

The Burger Court Opinion Writing Database

United States v. Ash

413 U.S. 300 (1973)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 6, 1973

Personal

Re: No. 71-1255 - U. S. v. Ash

Dear Harry:

This opinion gives me problems which I will try to sort out later.

I assume the remand is to require the CA to send the case to the District Court for findings but with that "crew" you had better be explicit. They have already made their own "fact findings" on taint.

More later when I get beyond my first run over.

Regards,



Mr. Justice Blackmun

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 15, 1973

Re: No. 71-1255 - United States v. Charles J. Ash, Jr.

Dear Harry:

Please join me.

Regards,

Mr. Justice Blackmun

Copies to the Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 14, 1973

Dear Bill:

Please join me in your dissent in
71-1255, U.S. v. Ash.

W.M.D.
William O. Douglas

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 5, 1973

RE: No. 72-1255 United States v. Ash

Dear Harry:

I shall try my hand at a dissent in
the above and hope to have it ready in a
few days.

Sincerely,

Bill

Mr. Justice Blackmun

cc: The Conference

SUPREME COURT OF THE UNITED STATES

mailed this

WJC Please give me my

✓ Marshall, J
6/14/73

No. 71-1255

United States)
)
) On Writ of Certiorari to the United
 v.) States Court of Appeals for the
) District of Columbia Circuit.
)
 Charles J. Ash, Jr.)

[June 1973]

MR. JUSTICE PRENNAN, dissenting.

The Court holds today that a pretrial display of photographs to the witnesses of a crime for the purpose of identifying the accused, unlike a lineup, does not constitute a "critical stage" of the prosecution at which the accused is constitutionally entitled to the presence of counsel. In my view, today's decision is wholly unsupportable in terms of such considerations as logic, consistency and, indeed, fairness. As a result, I must reluctantly conclude that today's decision marks another ~~step~~ towards the complete evisceration of the fundamental

STEP 11

~~step~~ towards the complete evisceration of the fundamental

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-1255

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Brennan, J.

Circulated: _____

United States, Petitioner, v. Charles J. Ash, Jr. On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Recirculated: 6/18/73

[June —, 1973]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

The Court holds today that a pretrial display of photographs to the witnesses of a crime for the purpose of identifying the accused, unlike a lineup, does not constitute a "critical stage" of the prosecution at which the accused is constitutionally entitled to the presence of counsel. In my view, today's decision is wholly unsupportable in terms of such considerations as logic, consistency and, indeed, fairness. As a result, I must reluctantly conclude that today's decision marks simply another¹ step towards the complete evisceration of the fundamental constitutional principles established by this Court, only six years ago, in *United States v. Wade*, 388 U. S. 218 (1967); *Gilbert v. California*, 388 U. S. 263 (1967); and *Stovall v. Denno*, 388 U. S. 293 (1967). I dissent.

I

On the morning of August 26, 1965, two men wearing stocking masks robbed the American Security and Trust Company in Washington, D. C. The robbery lasted only about three or four minutes and, on the day of the crime, none of the four witnesses was able to give the police a description of the robbers' facial characteristics. Some

¹ See *Kirby v. Illinois*, 406 U. S. 682 (1972).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 5, 1973

Re: No. 71-1255, United States v. Ash

Dear Harry,

I agree substantially with your memorandum and with the result you reach. I may write a few words in concurrence.

Sincerely yours,

P.S.

Mr. Justice Blackmun

Copies to the Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Stewart, J.
JUN 12 1973

Circulated:

No. 71-1255

Recirculated:

United States, Petitioner, } On Writ of Certiorari to the
v. } United States Court of Ap-
Charles J. Ash, Jr. } peals for the District of
Columbia Circuit.

[June —, 1973]

MR. JUSTICE STEWART, concurring in the judgment.

The issue in the present case is whether under the Sixth Amendment, a person who has been indicted is entitled to have a lawyer present when prosecution witnesses are shown the person's photograph and asked if they can identify him.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." This Court's decisions make it clear that a defendant is entitled to the assistance of counsel not only at the trial itself, but at all "critical stages" of his "prosecution." See *Coleman v. Alabama*, 399 U. S. 1; *United States v. Wade*, 388 U. S. 218; *Gilbert v. California*, 388 U. S. 263; *Hamilton v. Alabama*, 368 U. S. 52. The requirement that there be a "prosecution," means that this constitutional "right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against [an accused]. . . . It is this point . . . that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable." *Kirby v. Illinois*, 406 U. S. 682, 688, 690 (plurality opinion). Since the photographic identification in the present case occurred after the accused had been indicted, and thus clearly after adversary judicial proceedings had been initiated, the only ques-

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 5, 1973

Re: No. 71-1255 - United States v. Ash

Dear Harry:

Please join me in your opinion in this
case.

Sincerely,



Mr. Justice Blackmun

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 12, 1973

Re: No. 71-1255 - U. S. v. Ash

Dear Harry:

I shall withhold my vote pending
Bill Brennan's dissenting opinion.

Sincerely,


T.M.

Mr. Justice Blackmun

cc: Conference

file in sidebar
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 15, 1973

Re: No. 71-1255 - United States v. Ash

Dear Bill:

Please join me in your dissent.

Sincerely,

Thur
T.M.

Mr. Justice Brennan

cc: Conference

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To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-1255

Circulated: 6/4/73

Recirculated:

United States, Petitioner, v.
Charles J. Ash, Jr. } On Writ of Certiorari to the
United States Court of Appeals for the District of
Columbia Circuit.

[June —, 1973]

MR. JUSTICE BLACKMUN, memorandum.

In this case the Court is called upon to decide whether the Sixth Amendment¹ grants an accused the right to have counsel present whenever the Government conducts a post-indictment photographic display, containing a picture of the accused, for the purpose of allowing a witness to attempt an identification of the offender. The United States Court of Appeals for the District of Columbia Circuit, sitting *en banc*, held, by a 5-to-4 vote, that the accused possesses this right to counsel. 149 U. S. App. D. C. 1, 461 F. 2d 92 (1972). The court's holding is inconsistent with decisions of the courts of appeals of nine other circuits.² We granted certiorari

¹ "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

² *United States v. Bennett*, 409 F. 2d 888, 898-900 (CA2), cert. denied *sub nom.*; *Haywood v. United States*, 396 U. S. 852 (1969); *United States ex rel. Reed v. Anderson*, 461 F. 2d 739 (CA3, *en banc*, 1972); *United States v. Collins*, 416 F. 2d 696 (CA4), cert. denied, 396 U. S. 1025 (1970); *United States v. Ballard*, 423 F. 2d 127 (CA5 1970); *United States v. Serio*, 440 F. 2d 827, 829-830 (CA6 1971); *United States v. Robinson*, 406 F. 2d 64, 67 (CA7), cert. denied, 395 U. S. 926 (1969); *United States v. Long*, 449 F. 2d 288, 301-302 (CA8), cert. denied, 405 U. S. 974 (1972); *Allen v. Rhay*, 431 F. 2d 1160, 1166-1167 (CA9 1970); *McGee v. United States*, 402

P. 20

W. J. Blackmun
July 10, 1973

HAB,
I shall withhold
my vote pending
Bill Brennan's
dissenting opinion

2nd DRAFT

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Black
Mr. Justice White
Mr. Justice Powell
Mr. Justice Marshall
Mr. Justice Brennan
Mr. Justice Rehnquist

From: Blackmun, J.

SUPREME COURT OF THE UNITED STATES

No. 71-1255

Recirculated:

6/7/73

United States, Petitioner, v. Charles J. Ash, Jr. } On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June —, 1973]

MR. JUSTICE BLACKMUN, memorandum.

In this case the Court is called upon to decide whether the Sixth Amendment¹ grants an accused the right to have counsel present whenever the Government conducts a post-indictment photographic display, containing a picture of the accused, for the purpose of allowing a witness to attempt an identification of the offender. The United States Court of Appeals for the District of Columbia Circuit, sitting *en banc*, held, by a 5-to-4 vote, that the accused possesses this right to counsel. 149 U. S. App. D. C. 1, 461 F. 2d 92 (1972). The court's holding is inconsistent with decisions of the courts of appeals of nine other circuits.² We granted certiorari

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Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 15, 1973

MEMORANDUM FOR THE CONFERENCE

Re: Holds for No. 71-1255 - U.S. v. Ash

According to my records, there are ten cases being held for Ash. In all ten certiorari is sought by prisoners. All ten decisions below rejected the counsel claim. Thus, this issue was handled by the courts of appeals in a manner consistent with the presumed majority's Sixth Amendment holding in Ash.

Only one case, No. 72-5367, Johnson v. U.S., deals solely with the right to counsel issue. I shall vote to deny certiorari in this case.

In the nine other cases additional contentions are made. These cases are:

- No. 71-6355 ✓ Bamberger v. U.S.
No. 71-6579 ✓ Sheffield v. U.S.
No. 71-6812 ✓ Reed v. U.S.
No. 72-5379 ✓ U.S. Ex rel. Brandon v. N. J.
No. 72-5480 ✓ Conway v. Maryland
No. 72-5998 ✓ Coleman v. U.S.
No. 72-6185 ✓ Searcy v. Pinnock
No. 72-6377 - Holt v. California
No. 72-6396 ✓ Scruggs v. U.S.

WB

- 2 -

I shall not vote to grant certiorari in any of these cases on the basis of the right to counsel issue. I express no view on the other contentions presented in these petitions.

H. A. B.

WB

P.P. 1/15/1973

To: The Supreme Court
Mr. Justice Blackmun
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall ✓
Mr. Justice Powell
Mr. Justice Rehnquist

3rd DRAFT

From: Blackmun, J.

SUPREME COURT OF THE UNITED STATES

No. 71-1255

Recirculated: 6/19/73

United States, Petitioner, } On Writ of Certiorari to the
" " United States Court of Appeals for the District of
Charles J. Ash, Jr. } Columbia Circuit.

[June 21, 1973]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

In this case the Court is called upon to decide whether the Sixth Amendment¹ grants an accused the right to have counsel present whenever the Government conducts a post-indictment photographic display, containing a picture of the accused, for the purpose of allowing a witness to attempt an identification of the offender. The United States Court of Appeals for the District of Columbia Circuit, sitting *en banc*, held, by a 5-to-4 vote, that the accused possesses this right to counsel. 149 U. S. App. D. C. 1, 461 F. 2d 92 (1972). The court's holding is inconsistent with decisions of the courts of appeals of nine other circuits.² We granted certiorari

¹ "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

² *United States v. Bennett*, 409 F. 2d 888, 898-900 (CA2), cert. denied *sub nom. Haywood v. United States*, 396 U. S. 852 (1969); *United States ex rel. Reed v. Anderson*, 461 F. 2d 739 (CA3, *en banc*, 1972); *United States v. Collins*, 416 F. 2d 696 (CA4), cert. denied, 396 U. S. 1025 (1970); *United States v. Ballard*, 423 F. 2d 127 (CA5 1970); *United States v. Serio*, 440 F. 2d 827, 829-830 (CA6 1971); *United States v. Robinson*, 406 F. 2d 64, 67 (CA7), cert. denied, 395 U. S. 926 (1969); *United States v. Long*, 449 F. 2d 288, 301-302 (CA8), cert. denied, 405 U. S. 974 (1972); *Allen v. Rhay*, 431 F. 2d 1160, 1166-1167 (CA9 1970); *McGee v. United States*, 402

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 8, 1973

No. 71-1255 U. S. v. Ash

Dear Harry:

Please join me.

Sincerely,

Lewis

Mr. Justice Blackmun

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

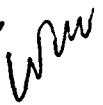
June 6, 1973

Re: No. 71-1255 - United States v. Ash

Dear Harry:

Please join me in your opinion.

Sincerely,



Mr. Justice Blackmun

Copies to the Conference