 218, 219, 237 (1967); *Gilbert v. California*, 388 U.S. 263, 269, 272 (1967); *Simmons v. United States*, 390 U.S. 377, 382–83 (1968).