STATE OF MINNESOTA

IN SUPREME COURT

A19-0157

Court of Appeals

McKeig, J.
Dissenting, Hudson, J., Gildea, C.J.

State of Minnesota,

Respondent,

vs.

Filed: March 31, 2021
Office of Appellate Courts

Raciel Zalva Zaldivar-Proenza,

Appellant.

Keith Ellison, Attorney General; Peter Magnuson, Assistant Attorney General, Saint Paul, Minnesota; and

Danielle Olson, Swift County Attorney, Benson, Minnesota, for respondent.

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Workman Jesness, Assistant State Public Defender, Saint Paul, Minnesota, for appellant.

S Y L L A B U S

An otherwise-valid discovery motion made by the State at the defendant's first court appearance to obtain transitory evidence from the defendant's body in a non-invasive manner pursuant to Minn. R. Crim. P. 9.02, subd. 2, is not a critical stage of a criminal proceeding that requires the presence of defense counsel when the risk of counsel's absence jeopardizing the defendant's right to a fair trial is minimal.

Affirmed.

O P I N I O N

MCKEIG, Justice.

This case presents an issue of first impression. At appellant Raciel Zalva Zaldivar-Proenza's first court appearance on criminal sexual conduct charges, the State made a discovery motion under Minn. R. Crim. P. 9.02 to take photographs of transitory scratch marks on Zaldivar-Proenza's arms. The question before us is whether, under the circumstances presented here, the discovery motion was a "critical stage" of the criminal proceeding that entitled Zaldivar-Proenza to have counsel present. We conclude that such a Rule 9.02 motion is not a critical stage when, as here, the risk that counsel's absence would jeopardize the defendant's right to a fair trial, is minimal. Thus, we affirm the decision of the court of appeals.

FACTS

On May 18, 2018, L.P.S. was an overnight guest at the home of A.R.E.B. Both women slept in the same bedroom. Early the next morning, appellant Raciel Zalva Zaldivar-Proenza observed that the side door to A.R.E.B.'s house was open. A.R.E.B. had previously given him permission to enter her house because he takes care of it when she is not home. He went into the house and the bedroom to see if anything was wrong. A.R.E.B. woke when Zaldivar-Proenza entered the bedroom, and she told him everything was okay. A.R.E.B. then asked Zaldivar-Proenza to leave the house and went back to sleep.

L.P.S. woke to find Zaldivar-Proenza touching her bare buttocks with his hands. The blankets had been removed and L.P.S.'s leggings and underwear were pulled down. L.P.S. pushed Zaldivar-Proenza away and scratched his arm, breaking her fingernail in the

process. L.P.S. yelled at Zaldivar-Proenza to leave the house. He left the room, but then returned and began "insulting" her. A.R.E.B. woke and observed Zaldivar-Proenza standing at the foot of her bed while arguing with L.P.S. When A.R.E.B. asked what was going on, L.P.S. stated that Zaldivar-Proenza had touched her sexually. Zaldivar-Proenza left when L.P.S. called the police. A deputy from the Swift County Sherriff's Department responded to the 911 call made from A.R.E.B.'s residence. He interviewed both A.R.E.B. and L.P.S. and took photographs of L.P.S.'s broken fingernail.

The next day, Zaldivar-Proenza was arrested and charged by complaint with fourth-degree and fifth-degree criminal sexual conduct. The State also filed a motion to conduct a physical examination of Zaldivar-Proenza under Minn. R. Crim. P. 9.02, subd. 2(1), to inspect his arms for evidence of scratches and take photographs.

Zaldivar-Proenza's first court appearance took place on the following day. The district court set bail and determined that Zaldivar-Proenza qualified for a public defender. The district court told Zaldivar-Proenza that he would be represented by counsel at the next court hearing.

At the end of the first appearance hearing, the district court asked about the Rule 9.02 discovery motion filed by the State. The district court noted: "I'd like to preserve his right to legal counsel to address that. Is that a timely—are we looking at something that needs to be done very rapidly?" The prosecutor responded that he was "not sure how long . . . a scratch would appear on a body" and "the offense did occur two days ago." The district court granted the State's motion. Following the hearing, photographs of Zaldivar-Proenza's arm were taken.

Zaldivar-Proenza filed a motion to suppress. He argued that the photographs taken during the physical examination conducted under Minn. R. Crim. P. 9.02 must be suppressed because the State improperly requested the inspection without providing him and his counsel a full and fair opportunity to object and respond.

The district court denied Zaldivar-Proenza's motion to suppress. The district court found that the physical inspection allowed under Minn. R. Crim. P. 9.02 did not violate Zaldivar-Proenza's right to counsel because that right did not attach during his first appearance, citing *State ex rel. Ahlstrand v. Tahash*, 123 N.W.2d 325 (Minn. 1963). The district court also found that the State's motion for permission to conduct the physical exam complied with the requirements of Minn. R. Crim. P. 9.02.

During the jury trial, the State offered and the district court admitted the photographs of the scratches on Zaldivar-Proenza's arm. Zaldivar-Proenza testified at trial and denied having sexual contact with L.P.S. He explained that on the weekend of the alleged offense, he and his brother worked on rolling and moving barbed wire fencing and that fencing caused the scratches. The jury found Zaldivar-Proenza guilty of fourth-degree and fifth-degree criminal sexual conduct. The district court sentenced him to 78 months in prison.

On appeal, Zaldivar-Proenza argued that his Sixth Amendment right to counsel was violated when the State made and the district court granted the Rule 9.02 discovery motion

without his counsel present.[1] The court of appeals concluded, "in this narrow set of circumstances, where there was minimal risk that the absence of counsel would result in an unfair trial, the discovery hearing on an otherwise-valid discovery request to noninvasively photograph scratches was not a critical stage of the proceedings." *State v. Zaldivar-Proenza*, A19-0157, 2020 WL 290442, at *4 (Minn. App. Jan. 21, 2020). The court of appeals reasoned "[i]n the abstract, the handling of a discovery request might generally be viewed as a critical stage of proceedings" because it "may involve a confrontation between the two parties governed by the rules of criminal procedure, during which counsel could provide important advice and guidance on both how best to comply with the request and how to challenge the request." *Id.* at *3. However, the court of appeals observed, "in *Gilbert v. California*, the United States Supreme Court held that a discovery matter is not a critical stage when 'there is minimal risk that the absence of counsel might derogate from [a defendant's] right to a fair trial.' " *Id.* (citing 388 U.S. 263, 267 (1967)) (alteration in original). The court of appeals determined that "this case is analogous to *Gilbert*" because "Zaldivar-Proenza has not shown that he lost any legal right by not having an attorney present at the discovery-hearing portion of his initial appearance" and he was able to later challenge the State's use of the photographs by filing a suppression motion. *Id*. Thus, the court of appeals concluded that there was no violation of Zaldivar-Proenza's Sixth Amendment right to counsel.

[1] Zaldivar-Proenza also challenged the district court's decision to prohibit his brother from testifying at trial. This issue is not before us.

We granted Zaldivar-Proenza's petition for review.

ANALYSIS

Both the Minnesota Constitution and the United States Constitution guarantee a criminal defendant the right to legal representation. Minn. Const. art. I, § 6; U.S. Const. amend. VI. The right to counsel serves to protect the defendant who "lacks both the skill and knowledge" to defend himself. *Powell v. Alabama*, 287 U.S. 45, 69 (1932). The Supreme Court has stated that there is a constitutional right to counsel not only at trial but also at critical stages before trial.

A "critical stage" is defined as "pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel." *Gerstein v. Pugh*, 420 U.S. 103, 122 (1975). Critical stages include "proceedings between an individual and agents of the State . . . that amount to trial-like confrontations, at which counsel would help the accused in coping with legal problems or . . . meeting his adversary." *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 212 n.16 (2008) (citations omitted) (internal quotation marks omitted) (second omission in original). "[C]ounsel must be appointed within a reasonable time after" the right to counsel attaches "to allow for adequate representation at any critical stage before trial." *Id.* at 212. The test to determine whether a defendant requires the presence of counsel is "whether the accused required aid in coping with legal problems or assistance in meeting his adversary." *United States v. Ash*, 413 U.S. 300, 313 (1973).

The United States Supreme Court has found that critical stages include: pretrial arraignments where certain rights may be sacrificed or lost, *Hamilton v. Alabama*, 368 U.S. 52, 54 (1961); pretrial custodial interrogations, *Miranda v. Arizona*, 384 U.S. 436, 471

(1966); pretrial in-person lineups, *United States v. Wade*, 388 U.S. 218, 236–37 (1967); preliminary hearings where the sole purpose is to determine whether there is sufficient evidence against the defendant to present the case to a grand jury, *Coleman v. Alabama*. 399 U.S. 1, 9 (1970); and pretrial psychiatric examinations conducted without the knowledge of the defendant's attorney, *Estelle v. Smith*, 451 U.S. 454, 469-71 (1981).

The question before us is whether the district court violated Zaldivar-Proenza's Sixth Amendment right to counsel when it granted the State's Rule 9.02 motion for a physical examination at the first appearance hearing.[2] Minnesota Rule of Criminal Procedure 9.02, subd. 2(1) permits, as applicable here:

> On the prosecutor's motion, with notice to the defense and a showing that one or more of the discovery procedures described below will materially aid in determining whether the defendant committed the offense charged, the court before trial may, subject to constitutional limitations, order a defendant to . . . [p]ose for photographs not involving re-enactment of a scene . . . and submit to reasonable physical or medical inspection.

Minn. R. Crim. P. 9.02, subd. 2(1)(e),(h). Zaldivar-Proenza asserts that because the discovery motion for a physical examination is a critical stage in a criminal prosecution whenever it happens, the district court could not proceed without Zaldivar-Proenza's attorney present. Zaldivar-Proenza asserts that this was a prejudicial structural error

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[2] In *State ex rel. Ahlstrand v. Tahash*, 123 N.W.2d 325, 326 (Minn. 1963), we held that the constitutional right to counsel does not attach during a defendant's first court appearance conducted pursuant to Minn. R. Crim. P. 5.02. The issue in this case, however, is not whether a defendant is generally entitled to counsel at a first appearance. Rather, the question here is whether a motion for discovery – a request that typically takes places at a later stage in the prosecution when the defendant's lawyer is present – is a critical stage when it occurs at the first hearing. The Supreme Court has held that whether a proceeding is a critical stage that requires the presence of defense counsel is a separate inquiry from whether a defendant's right to counsel has attached. *Rothgery*, 554 U.S. at 211-12.

because the photographs taken during the physical examination were the only independent evidence that corroborated the victim's testimony. Zaldivar-Proenza asks us to recognize a new rule: that any hearing where the State makes a discovery request to obtain transitory evidence from a defendant's body during a criminal prosecution is a critical stage in the proceedings.

Zaldivar-Proenza first argues that the State's discovery motion was a critical stage because he "needed the presence of counsel to challenge and prevent the taking of the photographs of his body." Zaldivar-Proenza argues that this case is like *U.S. v. Wade*, in which the United States Supreme Court held that a pretrial in-person lineup is a critical stage because it presents "grave potential for prejudice . . . which may not be capable of reconstruction at trial." 388 U.S. at 236. The Supreme Court noted the particular dangers of pre-trial lineups including "numerous instances of suggestive procedures" that occur with pretrial lineups, *id*. at 233, and the "dangers inherent in eyewitness identification and the suggestibility inherent in the context of the pretrial identification." *Id*. at 235. But in *Wade,* the Supreme Court also noted that a pretrial lineup is distinct from other preparatory steps in the government's gathering of evidence to use against a defendant. *Id.* at 227. This is because in many other circumstances where the government is gathering evidence:

> [k]nowledge of the techniques of science and technology is sufficiently available, and the variables in techniques few enough, that the accused has the opportunity for a meaningful confrontation of the Government's case at trial through the ordinary processes of cross-examination of the Government's expert witnesses and the presentation of the evidence of his own experts.

Id. at 227–28.

The State argues that the facts here are not like *Wade*, but are similar to *Gilbert v. California*. 388 U.S. 263 (1967). In *Gilbert,* the United States Supreme Court analyzed whether a handwriting sample taken from a defendant during a pre-indictment police interrogation was a critical stage of the criminal proceeding that required the presence of defense counsel. *Id.* at 266–67. The Supreme Court reasoned that "[i]f, for some reason, an unrepresentative exemplar is taken, this can be brought out and corrected through the adversary process at trial since the accused can make an unlimited number of additional exemplars for analysis and comparison by government and defense handwriting experts." *Id*. at 267. The Supreme Court noted that, like blood and DNA samples, the defendant has an opportunity to cross-examine witnesses and present evidence at trial regarding the taking of the evidence. *Id.* at 267. Ultimately, the Supreme Court concluded that the taking of writing exemplars is not a critical stage in a criminal proceeding because "there is minimal risk that the absence of counsel might derogate from [a defendant's] right to a fair trial." *Id.*

We agree that Zaldivar-Proenza's situation is analogous to *Gilbert* and distinguishable from *Wade*. There was no "grave potential for prejudice" in the taking of the photographs that would prevent Zaldivar-Proenza's lawyer from effectively representing him at trial. Zaldivar-Proenza points to nothing in the process of taking photographs that raises the same kind of inherent dangers that the Supreme Court found concerning in *Wade*. Indeed, Zaldivar-Proenza does not assert that the presence of counsel was required during the taking of the photographs, but only at the hearing requesting that

the photographs be taken.[3] Rather, like in *Gilbert*, if there was any question regarding the authenticity of the photographs, how the photographs were taken, or whether the photographs were accurate depictions of the scratches, the relevant challenges could have been made during cross-examination or in a motion to suppress. In addition, Zaldivar-Proenza could have hired an expert witness to testify regarding the nature of the scratches and photographs.

Zaldivar-Proenza also contends that his case is like *Coleman v. Alabama*, 399 U.S. 1 (1970). There, the United States Supreme Court found that the preliminary hearing at issue in the case was a critical stage of the proceeding. *Id.* at 9–10. The Court concluded that "the guiding hand of counsel at the preliminary hearing" in that case was "essential to protect the indigent accused against an erroneous or improper prosecution." *Id.* at 9. In explaining its conclusion, the Court listed a number of justifications, including that the preliminary hearing allows for cross-examination of witnesses, which affords "trained counsel" the important opportunity to "more effectively discover the case the State has

[3] For this reason, Zaldivar-Proenza's argument that "[u]nlike fingerprints, blood, and DNA, which can be preserved for later inspection and do not change, scratches are ephemeral" and, as a result, "accurate reconstruction" of the scratches is not possible in his situation is misplaced. Indeed, it is precisely the transitory nature of the scratches on Zaldivar-Proenza's arm in this case that dictated that the photographs could not be taken later and the photographs themselves preserve more permanently the images of the scratches. *See Ash*, 413 U.S. at 316 ("If accurate reconstruction is possible, the risks inherent in any confrontation still remain, but the opportunity to cure defects at trial causes the confrontation to cease to be 'critical.' "). In making this argument, Zaldivar-Proenza is attempting to bootstrap his critical stage analysis that counsel is needed in court at any hearing where a discovery motion is made into a different argument for earlier appointment of counsel. Whatever the pros and cons of earlier appointment of counsel, that question is not raised in this case.

against his client." *Id.* The court also noted that the preliminary hearing in *Coleman* included consideration of complicated legal issues that have immediate impact or consequences that are difficult to challenge later, like the need for an early psychiatric examination, bail, and the propriety of a grand jury. *See id.* at 8–9. In such circumstances, "counsel can also be influential . . . in making effective arguments for the accused." *Id*. at 9.

Zaldivar-Proenza's situation is distinguishable from *Coleman* because no evidence was presented, no witnesses testified at his first appearance, and, accordingly, there was no cross-examination of witnesses. It is true that after the State argued the discovery motion, Zaldivar-Proenza told the district court about an alternate cause for the scratches, but the district court, properly and promptly, stopped him from speaking further in order to preserve his right against self-incrimination. Nothing occurred when the motion to take the photographs was made that would require the "guiding hand" of counsel. *See id.* at 9.

We disagree that the presence of Zaldivar-Proenza's attorney "would have helped her better prepare for trial by learning about the state's evidence early on and would have increased the attorney's effectiveness at trial." Zaldivar-Proenza vaguely argues that the presence of his attorney would have "meant that trial-like confrontations *would have* been made." However, a critical stage occurs when there *are* trial-like confrontations, not when, if present, a defense attorney *could make* trial like confrontations.

Zaldivar-Proenza further contends that if his counsel had been present when the discovery motion was made, she could have "mounted several effective challenges to the state's motion to photograph [his] body" and prevented the photographs from ever being

taken. But Minn. R. Crim. P. 9.02, subd. 2(e), allows the district court to "order a defendant to . . . [p]ose for photographs not involving re-enactment of a scene" so long as the order is subject to constitutional limitations.

Zaldivar-Proenza and the dissent assert that his attorney could have argued that the photographs would not have materially aided the State, and that the scratches could have been caused by another source. But those are arguments that could just as readily be made at an evidentiary hearing or through a motion to suppress. Indeed, at trial, Zaldivar-Proenza argued his theory that the scratches came not from L.P.S. but from barbed wire fencing. His attorney's absence did not hinder Zaldivar-Proenza "in making effective arguments for the accused" and it did not prevent her from fully presenting this argument at trial. *See Coleman*, 399 U.S. at 9.

Finally, Zaldivar-Proenza argues his attorney could have asked that the State's discovery motion be deferred to a probable cause hearing. The whole point of the early discovery motion, however, was that the scratch marks were transitory and fading. Further, there was nothing about the taking of the photographs that prevented his attorney from filing a probable cause motion after the photographs were taken. Unlike *Coleman*, the attorney's presence here was not "essential to protect the indigent accused against an erroneous or improper prosecution." *Id*.

Zaldivar-Proenza argues that if his attorney had been present, she could have argued that the State failed to provide proper notice. While that may be true, the lack of notice is a straightforward legal argument. The absence of counsel at the first appearance when the discovery motion was made did not result in Zaldivar-Proenza losing a meaningful chance

to make precisely such argument later in the proceedings. In fact, Zaldivar-Proenza made an unsuccessful motion to suppress based precisely on lack of notice grounds. In *State v. Dye*, the State filed a Rule 9.02 motion in order to obtain samples of hair and saliva and failed to give defense counsel notice. 333 N.W.2d 642, 644 (Minn. 1983). We determined that although it was error for the State not to provide proper notice, the defendant was not prejudiced. *Id*. We reasoned that "unlike a lineup where the presence of defense counsel is usually necessary to help insure that it is conducted fairly, the taking of body samples is not the sort of procedure where the attorney can play such a role." *Id.* Likewise, the taking of photographs of Zaldivar-Proenza's arm was not a trial-like confrontation. He had the opportunity to move to suppress the photographs before trial and to mount a defense during the trial.

We hold that the State's discovery motion at Zaldivar-Proenza's first appearance seeking to photograph transitory scratches on Zaldivar-Proenza's arms was not a critical stage.[4]

CONCLUSION

For the foregoing reasons, we affirm the decision of the court of appeals.

Affirmed.

[4] To be clear, we do not hold that a Rule 9.02 discovery motion can never be a critical stage of a proceeding; only that in this instance it was not.

D I S S E N T

HUDSON, Justice (dissenting).

I respectfully dissent. Zaldivar-Proenza asks our court to adopt the following narrow rule of law: a hearing on a prosecutor's discovery motion under Minn. R. Crim. P. 9.02, subd. 2, is a "critical stage" of a criminal proceeding that requires the presence of counsel when the State seeks to obtain evidence of a transitory nature from the defendant's body. In my view, a defendant's Sixth Amendment right to counsel commands such a rule. When the State invoked Minn. R. Crim. P. 9.02, subd. 2, to obtain evidence from Zaldivar-Proenza's body, it engaged in a trial-like confrontation and presented a legal problem, one that Zaldivar-Proenza, a non-English-speaking layperson, was ill-equipped to understand without the aid of counsel. Because these circumstances amount to a critical stage, the absence of counsel violated Zaldivar-Proenza's Sixth Amendment right and I would therefore reverse the court of appeals and remand for a new trial.

I.

A criminal defendant's right to counsel is guaranteed by the U.S. and Minnesota Constitutions. Minn. Const. art. I, § 6; U.S. Const. amend. VI. The right to counsel exists to serve as a "guiding hand" to protect the criminal defendant who "lacks both the skill and knowledge" to adequately prepare his defense. *Powell v. Alabama*, 287 U.S. 45, 69 (1932). The function of counsel is to aid the "unaided layman [with] little skill in arguing the law or in coping with an intricate procedural system." *United States v. Ash*, 413 U.S. 300, 307 (1973). It is well established that a defendant is entitled to the assistance of counsel not only during the trial itself, but "at all 'critical' stages of the criminal proceedings." *Montejo*

v. Louisiana, 556 U.S. 778, 786 (2009). Indeed, the United States Supreme Court has noted that "the period from arraignment to trial [is] perhaps the most critical period of the proceedings . . . , during which the accused requires the guiding hand of counsel . . . if the guarantee is not to prove an empty right." *United States v. Wade*, 388 U.S. 218, 225 (1967) (internal citations omitted) (internal quotation marks omitted).

A "critical stage" is defined as "those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel." *Gerstein v. Pugh*, 420 U.S. 103, 122 (1975). Critical stages involve "proceedings between an individual and agents of the State . . . that amount to trial-like confrontations, at which counsel would help the accused in coping with legal problems or . . . meeting his adversary." *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 212 n.16 (2008) (internal citations omitted) (internal quotation marks omitted). "It is central to that principle that in addition to counsel's presence at trial, the 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." *Wade*, 388 U.S. at 226 (internal footnote omitted).

Therefore, a critical stage is best understood as a pretrial confrontation that, when occurring without the aid of counsel, "derogate[s] from the accused's right to a fair trial." *Id.* It is incumbent on our court to "scrutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial." *Id.* at 227. Specifically, we must consider "whether confrontation

with counsel at trial can serve as a substitute for counsel at the pretrial confrontation." *Ash*, 413 U.S. at 316.

A.

The majority concludes that a hearing on a prosecutor's discovery motion under Minn. R. Crim. P. 9.02, subd. 2, to obtain evidence of a transitory nature from a defendant's body is not a critical stage of the criminal proceeding that triggers a defendant's Sixth Amendment right to counsel. I disagree. Given the specific nature of transitory evidence on a person's body, any subsequent confrontation by defense counsel in the form of a motion to suppress or cross-examination is not an adequate substitute for the presence of counsel during the discovery motion hearing. I reach this conclusion for two reasons.

First, the prosecutor's motion for discovery under Minn. R. Crim. P. 9.02 is precisely the type of "legal problem" that is emblematic of a "critical stage" requiring the assistance of defense counsel. There is little doubt that Zaldivar-Proenza would have benefited greatly from the "guiding hand" of his attorney when the district court was deciding whether to grant the State's motion. For example, defense counsel could have argued that the State failed to establish that the photographs would "materially aid in determining whether [he] committed the offense charged." Minn. R. Crim. P. 9.02, subd. 2(1). Unlike subdivision 1 of Rule 9.02, which allows a prosecutor to obtain certain discovery items from a defendant without a court order, subdivision 2 requires the prosecutor to file a motion requesting specific discovery items and showing that the requested item is a necessary or material part of the investigation. This is an important

legal distinction and highlights the need for a defendant to have the assistance of counsel when such a motion is being heard and decided by the district court.

Defense counsel could have argued that the State failed to comply with the notice requirements of Rule 9.02, subdivision 2.[1] *Id.*, subd. 2(1) (requiring "notice to the defense"); *id*., subd. 2(2) (requiring "reasonable notice of the time and place" for the disclosure); *see also State v. Dye*, 333 N.W2d 642, 644 (Minn. 1983) ("[W]e are of the opinion that better practice as well as the wording and spirit of Rule 9.02 mandates that notice to defense counsel shall be provided, and that it was error here not to do so.").

Finally, defense counsel could have asked for the motion to be deferred until a hearing was held at which the attorney could elicit testimony about the materiality of the scratches. But these arguments were never made because Zaldivar-Proenza did not have his attorney present during the hearing.

I agree with Zaldivar-Proenza that his case is analogous to the United States Supreme Court's decision in *Coleman v. Alabama*, 399 U.S. 1 (1970). In *Coleman*, the Supreme Court concluded that a preliminary hearing is a critical stage when witnesses testify and the district court rules on a grand jury question. *Id.* at 10. The majority contends that, because the State did not call witnesses or present evidence at the hearing in this case, *Coleman* is inapplicable. However, as the Supreme Court explained, a pretrial hearing is a critical stage not only due to the presence of witnesses or the opportunity for cross-

[1] Given the facts of this case, it is not clear that Zaldivar-Proenza or his defense counsel were given adequate notice of the hearing. If defense counsel had been present at the hearing, he or she could have made such an argument before the district court. But this issue was not raised on appeal and therefore is not before us for review.

examination, but because "trained counsel can more effectively discover the case the State has against his client" and "counsel can also be influential *at the preliminary hearing* in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail." *Id.* at 9 (emphasis added).

Here, it seems plain that the State's discovery motion was one "such matter[]" where counsel could have been influential at the preliminary hearing in making effective legal arguments on behalf of Zaldivar-Proenza. *Id.* The majority concludes, without explaining, that nothing occurred at the pretrial hearing that would require the "guiding hand" of counsel. But the fact that the district court judge had to intervene and stop Zaldivar-Proenza from offering an alternate cause for the scratches in order to preserve his right against self-incrimination demonstrates exactly why the presence of counsel was so crucial. In effect, the judge had to act as the "guiding hand" of counsel because Zaldivar-Proenza had none. Thus, the rationale in *Coleman* supports the conclusion that the hearing in this case was a critical stage that required the presence of counsel to protect Zaldivar-Proenza's right to a fair trial.

The second reason I conclude that Zaldivar-Proenza was entitled to have his counsel present during the discovery motion hearing is that the absence of counsel during the hearing meant that Zaldivar-Proenza lost the benefit of having his attorney inspect and preserve the evidence for trial. Due to the changing physical nature of the body, the type of evidence at issue in this case cannot be reconstructed at a later date because the body heals and the evidence disappears. In contrast, static evidence like blood, DNA, or handwriting samples are immutable and do not change over time. In cases where transitory

evidence from a defendant's body is sought pursuant to a motion under Minn. R. Crim. P. 9.02, subd. 2, there is simply no substitute for having counsel at the hearing to inspect and preserve the evidence in order to better mount an effective defense at trial.

This conclusion is bolstered by the United States Supreme Court's decision in *United States v. Wade*, 388 U.S. 218. In *Wade*, the Supreme Court held that a pretrial in-person lineup is a critical stage because it poses "grave potential for prejudice" and "may not be capable of reconstruction at trial." *Id.* at 236. The Supreme Court explained that a pretrial in-person lineup is distinct from "various other preparatory steps, such as systematized or scientific analyzing of the accused's fingerprints, blood sample, clothing, hair, and the like" because the "[k]nowledge of the techniques of science and technology" for collecting and analyzing this type of evidence is "sufficiently available" and "the accused has the opportunity for a meaningful confrontation of the Government's case at trial through the ordinary processes of cross-examination of the Government's expert witnesses and the presentation of evidence of his own experts." *Id.* at 227–28.

The majority reasons that Zaldivar-Proenza had sufficient opportunities to challenge the evidence taken by the State by filing a motion to suppress and cross-examining the State's witnesses, or hiring an expert witness to testify about the nature of the scratches or the quality of the photographs. The majority's analysis, however, misses the point. It is *because of* the transitory nature of the evidence that "accurate reconstruction" is not possible and the absence of counsel at the hearing was so critical. No amount of motion practice or cross-examination can substitute for the opportunity of his counsel to inspect

the scratches and take her own photographs or, better yet, prevent the photographs from being taken in the first place.

B.

The majority also contends that the United States Supreme Court's decision in *Gilbert v. California*, 388 U.S. 263 (1967), governs the outcome of this case. I disagree.

In *Gilbert*, the Supreme Court held that a pre-indictment police interrogation, during which the defendant provided a handwriting sample, is not a critical stage. 388 U.S. at 267. The Supreme Court explained that the handwriting samples were not taken from the defendant at a critical stage because the circumstances of that case presented "minimal risk that the absence of counsel might derogate from his right to a fair trial." *Id.* Here, the majority adopts this reasoning and contends that Zaldivar-Proenza's right to a fair trial was preserved because he had ample opportunities to challenge the authenticity and accuracy of the photographs. But the majority's reliance on *Gilbert* is misplaced for two key reasons.

First, the police interrogation that produced the handwriting samples in *Gilbert* occurred *before* an indictment had been filed against the defendant. *See id.* at 267. The State had not committed itself to prosecuting the defendant nor was the defendant faced with a "trial-like confrontation." *See Rothgery*, 554 U.S. at 212 n.16. In other words, the pre-indictment police interrogation in *Gilbert* was not a critical stage of the criminal proceeding because the criminal proceeding had not yet begun. In contrast, here there is no doubt that the criminal proceeding against Zaldivar-Proenza was already underway when the State filed the motion under Minn. R. Crim. P. 9.02, subd. 2, to take photographs of the scratches on his arm. Indeed, the district court had appointed a public defender and

set bail prior to addressing the State's motion for the discovery. Even so, the majority contends that the taking of photographs of a defendant's arm does not amount to a "trial-like confrontation." Yet, again, the majority looks past the fact that to have the photographs taken, the State had to invoke the rules of criminal procedure, file a discovery motion, and make legal arguments in support of its motion. It was the filing of the discovery motion under Minn. R. Crim. P. 9.02, subd. 2, and arguing that motion before the district court judge that constituted a "trial-like confrontation," not the mere taking of photographs after the fact.

Second, the transitory nature of the evidence here is distinguishable from the static handwriting evidence collected in *Gilbert*. As explained above, a motion to suppress or cross-examination is simply not an adequate substitute for the assistance of counsel when dealing with transitory evidence from a defendant's body. In sum, the facts of this case are more analogous to the post-indictment, in-person line up held to be a critical stage in *Wade* than the pre-indictment collection of handwriting samples held not to be a critical stage in *Gilbert*.

Finally, I acknowledge that there are practical implications of adopting the rule of law proposed by Zaldivar-Proenza—namely, that public defenders must be present whenever a discovery motion under Minn. R. Crim. P. 9.02, subd. 2, is addressed in court. But at the end of the day, every Minnesotan facing criminal charges has the constitutional right to counsel. And under the circumstances presented by this case, we should require our district courts to promptly notify the local public defender's office and wait until

counsel is present before ruling on a discovery motion filed by the State. Fairness and the integrity of our judicial system requires nothing less.

II.

Having determined that the district court's ruling on the State's discovery motion under Minn. R. Crim. P. 9.02, subd. 2, is a critical stage during which Zaldivar-Proenza was denied his right to counsel, I now turn to whether this constitutional violation requires reversal of his conviction. To do so, we must first determine what standard of review to apply in reviewing the error.

Zaldivar-Proenza contends that the denial of his right to counsel at a critical stage of the criminal proceeding amounts to a structural error requiring automatic reversal. "Generally, most constitutional errors are reviewed for harmless error." *State v. Kuhlmann*, 806 N.W.2d 844, 850 (Minn. 2011). But, "there are a 'very limited class of' errors, referred to as structural errors, that require automatic reversal of a conviction." *Id.* at 851 (quoting *Johnson v. United States*, 520 U.S. 461, 468 (1997)).

"Structural errors are defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." *Kuhlmann*, 806 N.W.2d at 851 (internal citation omitted) (internal quotation marks omitted). These type of errors produce "consequences that are necessarily unquantifiable and indeterminate." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) (holding that a violation of the Sixth Amendment right to choice of counsel qualified as a structural error that is not subject to harmless-error review). The United States Supreme Court has recognized that "the total deprivation of the right to counsel at trial" is a structural error. *See Arizona v. Fulminante*, 499 U.S. 279, 309 (1991).

And while we have never directly addressed the standard of review applied to the denial of counsel during a preliminary hearing, we have cautioned that "[o]nly a small number of errors have been found to be structural errors." *Kuhlmann*, 806 N.W.2d at 851 (listing examples).

I am not convinced that the denial of counsel during a preliminary hearing is a structural error. The United States Supreme Court has been clear that when the right to counsel is denied at a critical stage in a criminal proceeding, "the test to be applied is whether the denial of counsel at the preliminary hearing was harmless error under *Chapman v. California*." *Coleman*, 399 U.S. at 11; *see also Wade*, 388 U.S. at 242 (concluding that the defendant was denied the right to counsel at a critical stage and remanding for further fact-finding and application of the harmless error standard).

"An error is not harmless if there is a reasonable possibility that the verdict might have been different if the error were not committed." *State v. Ferguson*, 804 N.W.2d 586, 592 (Minn. 2011) (internal citation omitted) (internal quotation marks omitted). The burden is on the State "to show that the errors are harmless beyond a reasonable doubt by showing that the error did not contribute to the verdict obtained." *State v. Conklin*, 444 N.W.2d 268, 275 (Minn. 1989). And "[w]hen determining whether the error is harmless, we consider all of the facts and circumstances of the case." *State v. Cannady*, 727 N.W.2d 403, 409 (Minn. 2007).

Therefore, the burden is on the State to prove, in light of all the facts and circumstances in this case, that the absence of counsel during the hearing was harmless error beyond a reasonable doubt. In my view, the State cannot meet this burden. It is

reasonable to conclude, based on the record, that the verdict might have been different had Zaldivar-Proenza's counsel been present when the district court addressed the State's discovery motion under Minn. R. Crim. P. 9.02, subd. 2. Most importantly, if counsel had been present, he or she could have prevented the photographs from being taken in the first place. Even if the district court had still sided with the State and allowed the taking of photographs, Zaldivar-Proenza's counsel would have been able to view the scratches in-person, document them, and be in a better position to defend against the photographs at trial.

This case ultimately hinged on a credibility contest between the alleged victim's version of events and Zaldivar-Proenza's version of events. The photographs of the scratches on his arms were the only piece of demonstrative evidence that corroborated the victim's story. Thus, the photographs played a decisive role for the jury in determining whose story was more credible and ultimately rendering a guilty verdict against the defendant.

Accordingly, I would hold that the denial of Zaldivar-Proenza's right to counsel during the preliminary hearing was not harmless error. I would therefore reverse the decision of the court of appeals upholding his conviction and remand to the district court for a new trial.

GILDEA, Chief Justice (dissenting).

I join in the dissent of Justice Hudson.