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Note

Commonwealth v. Richman: A State’s Extension of Procedural Rights Beyond Supreme Court Requirements

Historically, state courts have regarded the constitutional decisions of the United States Supreme Court as the limits beyond which they cannot favor the interests of the state over the constitutional rights of criminal defendants. The converse situation, where the state court decides for various reasons that a more encompassing standard of individual protection should prevail in the state than that required by the Supreme Court, has occurred less frequently. With Supreme Court decisions now tending to emphasize the interests of society and to downplay the borderline interests of the criminal defendants, a state court may find itself more frequently inquiring into the feasibility of establishing a higher standard of individual protection within the state. This note will concern itself generally with the adjudicatory tools available to the state court that desires to chisel out a more demanding state criminal procedure. More specifically, by concentrating on a recent Pennsylvania decision, Commonwealth v. Richman, this note will seek to illustrate those various methods available to judicially establish a higher degree of individual protection within the state. In Richman, the Pennsylvania court was confronted with the dilemma of maintaining an established standard pertaining to the right to counsel at pretrial identification confrontations.

The Need for More than the Minimum

The United States Supreme Court first ruled on the constitutionality of pretrial confrontations conducted in the absence of counsel in United States v. Wade and its companion case, Gilbert v. California. The lineup identification in Wade occurred before trial

3. Id. at 263.
but after indictment. While denying petitioner Wade's contention
that the involuntary lineup accompanied by compulsory voice iden-
tification violated his protection against self-incrimination under
the fifth amendment, the Court agreed that the lineup violated his
sixth amendment rights. The Court therein recognized that the
sixth amendment guaranteed the right to counsel at any critical
stage in the prosecution where the suspect's right to a fair trial
might be derogated; and because of its inherent prejudicial poten-
tial, a post-indictment lineup was deemed to be such a “critical
stage.”

The Court held that the great likelihood of substantial
prejudice required in-court identifications to be excluded unless
based upon means sufficiently independent of the tainted lineup.

The Wade Court was clearly concerned that certain kinds of
pretrial procedures would endanger the criminal defendant's sixth
amendment rights. Furthermore, the “critical stage” analysis em-
ployed by the Supreme Court in Wade did not appear to be limited
to confrontations occurring after indictment. However, Kirby v.
Illinois, decided five years later, refused to extend the Wade-
Gilbert exclusionary rule to a confrontation occurring before any

4. Id. at 221.
5. Id. at 236-37.
6. In the language of the Wade majority:

In sum, the principle of Powell v. Alabama and succeeding cases requires that we
scrutinize any pretrial confrontation of the accused to determine whether the presence
of counsel is necessary to preserve the defendant's basic right to a fair trial as affected
by his right meaningfully to cross-examine the witnesses against him and to have
effective assistance of counsel at the trial itself. It calls upon us to analyze whether
potential substantial prejudice to defendant's rights inheres in the particular confron-
tation and the ability of counsel to help avoid that prejudice.

Id. at 227

7. The Wade Court broadly defined what it meant by “critical stage”:

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 lineup was a critical
stage of the prosecution at which he was “as much entitled to such aid [of counsel]
. . . as at the trial itself.”

Id. at 236-37 (footnote and citations omitted).
8. Id. at 241.
“adversary judicial proceeding” had been initiated against the suspect. The Court reasoned that before that time, no right to the sixth amendment’s protections had accrued. The confrontation in *Kirby* had occurred after formal arrest but before any other criminal proceeding had begun. Within the reasoning of the *Kirby* Court, arrest, or at least arrest per se, was not considered to be the initiation of adversary proceedings which called into action the protections of the sixth amendment. The Court in *Kirby* retreated from the language and rationale of *Wade*. The switch in analysis from the nature of the confrontation to the time at which the confrontation took place would not have been predictable from the *Wade* decision. In fact, many jurisdictions, including Pennsylvania, had followed the *Wade* rationale without mentioning the significance of the procedural development of the investigation.

Prior to *Kirby*, the Supreme Court of Pennsylvania had been willing to apply the *Wade-Gilbert* exclusionary rule to any post-arrest, pretrial confrontation, with the exception of on-the-scene identifications. The Pennsylvania Supreme Court had first held that certain pretrial confrontations would be subject to the *Wade-Gilbert* rule in *Commonwealth v. Whiting*. In that case, the victim

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10. The *Kirby* Court suggested a few starting points of adversary judicial criminal proceedings—“formal charge, preliminary hearing, indictment, information, or arraignment.” *Id.* at 689. Since *Kirby* was concerned with striking an appropriate balance between the right of an individual to be free from prejudicial confrontation and the interest of society in the prompt and efficient investigation of crime, the accused’s right to fair treatment before adversary judicial proceedings commenced could comfortably be protected by the due process standard set forth in Stovall v. Denno, 388 U.S. 293 (1967). *See* 406 U.S. at 691.


The Pennsylvania Supreme Court first noted *Kirby* in *Commonwealth v. Ray*, *supra*, but since the identification confrontation in that case was of the on-the-scene variety and was made before any formal arrest, the court had no difficulty agreeing that the confrontation occurred before the "initiation of adversary judicial proceedings" and thus no sixth amendment right to counsel had yet accrued. *Id.* at 49, 315 A.2d at 636.

identified the defendant by means of a photographic lineup\textsuperscript{15} one hour after the defendant's arrest, and the following day identified the defendant through a one-way mirror.\textsuperscript{16} Following what it perceived to be the \textit{Wade} rationale, the court in \textit{Whiting} concerned itself more with the nature of the confrontation which requires the presence of counsel than with the time at which the right to counsel attaches for pretrial identifications.\textsuperscript{17} The court reasoned that since in both instances a substantial potential for improper influence or suggestion might be present, both confrontations were critical stages requiring counsel.\textsuperscript{18} Likewise, in \textit{Commonwealth v. Spencer},\textsuperscript{19} the Pennsylvania court summarily applied the \textit{Wade} rationale to a confrontation occurring after arrest, but before any other adversary proceeding.\textsuperscript{20} Since \textit{Kirby} was to later hold that there is no federal constitutional right to counsel at a lineup merely because it had occurred after arrest, the Supreme Court of Pennsylvania had "unknowingly" granted the criminal defendant a higher standard of procedural protection than would ultimately be required by the United States Supreme Court in its interpretation of the Constitution.

The facts presented to the Supreme Court of Pennsylvania in \textit{Commonwealth v. Richman}\textsuperscript{21} ultimately provided the vehicle for resolving this disparity between state and federal standards. At 9:30 a.m. on May 6, 1970, Leroy Richman was arrested\textsuperscript{22} without a warrant and taken to the 9th District Central Detective Division in the City of Philadelphia.\textsuperscript{23} After signing a written waiver of counsel, and

\begin{itemize}
\item \textsuperscript{15} The police showed the victim eight photographs, one of which was the defendant without eye glasses. After the victim selected the suspect's picture, she was shown another photograph of the defendant, this time with eye glasses (her assailant had worn eye glasses). She again identified the defendant as her assailant. \textit{Id.} at 207, 266 A.2d at 739.
\item \textsuperscript{16} \textit{Id.}
\item \textsuperscript{17} However, the court did expressly note that the identifications were post-arrest confrontations by italicizing the word "after" while discussing when the picture-lineup occurred. \textit{Id.} at 207, 266 A.2d at 739.
\item \textsuperscript{18} \textit{Id.} at 208, 266 A.2d at 739-40.
\item \textsuperscript{19} 442 Pa. 328, 275 A.2d 299 (1971).
\item \textsuperscript{20} \textit{Id.} at 331, 275 A.2d at 301.
\item \textsuperscript{21} 320 A.2d 351 (Pa. 1974).
\item \textsuperscript{22} Richman was arrested in connection with the rape of Elina Taber and the burglary of her apartment. The alleged burglary and rape had occurred five days earlier, on May 1, 1970. Brief for Appellee at 2, 3, \textit{Commonwealth v. Richman}, 320 A.2d 351 (Pa. 1974) [hereinafter cited as Brief for Appellee].
\item \textsuperscript{23} \textit{Commonwealth v. Richman}, 320 A.2d 351, 352 (Pa. 1974).
\end{itemize}
about four hours after his arrest, he was placed in a six-man lineup\textsuperscript{24} where the complaining witness identified him as her assailant.\textsuperscript{25} At the trial, that witness again identified the appellant without reference to the previous lineup. Richman was found guilty of burglary and rape; post-trial motions were denied on a finding that appellant waived any possible right to counsel; and the superior court affirmed, per curiam.\textsuperscript{26} The Supreme Court of Pennsylvania granted allocatur, limiting the issue to "whether there was a constitutional right to counsel at a preindictment lineup, and if so, whether that right was intelligently waived in this case."\textsuperscript{27}

\textbf{THE PENNSYLVANIA SOLUTION}

The Richman court was confronted with the conflict between Kirby's holding that no sixth amendment right to counsel accrued upon arrest, and the Pennsylvania requirement for counsel at any post-arrest lineup. The court's least involved option would have been to adopt Kirby's suggestion that counsel is only required at lineups conducted in Pennsylvania occurring after information, indictment, or the like,\textsuperscript{28} though this position would have meant over-

\begin{itemize}
\item \textsuperscript{24} The lineup consisted of a cross-section of people similar in appearance to the description given to the police by the victim, that is, the six men in the lineup were all black, in addition to the defendant, at least two others had bush hair cuts, the group ranged in height from 5'9 to 6', and none had beards.
\item \textsuperscript{25} 320 A.2d at 352.
\item \textsuperscript{26} Id.
\item \textsuperscript{27} Id.
\item \textsuperscript{28} It is clear that the Supreme Court of Pennsylvania did not wish to retreat to a strict reading of Kirby by requiring that counsel need not be present unless criminal process had been initiated by "formal charge, preliminary hearing, indictment, information, or arraignment." Kirby v. Illinois, 406 U.S. 682, 689 (1972). A number of state court decisions which have been handed down since Kirby may be read to stand for the proposition that the quoted list is exclusive. See Houston v. State, 49 Ala. App. 403, 272 So. 2d 610 (1973); People v. Chojnacky, 8 Cal. 3d 759, 505 P.2d 1402, 106 Cal. Rptr. 106 (1973); State v. Jackson, 199 N.W. 2d 102 (Iowa 1973); Jackson v. State, 17 Md. App. 167, 300 A.2d 430 (1973) (offense report of police officer is not "formal charge"); Stewart v. State, 509 P.2d 1402 (Okla. Crim. App. 1973) (preliminary information is "formal charge"); State v. Taylor, 60 Wis. 2d 506, 210 N.W.2d 873 (1973).
\end{itemize}

Had the Pennsylvania court decided it best to follow this line of cases interpreting Kirby, it would have meant overruling the Whiting and Spencer cases to the extent they held otherwise. The court instead chose to maintain the higher standard of individual protection which those cases had established.
ruling Commonwealth v. Whiting\textsuperscript{29} and Commonwealth v. Spencer\textsuperscript{30} to some extent. Even a cursory reading of the Richman opinion, however, will indicate that the Pennsylvania court was concerned with maintaining the state's more demanding "right to counsel" standard.

The court accomplished this goal by using a process which might be labeled "judicial interpretation,"\textsuperscript{31} focusing on the broader phraseology in Kirby\textsuperscript{32} and applying an interpretation of that language to the local criminal processes. Within the framework of this process of "judicial interpretation," the Supreme Court of Pennsylvania rejected the appellant's argument\textsuperscript{33} and adopted its own "interpretational solution." Justice Nix, speaking for the majority,\textsuperscript{34} commenced with an endorsement of the strong policy behind the exclusionary rule announced in Wade,\textsuperscript{35} but noted that the opinion there did not specify exactly when the right to counsel attaches.\textsuperscript{36}

That task, the court conceded, had been left to Kirby. However, the majority felt that Kirby had not established an all inclusive rule; the line to be drawn would depend upon the particular procedures which were employed by each state.\textsuperscript{37} The determinative issue was "whether this lineup preceded the 'initiation of adversary judicial proceedings' as defined in Pennsylvania."\textsuperscript{38}

\begin{itemize}
\item \textsuperscript{29} 439 Pa. 205, 266 A.2d 738 (1970).
\item \textsuperscript{30} 442 Pa. 328, 275 A.2d 299 (1971).
\item \textsuperscript{31} The "judicial interpretation" phrase is employed as a shorthand reference to the wide spectrum of judicial analyses which construe, apply and distinguish a case which would appear to control the matter at hand rather than directly apply its holding.
\item \textsuperscript{32} In interpreting a Supreme Court decision, a state court may grab hold of a catch phrase in the case more conducive to a broader interpretation. In Richman, the phrase from Kirby that properly caught the court's eye was the "initiation of adversary judicial proceedings." 320 A.2d at 353.
\item \textsuperscript{33} The appellant argued that under the Pennsylvania Rules of Criminal Procedure, the initiation of adversary judicial criminal proceedings takes place at the preliminary arraignment. Under Pennsylvania criminal procedure, he argued, the arrested suspect must be given a preliminary arraignment without unnecessary delay, even though the procedure varies slightly depending upon whether the arrest is made with or without a warrant. The appellant then argued that the distinction in Kirby is irrational when applied to this procedure; necessary delay should not include time for identification confrontations. See Brief for Appellant at 6-7; PA. R. CRIM. P. 122, 130.
\item \textsuperscript{34} He was joined by Justices O'Brien, Roberts, and Manderino. 320 A.2d at 352, 355.
\item \textsuperscript{35} Justice Nix cited a quote from Wade. Id. at 352. See note 7 supra.
\item \textsuperscript{36} 320 A.2d at 352.
\item \textsuperscript{37} Id. at 353.
\item \textsuperscript{38} Id.
The majority of the court labeled the time at which a magistrate approves a written complaint as the "initiation of adversary judicial proceedings" since in Pennsylvania that stage is "at least as significant as the indictment" in determining the formation of adversary positions and the strength of the government's decision to prosecute. The court then analyzed the circumstances under which such approval is given during the normal state criminal process in order to determine exactly when the right to counsel attaches. In Pennsylvania, magisterial approval of a complaint occurs on one of two alternative occasions: either at the time of the issuance of an arrest warrant, or, where an arrest is made without a warrant, at the preliminary arraignment. If the Pennsylvania court would have gone no further in its analysis of Kirby, it is clear that the time at which the suspect's right to counsel at pretrial confrontations would attach would depend upon the type of arrest. A suspect arrested with a warrant would have a right to counsel at the point of his arrest, whereas such right to counsel would not attach until the preliminary arraignment if he were arrested without a warrant.

Realizing the predicament that its analysis had created, the Pennsylvania court unveiled two policy reasons for not so distinguishing the two types of arrests. First, since warrantless arrests are justified only in the face of compelling exigent circumstances, allowing uncounseled lineups between warrantless arrests and initial presentments could only encourage abuse of the exigent circumstances exception and undercut the strong policy requiring warrants

39. Id.
40. See Pa. R. Crim. P. 3(i), 102, 130.
41. In Pennsylvania, the initial presentment is termed "preliminary arraignment." See Pa. R. Crim. P. 130.
42. 320 A.2d at 353. A strict reading of the test for the initiation of adversary judicial criminal proceedings proposed by the Pennsylvania Supreme Court would demand a right to counsel at any post-issuance confrontation, with the noted exception of on-the-scene confrontations. Though the situation would be rare where a right to counsel would be asserted after the warrant is issued but before it is served, it is within the realm of possibility. Suppose after a complaint had been filed and a warrant issued, the suspect, aware that he is suspected of the crime, turns himself in so that he may be exculpated by the witnesses to the crime. Before the warrant is served or he is otherwise formally arrested, he executes an invalid waiver of counsel and submits to a lineup where he is "identified" by the witnesses as the criminal. The majority in Richman would undoubtedly hold that the suspect never had a right to counsel at this lineup since he had not yet been formally arrested; yet they would be forced to admit that the confrontation had occurred after the initiation of adversary judicial proceedings in Pennsylvania as they had defined the term.
whenever possible. Secondly, the distinction would conflict with the policy behind rule 130 of the Pennsylvania Rules of Criminal Procedure, which requires that a suspect arrested without a warrant be taken "without unnecessary delay" before the proper authority for an immediate preliminary arraignment. The court noted that the unnecessary delay phrase was designed to permit delays only for routine police procedures such as booking, photographing, fingerprinting and other common administrative procedures, and argued that to include a lineup within that category would be inconsistent with the purpose of the rule.

The court chose to eliminate the unwise distinction between the two types of arrests by further stretching its interpretation of Kirby; it declared that Kirby only requires the states to limit the Wade rule requiring counsel where the limitation would benefit the interest of society in the prompt and efficient investigation of unsolved crime. In other situations the right to counsel should attach at the last stage in the investigative process before the initiation of "adversary criminal proceedings," after which no real benefit to society could accrue. The application of this conditional reading of Kirby established a right to counsel for the suspect arrested without a warrant which was coextensive with the rights granted other suspects. Under established Pennsylvania criminal procedure, an investigative proceeding between arrest and preliminary arraignment would be considered an "unnecessary delay." Thus, no valid benefit could accrue to society after a warrantless arrest, and the right to counsel should attach at the time the suspect is arrested.

44. 320 A.2d at 354.
45. PA. R. CRIM. P. 130 provides:

When a defendant has been arrested without a warrant in a court case, he shall be taken without unnecessary delay before the proper issuing authority where a complaint shall be filed against him and he shall be given an immediate preliminary arraignment.

47. 320 A.2d at 354.
48. Id. at 353.
49. PA. R. CRIM. P. 130.
50. The court went on to hold that Richman had not executed a valid waiver of counsel form; that is, that his waiver was not "knowing and intelligent" since at the time of signing he had not even been informed of the general nature of the crime for which he was being held suspect. 320 A.2d at 355.

The court then remanded the case to the lower court for a determination of whether the in-court identification of Richman had a sufficient basis independent of the uncounseled lineup as required by Wade. 320 A.2d 351, 355 (Pa. 1974).
The federal constitutional analysis employed by the Richman court has two major weaknesses that leave it prone to potential Supreme Court review.\textsuperscript{51} First, the court's holding that a magistrate's approval of a complaint is the initiation of "adversary judicial criminal proceedings" would have been more persuasive if it had been based upon some distinct aspect of established Pennsylvania criminal procedure, or if the court had at least delineated some reasons for its choice. In the absence of any special justification, that determination is highly questionable, for as Justice Eagen noted in his concurring opinion, the overwhelming weight of authority has not been so broad in the interpretation of the phrase "adversary judicial criminal proceedings."\textsuperscript{52} Secondly, the Richman majority held that Kirby only works to limit the Wade rule when the limitation would benefit society in the prompt and efficient investigation of unsolved crime. The validity of this interpretation is equally questionable.\textsuperscript{53}

The Richman court could have authored a sounder opinion and avoided the problems of its conditional reading of Kirby by determining the preliminary arraignment to be the initiation of adversary judicial criminal proceedings. The Kirby Court had suggested focusing on the point at which the defendant "finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law."\textsuperscript{54} A look at the established procedures in Pennsylvania which surround the initial presentment, or preliminary arraignment, indicates the requi-

\textsuperscript{51} Ever since Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816), the Supreme Court has recognized its authority to review state court decisions that have arisen under the Federal Constitution. In fact, it would be interesting to conjecture how the Supreme Court of Pennsylvania would have interpreted its own decision on remand had the state prosecutor appealed to the Supreme Court. Despite the "interpretive" analysis, should the state court be faced with the alternatives of being overruled by the Supreme Court as a matter of federal constitutional law or retracting to the stand that the decision was one of "state supervisory power," it is suggested that the latter would be chosen. A similar problem arose in Commonwealth v. Campana, 452 Pa. 233, 304 A.2d 432 (1973), and is discussed in the text accompanying notes 80-83 infra.

\textsuperscript{52} 320 A.2d at 360 nn.3 & 4 (Eagen, J., concurring).

\textsuperscript{53} The United States Supreme Court in Kirby decided to draw a definite line for the attachment of the right to counsel at the initiation of adversary judicial criminal proceedings \textit{regardless} of the potential benefit to society in the prompt and efficient investigation of unsolved crime. The holding of Kirby could be more accurately described as a delineation of the exact time when the explicit guarantees of the sixth amendment, including the right to counsel, are applicable. That is, before the initiation of adversary judicial proceedings, no such rights can be said to attach. \textit{See} Kirby v. Illinois, 406 U.S. 682, 689-90 (1972).

\textsuperscript{54} \textit{Id.} at 689.
site gelling of such adversary positions. At the preliminary arraign-
ment the suspect is served for the first time with a copy of the
complaint by a magistrate or other "issuing authority."55 He must
be informed of his right to secure counsel or be assigned counsel
prior to his preliminary hearing, which, unless waived, must be
within three to ten days.56 If the offense is bailable, the suspect may
post bail, and be set free; otherwise, he must be committed to jail
according to law.57 Considering these procedures, the Pennsylvania
court would have been more reasonable in concluding that the pre-
liminary arraignment was the initiation of adversary judicial crimi-
nal proceedings in Pennsylvania. Admittedly, by itself, such a de-
termination would not have maintained the same standard of indi-
vidual protection as had Whiting and Spencer, but it would have
preserved the highest federal constitutional right of protection con-
istent with the actual holding of Kirby.58

THE "STATE LAW" SOLUTION

A sound alternative to the interpretational solution chosen by the
Pennsylvania Supreme Court with its attendant difficulties would
have been the establishment of a higher degree of procedural protec-
tion solely as a matter of state law. Conceptually, this "state law"
solution would seem the easier and more appropriate way to estab-
lish a higher standard of individual protection within the state. As
mentioned previously, the interpretational method used by the
Richman court leaves that decision open to potential Supreme
Court review, but no such review can follow a "state law" decision,
since it is naturally based on an adequate and independent non-

55. Pa. R. Crim. P. 3(i), 140.
56. Id. 140.
57. Id.
58. Whether or not other considerations might effectively raise that standard of protection
in Pennsylvania is another question, for Pennsylvania law recently provided that the time
passing between arrest and preliminary arraignment cannot be used for anything other than
routine administrative procedures. When a defendant has been arrested, he must be taken
without unnecessary delay before the proper authority for a preliminary arraignment. See Pa.
R. Crim. P. 122, 123, 130.

The meaning of the term "unnecessary delay" has been repeatedly defined to include delay
only for recognized administrative practices. See Commonwealth v. Dixon, 454 Pa. 444, 311
A.2d 613 (1973); Commonwealth v. Wayman, 454 Pa. 79, 309 A.2d 784 (1973); Commonwealth

In Futch, the Pennsylvania court held that all evidence obtained during an unnecessary
federal ground.59 Furthermore, since the choice to create the higher standard of protection necessarily implies dissatisfaction with the federal minimum, there could be no more appropriate way to express that dissatisfaction than to reject the minimum standard and establish the higher standard independently, as a matter of state law.

A complete rejection of Kirby on state grounds could have been legally supported.60 The Richman court could wisely have declared that the broad language and policy of Wade reached soundly beyond the facts of that case to encompass any pretrial confrontation, and therefore, Kirby was an unreasonable and unwise restriction of that language and policy.61 Had the court in that way disregarded the federal standard embodied in Kirby, a reasoned choice from among several state law alternatives would have been necessary.

At least three such alternatives were available to extend the state right to counsel to any post-arrest lineup. The first two of these solutions stem from the Judiciary Article of the Constitution of Pennsylvania.62 That article confers upon the Supreme Court of Pennsylvania the general power to supervise all courts and officers of court, and to prescribe rules of procedure for the judiciary system subject to the limitation that rulings so authorized do not enlarge or modify the substantive rights of any litigant.63 The same article delay between arrest and preliminary arraignment would be excluded from court except that which had no reasonable relation to the delay whatsoever; included in the former category would be in-court identifications based on uncounseled lineups, unless they had a clear and independent basis. Thus, if the Richman court had decided that the preliminary arraignment was the Kirby "initiation," counsel would be required at that point and under the Futch rationale, no lineups could be permitted during the time between arrest and preliminary arraignment.

One may wonder why appellant Richman did not propose a Futch argument. Unfortunately, Richman had been tried in 1970 and had argued his case before the Pennsylvania Superior Court in 1971; Futch was not handed down until 1972. Not having timely made a Futch unnecessary delay argument, Richman could not raise it in the Supreme Court of Pennsylvania. Additionally, since Futch had not been decided when Richman was arrested, the Pennsylvania court could not take judicial notice of the decision.

60. Kirby has been variously criticized. See, e.g., Steele, Kirby v. Illinois: Counsel at Lineups, 9 CRIM. L. BULL. 49 (1973); The Supreme Court, 1971 Term, 86 HARV. L. REV. 1, 156 (1972); Note, Preindictment Confrontations, 2 AM. J. CRIM. L. 98 (1973); Comment, Kirby v. Illinois: A New Approach to the Right to Counsel, 58 IOWA L. REV. 404 (1972); Note, Counsel at Lineups, 51 N.C.L. REV. 630 (1973).
61. This was substantially the position of Justice Eagen, concurring, in the principal case.

He was joined by Chief Justice Jones. 320 A.2d at 358.
62. PA. CONST. art. 5.
63. PA. CONST. art. 5, §§ 10(a), (c), provide in relevant part:
also gives statutory effect to such rulings by suspending existing laws which are inconsistent with them.64

Under such authorization, the Supreme Court of Pennsylvania could have established a right to counsel at post-arrest confrontations by the formal adoption of a Rule of Criminal Procedure. Such rules are usually submitted to the court by the Criminal Procedural Rules Committee appointed by the supreme court under article 5, § 10(c) of the Constitution of Pennsylvania and are adopted by a formal order of court.65 Though this power is normally employed to promote the efficient administration of the state judiciary,66 the Pennsylvania Supreme Court will adopt a rule governing procedure in a criminal trial when the defendant's interest deserves protection but does not achieve the status of a constitutionally protected right.67

In Commonwealth ex rel. West v. Rundle,68 the appellant contended that in order to assure a voluntary, knowing and intelligent guilty plea, the court ought to require an on-the-record colloquy between the judge and the defendant detailing the explanation of the consequences of such a plea.69 Although the court did find merit in the suggestion of such an on-the-record examination by the trial judge, it did not feel that it was constitutionally required, and declined to adopt any such rule in the case before it.70 Interestingly

(a) The Supreme Court shall exercise general supervisory and administrative authority over all the courts and justices of the peace . . . .

(c) The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts [and] justices of the peace . . . including the power to provide for . . . the administration of all courts and supervision of all officers of the judicial branch, if such rules are consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant, nor affect the right of the General Assembly to determine the jurisdiction of any court or justice of the peace, nor suspend nor alter any statute of limitation of repose. All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions.

64. Id. § 10(c).
65. Adoption or amendment of these rules can be found regularly in the forward pages of the Pennsylvania State Reports. See, e.g., In Re: Order Amending Rule 319(a) of The Rules of Criminal Procedure, 432 Pa. xxxii (1968).
68. 428 Pa. 102, 237 A.2d 196 (1968).
69. Id. at 103-05, 237 A.2d at 196-98, citing Machibroda v. United States, 368 U.S. 487 (1962).
70. 428 Pa. at 105-07, 237 A.2d at 197-98.
enough, less than ten months after the date of the *West* decision, the Supreme Court of Pennsylvania, pursuant to its procedural rule-making power, adopted and promulgated an amended rule 319 providing that a judge shall not accept a plea of guilty unless, by an inquiry appearing on the record, the judge determines that the plea was voluntarily and understandingly made. Though the supreme court had declined to assist the appellant West, it had in this way provided guidance for later defendants.

Had the *Richman* court desired to use the *West* approach, it would have had to conclude that the presence of counsel at a post-arrest lineup was demanded only on behalf of the efficient administration of justice and not by the Federal Constitution. In light of the justices' continued support for *Wade* and its progeny in Pennsylvania, such a stance would have been highly improbable. In addition, the *West* approach could not have aided appellant Richman or others whose confrontations occurred under similar circumstances before the rule in question had been formally adopted. A rule of criminal procedure, being in the nature of legislation which does not affect substantive rights, is given effect from some prospective date or the date of adoption. It is suggested that the *Richman* court was concerned enough about the proper disposition of the

71. PA. CONSt. art. 5, § 10(c).
72. In Re: Order Amending Rule 319(a) of The Rules of Criminal Procedure, 432 Pa. xxxii (1968). The following comment accompanied the revised version of rule 319(a):

The purpose in amending Rule 319 is to codify the requirement that the judge, on the record, ascertain from the defendant that the guilty plea is voluntarily and understandingly made. Recent Court decisions have indicated that this is the preferred practice but have not made the requirement mandatory. See Commonwealth ex rel. *West v. Rundle*, 428 Pa. 102, 237 A.2d 196 (1968).
74. An accession to the position that the Federal Constitution does not require counsel at post-arrest lineups would have implicitly overruled *Whiting* and *Spencer* since those cases had held that *Wade* requires counsel at lineups which occur after arrest only. Moreover, there is a strong hint in the *Richman* majority opinion that the justices felt that a constitutional interest was involved.
75. See text accompanying note 64 supra.
76. See text accompanying note 63 supra.
case at hand\textsuperscript{78} that the rule adoption solution was concededly inappropriate.

The second state law alternative which was available to the Pennsylvania court in \textit{Richman} was adjudication by way of the court's supervisory power. Although analogous to the court's authority to adopt rules of procedure, the supervisory power is more extensive, since it enables the court to establish a higher standard of procedural protection via ad hoc adjudication.\textsuperscript{79} An interesting and analogous application of the supervisory power was made by the court in \textit{Commonwealth v. Campana}.\textsuperscript{80} In the original \textit{Campana} decision, the plurality opinion discussed the issue at hand primarily in terms of federal constitutional protections, establishing a double jeopardy standard more demanding than that ever required by the decisions of the Supreme Court.\textsuperscript{81} A petition for writ of certiorari was granted by the United States Supreme Court, which vacated the judgment and remanded the case for a determination of whether the original

\textsuperscript{78} As stated in note 58 \textit{supra}, the supreme court could have used the combination of the \textit{Kirby} constitutional right (preliminary arraignment is the initiation of adversary judicial proceedings) and the \textit{Futch} rule (no unnecessary delay between arrest and preliminary arraignment) to establish a right to counsel for post-arrest confrontations, but that would not have aided \textit{Richman}. Similarly, the court could not have chosen the strict rule adoption route discussed in the text, since \textit{Richman} would not have benefited.


\textsuperscript{81} The plurality opinion, written by Justice Roberts and joined by Justices Manderino and O'Brien, held that the fifth amendment required compulsory joinder of all charges arising from a "single criminal episode." The plurality noted that the most recent Supreme Court authority, \textit{Ashe v. Swenson}, 397 U.S. 436 (1970), had discussed the double jeopardy clause in terms of the "same evidence" test, and had held that collateral estoppel applied in subsequent criminal prosecutions to bar the relitigation of ultimate issues of fact resolved in favor of the defendant in an earlier prosecution. Nevertheless, the court felt that \textit{Ashe} had only incorporated the concept of collateral estoppel as a \textit{minimum} double jeopardy protection. Whether or not that provision barred successive prosecutions arising from a single transaction was still an open question. 452 Pa. at 239-55, 304 A.2d at 434-41.

Justice Nix, concurring, would have supported the "single episode" test by requiring compulsory joinder of all known crimes based on the same conduct, but did not feel that such a standard was constitutionally mandated. \textit{Id.} at 260-63, 304 A.2d at 449-51 (Nix, J., concurring).
decision was based on federal or state grounds. Surprisingly, the Pennsylvania Supreme Court, in its per curiam addendum opinion, held that since additional reasoning, over and above the constitutional rationale, had been employed as a basis for the original opinion, it should be viewed as state law established pursuant to the broad supervisory power invested in the court.

Clearly, the Pennsylvania court has shown its willingness to establish such a higher standard of individual protection by use of its broad supervisory powers when there appear to be obstacles to the establishment of that standard by an interpretation of federal constitutional requirements. Actually, where non-constitutional rights are involved, the supervisory power solution is probably the most attractive. Justice Pomeroy strongly advocated this approach in the Richman case. Although he felt that, under Kirby, the initiation of adversary judicial proceedings in Pennsylvania occurred at the preliminary hearing, he noted that the court need not limit the Pennsylvania requirements to those minimum standards required by the

Justice Eagen and Chief Justice Jones concurred in the result reached by the plurality, but would have espoused a different double jeopardy standard. They felt that fifth amendment double jeopardy required joinder in all crimes which flow from continuous conduct directed to the accomplishment of a single criminal objective. A second prosecution, however, may obtain where the purpose of the crime charged is "to prevent a substantially different harm or evil." Id. at 256-60, 304 A.2d at 451-53 (Eagen, J., concurring).

Justice Pomeroy did not disagree with the principle behind the single criminal episode standard, but argued that such a constitutionally based option had already been foreclosed by the decisions of the Supreme Court. He suggested a state procedure whereby the defendant would have the power to opt for joinder of all crimes arising from the same transaction. Id. at 263-75, 304 A.2d at 443-49 (Pomeroy, J., dissenting). Though a majority of the court favored the single transaction test, there was no agreement as to its basis.

The Campana case evidences one "difficulty" that occurs when a state court purports to decide a case on federal constitutional grounds: the possibility that the state attorney general might petition the United States Supreme Court for a review of the case. That is exactly what happened in Campana; the state sought a determination that the state court's decision was erroneous. However, since the Supreme Court will not review a state court decision when it is based on an adequate and independent non-federal ground, see California v. Krivda, 409 U.S. 33 (1972), it remanded for a determination of what grounds the case was decided upon.

Justice Pomeroy conceded that another tenable position was that the preliminary arraignment was such initiation. 320 A.2d at 357 (Pomeroy, J., dissenting).
Federal Constitution. Justice Pomeroy thought that two alternatives were available: adoption of a supervisory rule, or adjudication as a matter of state constitutional law. In choosing the supervisory ruling, he expressed the court's well-founded reluctance to decide an issue on constitutional grounds when disposition might be made on some other adequate basis. Additionally, a supervisory ruling would be a more flexible means of dealing with the problem in Richman, where the endeavor was to strike the appropriate balance between fairness to the individual suspect and the interest of society in the prompt and efficient investigation of crime.

Such a supervisory power solution could have established the broader state right to counsel in an eminently acceptable manner. Justice Eagen and Chief Justice Jones, who were vocal critics of Kirby in the Richman case, stated that they would have supported the creation of a state right to counsel as a matter of supervisory ruling. The majority's refusal to implement this attractive and persuasive alternative would seem to imply a conviction that the right to counsel at post-arrest lineups should be preserved by a constitutional guarantee.

Conveniently, the third alternative potentially available to the court would have been to establish the higher standard of protection within the state as a standard mandated by the Pennsylvania Constitution. To employ this solution, the Pennsylvania court would have had to hold that the right to counsel upon arrest was so fundamental that it must be accorded state constitutional protection. Admittedly, constitutional adjudication is generally thought to be less flexible than other types of adjudication, such as a supervisory power solution, but such inflexibility can in many cases be a virtue rather than a vice. Where fundamental interests are involved, the law protecting them should necessarily be more rigid and less receptive to impulsive change. Moreover, a state constitutional decision, being free of Supreme Court review, could provide a more indelible

85. 320 A.2d at 357 (Pomeroy, J., concurring). Justice Pomeroy thought there was merit in extending the right to counsel beyond Kirby requirements.
86. Id.
87. Id.
88. Id. at 361 (Eagen, J., concurring).
89. The highest state court is the ultimate tribunal to construe the state's constitution unless the rights of other states or the United States are concerned. West Virginia ex rel. Dyer v. Sims, 341 U.S. 22 (1951). Of course, a narrow interpretation of a state constitution in favor of the state and against the individual defendant would be limited by the minimum guarantees of the supreme law of the land, the United States Constitution.
protection of fundamental interests than federal constitutional adjudication since it would not be influenced by restrictive decisions of the United States Supreme Court.

There are two separate bases upon which a right can be established as a matter of state constitutional law where no such right is recognized under the Federal Constitution. Logically, a state constitution might contain specific protections, dispositive of the case at hand, which are not contained within the Federal Constitution. Where that is not the case, however, the state is left with only the possibility of construing a similar clause in its constitution as being different from, or more demanding than, an analogous federal provision.

The Constitution of Pennsylvania sets out the rights of the accused in criminal prosecutions in article 1, § 9. Among other protections, the accused is specifically guaranteed: 1) the right to confront and cross-examine witnesses; 2) the right to effective assistance of counsel; 3) the privilege against self-incrimination;


91. The New Jersey Supreme Court was faced with a problem similar to that faced by the Richman court in Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973). After drafting an opinion which declared the state’s method of raising revenues for school systems as violative of the equal protection clause of the fourteenth amendment to the Federal Constitution and a similar state constitutional provision, the New Jersey court learned that in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973), the United States Supreme Court had rejected such a federal constitutional argument. The court then recognized two alternatives available to reach the same result under the New Jersey Constitution. It acknowledged that it could construe the state equal protection clause as being more demanding than the federal equal protection clause, or it could turn the decision on specific state constitutional provisions which pertained to the matter at hand and which were not contained within the Federal Constitution. In choosing the latter alternative, the court noted that the state equal protection clause might become unmanageable if it were called upon to supply answers categorically in the broad field of human needs. It was not the proper instrument for choosing those needs that must be met and the sole basis upon which the state was permitted to act. Since the state constitution provided a specific constitutional right to education, however, the state court did not need to interpret its equal protection clause as demanding more than the federal one to establish an equal right to adequate education within the state. 62 N.J. at 490, 492, 501, 303 A.2d at 282, 283, 287. See generally 12 Duq. L. Rev. 989 (1974).

92. This section provides:

In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and, in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage; he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty, or property, unless by the judgment of his peers or the law of the land.

PA. CONST. art. 1, § 9.
and 4) the protections of due process. Each of these protections is also substantively guaranteed by a provision in the fifth, sixth or fourteenth amendments to the Federal Constitution. Thus, the Richman court could not have utilized the first suggested analysis —reliance upon a unique provision of the Pennsylvania Constitution. However, it could have established the post-arrest right to counsel by interpreting a state constitutional provision as being more demanding than the corresponding federal provision.

The implementation of such a solution would have initially involved distinguishing certain similarities in the Pennsylvania and Federal Constitutions. Under both article 1, § 9 and the sixth amendment, rights are granted to a defendant only during a "criminal prosecution." Kirby v. Illinois gave meaning to that federal

93. Id.
94. At first glance, the Pennsylvania self-incrimination provision may seem different than the federal self-incrimination provision. The former provides that the accused "cannot be compelled to give evidence against himself." PA. CONST. art 1, § 9. The latter provides that the accused shall not "be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

The federal self-incrimination privilege has been held to require, on proper exercise of the privilege, the exclusion of evidence which is of a testimonial or communicative nature, but not real physical evidence which is not of a testimonial nature. See Schmerber v. California, 384 U.S. 757 (1966); Holt v. United States, 218 U.S. 245 (1910). Using this distinction as a basis, the Supreme Court in United States v. Wade, 388 U.S. 218 (1967), held that the compulsory body exhibition and voice sample was not violative of Wade's privilege against self-incrimination.

Since the federal privilege permits a defendant to refuse only to "be a witness against himself," it is natural to expect that only evidence of a testimonial nature can be excluded by the invocation of the privilege. However, the Pennsylvania constitutional provision, on its face at least, would seem to permit the accused to invoke the privilege to exclude all evidence, testimonial or real, which had been extracted from him involuntarily. In spite of the difference in language though, the Supreme Court of Pennsylvania has apparently chosen to construe the state provision to have the same meaning as the federal provision, and has employed the testimonial-real evidence distinction in deciding cases brought before it. See Commonwealth v. Aljoe, 420 Pa. 198, 216 A.2d 50 (1966); Commonwealth v. San Juan, 129 Pa. Super. 179, 195 A. 433 (1938), cited with approval in Commonwealth v. Aljoe, supra.

95. PA. CONST. art. 1, § 9. See note 92 supra.
96. The sixth amendment 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 defence.

U.S. Const. amend. VI (emphasis supplied).
phrase by holding that the sixth amendment right to counsel does not accrue until the "initiation of adversary judicial criminal proceedings," thereby establishing such initiation as the beginning of the "criminal prosecution." This Kirby test for the commencement of the prosecution essentially depends upon whether a certain stage of adversity in criminal proceedings has been reached. Until that requisite point in time, the inchoate guarantees of the sixth amendment remain unperfected. If the Kirby definition of "criminal prosecution" were carried over to determine the applicability of the article 1, § 9 guarantees, serious limitations would result. Such guarantees would then attach only after adversary judicial proceedings had been initiated by a magistrate's approval of a written complaint.

The basis for determining the attachment of the state protections guaranteed during a "criminal prosecution," however, need not be the same as the federal standard enunciated in Kirby. Indeed, a strong argument can be made that the applicability of each of these Pennsylvania constitutional protections should be determined by the nature of the guarantee and not merely the procedural stage at which it is invoked. Various rights are granted the accused during a "criminal prosecution" in Pennsylvania which are not encompassed by the sixth amendment. Thus the expanded scope of article 1, § 9 already suggests that a more liberal basis for application may be necessary. Among these state constitutional protections are the privilege against self-incrimination and the protections of due process. Incorporation of the Kirby stage-of-adversity test to fix one point at which each of these protections becomes enforceable would be highly inappropriate. Surely due process is required during every stage in the criminal proceeding, and it is beyond question that the state privilege against self-incrimination applies in instances completely independent of any initiation of adversary judicial proceedings. Thus, the test for application of these two state protections does not depend on the stage of adversity which has been obtained, but must relate to the nature and purpose of the protection and the

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98. Id. at 689. The Kirby Court felt that "[i]t is this point . . . that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable." Id. at 690.

99. E.g., Commonwealth v. Kilgallen, 379 Pa. 315, 108 A.2d 780 (1954) (Pa. Const. art. 1, § 9 privilege against self-incrimination applies to proceedings before a grand jury where "the accused" has been subpoenaed to testify as a witness).
circumstances under which it is invoked. If that is to be the flexible
test for determining the initiation of these state constitutional guar-
antees, it should logically be the test for all. Consequently, each
claim of state constitutional protection should require a separate
determination of whether a "criminal prosecution" has begun based
upon the nature of the provision in question and the factual setting
before the court.

Such a state constitutional analysis would have given the
Richman court a fresh start in determining the scope of the state
right to counsel at pretrial confrontations. The compelling "critical
stage" rationale of Wade had similarly focused on the nature of the
sixth amendment right to counsel in the context of the highly
suggestive lineup situation. Freed from the confining effect of
Kirby, the Supreme Court of Pennsylvania could have merely reas-
serted the Wade rationale it had found so appealing and established
a right to counsel at post-arrest confrontations as a matter of state
constitutional law.

It might be argued, however, that the protection granted the ac-
cused in Wade was based primarily on a sixth amendment penum-
bra guarantee to a "fair trial," rather than the specific guarantee
to the assistance of counsel. If that theory is correct, then in order
to complete the analogy to the federal constitutional analysis in
Wade, the Pennsylvania Constitution would have to be found to

100. After all, isn't that where the emphasis properly lies? To quote the words of Justice
Brennan:

[T]here inhere in a confrontation for identification conducted after arrest the ident-
ical hazards to a fair trial that inhere in such a confrontation conducted "after the
onset of formal prosecutorial proceedings."

101. In United States v. Wade, 388 U.S. 218 (1967), the Court declared that

[T]he accused is guaranteed that he need not stand alone against the State at 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. 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—the right of the accused to a speedy and public trial by an impartial
jury, his right to be informed of the nature and cause of the accusation, and his right
to be confronted with the witnesses against him and to have compulsory process for
obtaining witnesses in his favor.

Id. at 226-27 (emphasis added) (footnote omitted).

It is possible that the Court was only reiterating the concept that fourteenth amendment
due process requires a fair trial; the "fair trial" language might, however, indicate an inten-
tion to breathe into the sixth amendment itself a general right to a "fair trial" through the
(1965).
include a similar general right to a "fair trial." In Pennsylvania, the fundamental concept of a fair trial is extracted from the "law of the land" clause of article 1, § 9 of the state constitution, which parallels the concept of due process in the Federal Constitution. Since fourteenth amendment due process per se has never been held to require the presence of counsel at pretrial confrontations, the Pennsylvania "law of the land" clause could require counsel at such lineups only if it were interpreted as being more demanding than its federal counterpart.

A state court clearly has the power to interpret the provisions of its state constitution differently from those in the Federal Constitution. However, where a provision in both is nearly identical in form, some legally or socially based justification for distinguishing the two would undoubtedly be sought. A mere exercise of power without justification or reason is an empty exercise of that power which few courts would condone.

One such basis for distinction may be in the traditional dichotomy between the roles of the federal and state governments. An individual is, first of all a citizen of his state, with concomitant duties and enforceable privileges. The state's constitution was enacted for the protection of its own citizens whose traditions and ideals may differ greatly from those of the United States populace as a whole. Moreover, the citizens of Pennsylvania certainly ratified their state constitution with the intention that each provision should have the full force of law, and to hold that any such provision is identical with its federal counterpart would render it superfluous and without substance.

104. However, fourteenth amendment due process may in certain overtly suggestive circumstances require exclusion of a lineup identification independent of any right to counsel. See Stovall v. Denno, 388 U.S. 293, 302 (1967).
105. See note 89 supra.
106. An additional reason for distinguishing identical state and federal constitutional provisions would lie in the different impact which an interpretation of each would have. While a federal constitutional decision affects each of the states, a state constitutional decision affects but one. Concerns that our system of government might become overly federalized have historically cautioned less activist justices on the Supreme Court to allow the states the widest latitude in administering their own systems of criminal justice. In order to give each state that latitude, the states cannot be collectively bound by a federal constitutional decision more restrictive of state criminal procedures than is absolutely necessary. Such concerns
It would be particularly appropriate, where the due process provision of any constitution is concerned, to take into consideration the different social and legal environments which influenced the passage of that constitution. Such factors, combined with the traditional nature of due process as a fluid response to the needs of society,\textsuperscript{107} would naturally encourage an independent determination of "due process" within the state.

**Summary**

During a period of expanding federal constitutional decisions designed to protect the interest of the criminal defendant, state courts will rarely find cause to establish a higher standard of individual protection than that required by the United States Supreme Court. Yet, when a decision is handed down by the Supreme Court which constricts the broad language of an accepted decision, or when the state court feels that the Supreme Court has not been vigilant enough in protecting the rights of the individual, the state court may choose to establish a higher standard of protection for the criminal defendant. Should the state court choose to interpret the existing Supreme Court case law in order to expand that standard of protection, various difficulties become apparent. Although such interpretation is ostensibly a mere analysis and application of the federal rule to the particular state procedures in use, a highly erroneous interpretation will likely find general disapproval among the legal community and may potentially be overruled by the Supreme Court.

Establishing the higher standard solely as a matter of state law presents fewer difficulties and is conceptually a sounder solution. Once the state court has chosen not to defer to the restrictive Supreme Court decision in every respect, has analyzed the needs and exigencies of the situation at hand, and has resolved the question as to the status of the interests to be protected, an intelligent choice can be made among rule adoption, supervisory ruling or state constitutional adjudication, each of which could maintain or establish within the state the higher standard of protection for the individual.

Andrew M. Roman

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\textsuperscript{107} See, \textit{e.g.}, Rochin v. California, 342 U.S. 165, 170-72 (1952).