IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JUN 17 1987
CLERK, SUPREME COURT
By ______ Deputy Clerk

STATE OF FLORIDA,	)	
	)	
Petitioner,	)	
	)	CASE NO. 70,261
vs.	)	
	)	
SYLESTER EARL SMITH,	)	
	)	
Respondent.	)	
	)	

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the prosecution in a felony criminal proceeding in the Circuit Court of the 17th Judicial Circuit and the Appellee in the lower tribunal. Respondent was the Defendant in the criminal proceeding and the Appellant in the lower tribunal. Petitioner will be referred to as Petitioner as well as "State" and "State Attorney". Respondent will be referred to as he appears in this Honorable Court.

The transcript of the trial proceedings will be designated by the letter "T" and followed by the page number to which reference is made. The record of the proceedings will be designated by the letter "R" and followed by the page number to which reference is made. Lineup photographs will be designated by the symbol "SR".

.STATEMENT OF THE CASE

The Respondent accepts the Petitioner's Statement of the case as herein modified and supplemented.

The Respondent was arrested on March 14, 1983 and appeared before a magistrate on March 15, 1983 (R 477). After his first appearance Petitioner obtained an Order that compelled Respondent to stand in a lineup (R 478). Petitioner was significantly involved in arranging for the lineup, selecting persons to stand in the lineup and conferring with the Public Defender's Office regarding counsel for Respondent at the lineup (T 286, 297-298, 304).

Because Respondent did not have counsel representing him at critical stages of the proceedings against him, he filed a Motion to Suppress the Indentification (R 457-4581, but the motion was denied R 460).

STATEMENT OF THE FACTS

Respondent accepts the Statement of the Facts of the Petitioner as herein modified and supplemented.

On February 28, 1983 a robbery was committed (R 456). On the night of the robbery Respondent's brother, Sylvester Smith, Jr., was arrested and charged with committing the robbery (T 7-8, 41-42, 48). The day after the robbery, March 1, 1983, Terry Lamar Green was arrested and charged with committing the robbery. His arrest occurred while he was attempting to cash one of the money orders stolen during the robbery.

After Mr. Green's arrest his photograph was placed in a photographic display that was presented to the victim of the robbery. The victim selected Mr. Green's photograph from the display and positively identified Mr. Green as the second person involved in the robbery (T 27,29,44). With this information Detective Carroll of the Wilton Manors Police Department went to the office of the State Attorney, 17th Circuit, to file a robbery charge against Mr. Green (T 27). This attempt was aborted however as Detective Carroll was advised by an Assistant State Attorney that the Respondent and not Mr. Green was the second person involved in the robbery (T 31). Thus, instead if filing a complaint against Mr. Green, Detective Carroll arrested Respondent on March 14, 1983 at his place of employment.

After his arrest Respondent appeared before a magistrate for his first appearance. After this hearing he was asked to stand in a live lineup, but he refused (T 31-32). As a result the State Attorney initiated judicial proceedings to obtain a court order that compelled Respondent to stand in a lineup (R 478). Respondent was not represented at this hearing (R 478). On the day of the lineup the State Attorney and Detective Carroll went to the Office of the Public Defender to advise them that a lineup was going to be held (T 304). Thereafter the State Attorney and Detective Carroll went to the Broward County Jail to obtain other persons to stand in the lineup with Respondent (T 286). After arranging for the lineup and obtaining the necessary persons to stand in it, the State Attorney and Detective Carroll went to the lineup (T 26, 34, 297-298). Respondent did not have an attorney representing him at the lineup which was conducted on March 24, 1983 (T 33, 34).

Prior to the lineup Respondent advised Detective Carroll that he wanted to participate in the way the lineup was to be conducted to insure its fairness (T 32, 34, 37). Detective Carroll refused this request (T 34). At the lineup Respondent was selected by the victim who had previously indentified Mr. Green (T 9, 26). After the lineup Respondent complained that he had not been permitted to participate in the way the lineup was conducted to insure that it was fair. On March 28, 1983 an Information was filed charging the Respondent with the robbery (R 456).

POINT INVOLVED

WHETHER, PRIOR TO THE INITIATION OF FORMAL ADVERSARY JUDICIAL PROCEEDINGS IN THE FORM OF AN INDICTMENT OR INFORMATION, AN ACCUSED HAS A CONSTITUTIONAL RIGHT TO COUNSEL AT A COMPELLED LINEUP?

ARGUMENT

A DEFENDANT IS ENTITLED TO BE REPRESENTED BY COUNSEL, OR TO REPRESENT HIMSELF, AT A COMPELLED LINEUP, PRIOR TO THE FILING OF AN INDICTMENT OR INFORMATION WHEN THE PROSECUTING AUTHORITY HAS FOCUSED AN INVESTIGATION ON THE DEFENDANT AND JUDICIAL PROCEEDINGS INVOLVING THE DEFENDANT HAVE BEGUN.

The facts of this case reveal that the lineup of Respondent occurred prior to the filing of an Indictment or Infomation. If the filing of either is required before an accused is entitled to counsel or to proceed pro se at a lineup, then Respondent was not entitled to an attorney or to proceed pro se at the lineup conducted on March 24, 1983. Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972). But such is not the case.

Under the Sixth and Fourteenth Amendments to the United States Constitution, Respondent is entitled to counsel upon the initiation of adversary judicial criminal porceedings against him. Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 2d 158 (1932). The initiation of adversary criminal proceedings, although often marked by the filing of an Information or Indictment, may be marked by other proceedings such as a preliminary hearing or an arraignment. Coleman v. Alabama, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed. 2d 387 (1970); Hamilton v. Alabama, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed. 2d 114 (1961). Counsel has been required prior to trial in those proceedings in which "the accused [is] confronted, just as at trial, by the procedural system, or by his expert adversary, or by both". United States v. Ash, 413 U.S. 300 at 310, 93 S.Ct. 2568, 37 L.Ed. 2d 619 (1973).

F.R. Crim.P. 3.133 (b) provides for an adversary preliminary hearing. When such a hearing is held witnesses are subpoenaed and examined as at trial. An accused who has the opportunity to cross-examine a witness produced at an adversary preliminary hearing does not have his Sixth Amendment right to confrontation infringed if the testimony of the witness is later used at trial because the witness is unavailable. California v. Green 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed. 2d 489 (1970); Mancussi v. Stubbs, 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed. 2d 293 (1972).

Because the adversary preliminary hearing is a proceeding in which "the accused (is) confronted, just as at trial, by the procedural system, or by his expert adversary, or by both", id., the accused is entitled to counsel at the hearing. U.S. Const. Amend. 6 & 14: Fla. Const. Art. I Sec. 16; Coleman v. Alabama supra; Contra Montgomery v. State, 176 So.2d 331 (Fla. 1965). Counsel is required because without counsel the results of the confrontation "might well settle the accused's fate and reduce the trial itself to a mere formality". United States v. Wade, 388 U.S. 218 at 224, 87 S.Ct. 1926, 18 L.Ed. 2d 1149 (1967).

If it is conceded that the Sixth and Fourteenth Amendments to the United States Constitution require, or at least under certain circumstances would require, that an accused be

permitted to have counsel at such hearing, then it is clear that an accused is entitled to counsel before the filing of an Indictment or an Information whenever such hearing occurs prior to the filing of formal charges. The possibility that such a hearing will occur prior to the filing of formal charges is real because the hearing can be held upon demand of an accused if charges have not been filed against him within 21 days of his arrest. Fla. R. Crim.P. 3.133 (b). Thus, in Florida the initiation of adversary criminal proceedings need not be marked by the filing of an indictment or an information. This is so even though the only method for filing formal charges against a person accused of a non-capital felony is by the filing of an indictment or an information. See Fla. Const. Art. I Section 16 (1968). The "initiation of formal charges against an accused" is not synononomous with the "initiation of adversary criminal proceedings." Any pretrial proceeding must be scrutinized to determine whether the presence of an accused's counsel is necessary. United States v. Wade, 388 U.S. 218 at 227 (1967) (emphasis supplied).

Assuming arguendo that an adversary preliminary hearing in Florida can be a hearing at which an accused is entitled to counsel under the Sixth and Fourteenth Amendments to the Constitution, Respondent submits that the filing of formal charges is not the only point at which the initiation of adversary criminal proceedings may be marked.

The Sixth and Fourteenth Amendments of the United States Constitution do not prescribe how states may initiate adversary criminal proceedings. A state is free to delineate the point at which an accused is entitled to counsel under the Sixth and Fourteenth Amendment of the United States Constitution provided the designation does not result in a narrowing of the right to counsel as recognized by the United States Supreme Court. Moore v. Illinois, 434 U.S. 220 at 227 98 S.Ct. 458, 54 L.Ed.2d 424 (1977); Kirby v. Illinois, supra at 688; Sobczak v. State, 462 So.2d 1172 at 1173 (Fla, 4th DCA 1984); State v. Douse, 448 So.2d 1184 at 1185 (Fla. 4th DCA 1984); Felder v. McCotter, 765 F.2d 1245 at 1247 (5th Cir. 1985). See generally Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977). In Florida an indigent person is entitled to have counsel appointed in all prosecutions for offenses punishable by imprisonment. Fla.R. Crim.P. 3.111 (b)(1). Appointment of counsel does not occur only after the filing of formal charges. Rather, a magistrate must decide at the earliest possible time whether the indigent is being prosecuted for an offense punishable by imprisonment. If it is determined that the indigent is entitled to counsel because of prosecution for an offense punishable by imprisonment, then counsel must be appointed when the indigent accused

> "is formally charged with an offense, or as soon as feasible after custodial restraint or upon his first appearance before a committing magistrate, whichever occurs earliest."
> Fla. R. Crim.P. 3.111(a).

Because a magistrate must determine no later than an accused's first appearance whether the accused is entitled to counsel pursuant to Fla.R.Crim.P. 3.111(a), i.e., whether the accused is being prosecuted for an offense punishable by imprisonment, Respondent submits that the first appearance is a point at which adversary judicial criminal proceedings are initiated in Florida. See Sobczak v. State, supra; State v. Douse, supra. But see State v. Hoch, 500 So.2d 597 (Fla. 3rd DCA 1986).

Assuming arguendo this Court concludes that the first appearance of an accused does not per se mark the initiation of adversary criminal proceedings against an accused in Florida, it does not follow that the filing of formal charges is the only point at which adversary criminal proceedings may be initiated. Every pretrial proceeding must be scrutinized to determine if adversary proceedings have been initiated. United States v. Wade, supra at 227. The focus must be on whether an accused is "confronted, just as at trial, by the procedural system, or by his expert adversary, or by both". United States v. Ash, supra at 310. In the instant case although Terrence Lamar Green

had been identified by the victim as the person who robbed him, Mr. Green was released from custody and the detective who was investigating the case was instructed to focus on the Respondent. All this was done at the behest of the Petitioner who had interviewed Respondent's brother and determined for itself that Respondent and not Mr. Green was the robber. Thereafter, the Petitioner proceeded before a Judge and in a judicial proceeding at which the Respondent was not represented, the Petitioner obtained an Order that compelled the Respondent to stand in a lineup. After obtaining this Order the Petitioner went to the Office of the Public Defender to inquire about counsel for the Respondent; Petitioner arranged for the lineup; selected individuals that would stand in the lineup; and witnessed the lineup. (If the State Attorney was present at the lineup in a capacity other than its official capacity he had a duty to excuse himself as prosecutor because he was a witness in the case.) (T 26, 34, 286, 297-98, 304; R 478). As a result of these events, Respondent was confronted, just as at trial, not only by the procedural system but also by his expert adversary. See Id.

First, Respondent was subjected to a proceeding in which an order compelling him to stand in a lineup was obtained. This proceeding was a critical stage in the pretrial proceedings prior to Respondent's trial. See Coleman v. Alabama, supra. At this hearing proceedings occurred that impaired Respondent's

defense on the merits. If Respondent had been represented by counsel at this pretrial hearing, Respondent could have indicated to the presiding Judge that the State Attorney had focused on the Respondent and that adversarial proceedings had begun. As a result Respondent could have been assured that no Order compelling him to stand in a lineup would have been entered unless it also provided for the right of Respondent to have counsel present. If necessary, testimony could have been procured at this hearing indicating the involvement of the State Attorney. Respondent, without counsel, was not able to procure this testimony or to protect his interests by effectively confronting the "intricacies of the law and the advocacy of the public prosecutor". United States v. Ash, supra at 309. It is no wonder, as the right to counsel

> "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." Johnson v. Zerbst, 304 U.S. 458, 462-463, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

Without Respondent having Counsel, Petitioner had no difficulty obtaining the Order that it wanted and that was highly favorable to it. Without counsel for Respondent at the hearing, Petitioner was able to proceed with a lineup without the presence of counsel being required by the Order. Without counsel at the lineup, Respondent's right to a fair trial was derogated

because of the dangers inherent in a pretrial identification conducted in the absence of counsel. With counsel present, Respondent could have objected to suggestive procedures before they influenced a witness' identification. See Moore v. Illinois, supra at 224-225; United States v. Wade, supra at 235-236, 238. None of this was done because Respondent had no counsel.

Not only was the hearing to obtain the order that compelled Respondent to stand in a lineup one in which proceedings like those at trial were present (and would have been more present if Respondent had counsel e.g. examination of witnesses to prove the involvement of the Petitioner). The proceeding was one in which Respondent was confronted by his expert adversary. Because Respondent was not represented by counsel, the proceeding was one sided and resulted in an inherently suggestive line-up, at which Respondent had no counsel. Because Respondent can point to a proceeding at which he was confronted, without counsel, by the expert adversary he would face at trial, and because this proceeding adversely affected his trial rights, Appellant was entitled to counsel. The proceeding was a critical stage in the prosecution. Consequently, Respondent was entitled to counsel, not only at the hearing, but at the line-up that occurred thereafter. See United States v. Wade, supra; United States v. Ash at 310.

Another reason exists why Respondent was entitled, under the Sixth and Fourteenth Amendments to the United States Constitution, to counsel at the line-up. By the time the line-up had occurred the State had become significantly involved in the prosecution of Respondent. The State was active in releasing another accused of the crime for which Respondent was convicted, obtaining the arrest of Respondent, obtaining an Order compelling Respondent to stand in a line-up, arranging for a line-up, and selecting the persons to stand in it, attempting to consult with counsel for the Respondent, and participating in the line-up. Clearly, the Respondent found "himself faced with the prosecutorial forces of organized society, and immersed in the intracacies of substantive and procedural criminal law." Kirby v. Illinois, supra at 689. Consequently, Respondent's right to counsel under the Sixth and Fourteenth Amendments to the United States Constitution attached. See Moore v. Illinois. supra at 228-229; Lomax v. Alabama, 629 F. 2d 413 (5th Cir. 1980). The State may not focus on an accused without providing the accused with counsel. Id.

Petitioner's argument that the procedures against Respondent were investigatory is erroneous, but in any event, immaterial. Respondent had been arrested as a result of the actions of the State and another had been released. If the line-up with Respondent was simply a routine line-up prior to the

initiation of adversary judicial proceedings, there would have been no involvement by the State. But here the State was heavily involved and the State cannot pretend that it did not consciously, or unconsciously, select subjects for the line-up that would make it more likely for the Respondent to have been selected. The State cannot ignore that the victim to the crime was subject to suggestive activities, whether intended or not, by the State at the line-up, if for no other reason than because the line-up procedures were inherently suggestive at that point. See United States v. Wade supra at 224. No, the State was very involved in the line-up and Petitioner may not eschew the State's involvement by describing the line-up as investigatory. The forces of the State had mobilized to compel, arrange and conduct the line-up of Respondent. Moreover, prior to the presence of the State, no line-up had been successfully conducted, as the Respondent had resisted it. Only after the involvement of the State was Respondent compelled to stand in the line-up. Thus, regardless of whether the police had the right to conduct a line-up without the forces of the State Prosecutor, it was only after the State became involved that the line-up was held. In addition, the line-up cannot be termed as investigatory. The State had directed that another person who had been positively identified as the robber, not be charged and that Respondent be arrested. The State knew against whom it was going to proceed and through the lineup continued to accumulate evidence against the Respondent.

Assuming arguendo that this Court concludes that Respondent was not entitled pursuant to the Sixth and Fourteenth Amendments of the United States Constitution to counsel at his lineup, Respondent submits he was entitled under Florida law to counsel at the lineup. It is Respondent's contention that Article I, Section 16 of the Florida Constitution, Fla. Stat. 901.24 (1985) and Fla. R. Crim. P. 3.111 entitle Respondent to counsel prior to the initiation of adversary judicial criminal proceedings. Clearly Fla. R. Crim. P. 3.111 (a) entitles an accused to counsel at his first appearance even though a formal charge has not been filed. The accused that has been appointed counsel at his first appearance is entitled to counsel thereafter until the magistrate terminates the appointment. Fla. R. Crim. P. 3.130 (c)(1). Moreover, pursuant to the Florida Constitution, Article I, Section 16 (1968) and Fla. Stat. 901.24 (1985) Respondent was entitled to counsel. Thus, when a hearing was held after Respondent's first appearance to compel Respondent to appear in a lineup, Respondent was entitled to counsel. Sobczak v. State, supra; State v. Douse, supra and Fla. Stat. 901.24 (1985).

It is irrelevant and immaterial that counsel was not appointed to represent the Respondent at his first appearance. At each proceeding against an accused the lower tribunal has an obligation to determine if the accused should have counsel appointed. In addition, regardless of whether counsel was

appointed for Respondent at his first appearance, he was entitled to counsel independently of Fla. R. Crim. P. 3.111 pursuant to the United States Constitution, Amendment 6 and 14. the Florida Constitution, Article I. Section 16 and Fla. Stat. 901.24 (1985). The Fourteenth Amendment to the United States Constitution provided Respondent with the right to counsel guaranteed under the Sixth Amendment to the United States Constitution. Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). It also provided Respondent with the right to equal protection. Thus, because Fla. R. Crim. P. 3.111 entitled others i.e., indigents to counsel at the first appearance and thereafter, Respondent could not be denied the opportunity to have counsel appointed at proceedings occurring after the first appearance, See Douglas v. California, 372 U.S. 353 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963), or alternatively, the opportunity to represent himself. See infra. As is evident from the appointment of counsel for Respondent by the trial court, the intitial decision of a magistrate to appoint or not to appoint counsel at a first appearance is not a final judgment as to whether counsel should be appointed in a subsequent proceeding pursuant to Fla. R. Crim. P. 3.111. Moreover, the trial court could not infer that Respondent relinquished counsel at all proceedings subsequent to the first appearance as a result of the Respondent not affirmatively invoking the right

to counsel at this critical stage of the prosecution. **See** Traylor v. State, 498 So.2d 1297, 1300 (Fla. 1st DCA 1986). A waiver of counsel must be in writing. Fla.R.Crim.P. **3.160(e)**.

> "To establish a waiver of the Sixth Amendment right to assistance of counsel, it is incumbent upon the State to prove **an intentional relinquishment or abandonment of a known right** or privilege! **Williams** 430 U.S. 387, 404, 97 S. Ct. 1232, 1242, 51 L. Ed. 2d 424 (1977)"; Traylor v. State, **supra** at 1300.

A court may not conclude there has been a waiver without indulging in every reasonable presumption against waiver in assessing the totality of the circumstances, **Id.** "Once the right to counsel has attached the State must honor it". **Maine** v. Moulton, 106 S.Ct. 477; 88 L.Ed. 2d 481 (1985). In the instant case there is no written waiver of counsel and the facts do not reveal that Respondent knowingly, intentionally and voluntarily decided to proceed without counsel at critical stages of the proceedings. Further, the record is void of any evidence of Respondent's ability to represent himself. Thus counsel should have been provided to the Respondent.

Consequently, Respondent's rights pursuant to Fla. R. Crim. P. 3.111 compelled the appointment of counsel for Respondent at the proceeding to compel Respondent to stand in a lineup and at the actual lineup, even though Respondent had not been provided counsel at this first appearance.

Even if Respondent knowingly, intelligently and voluntarily waived his right to counsel, he did not waive his right to proceed pro se. If Respondent was entitled to counsel absent a waiver, he was entitled to proceed on his own and to represent himself to the same extent that counsel could have regardless of whether his right to counsel was pursuant to a constitutional provision, statute or rule. Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 80 L. Ed. 2d 148 (1975). Yet, when Respondent attempted to participate in the lineup, he was denied the opportunity. (T 32, 34). He was also not permitted to represent himself at the hearing at which an Order was obtained to compel him to stand in a lineup. Thus, he was denied the opportunity to represent himself at proceedings at which counsel was required absent a waiver and consequently the lineup was illegal. Id.. State v. Ruth, 102 Idaho 638, 637 I.2d 415 (1981).

It should not be concluded that because Fla. R. Crim. P. 3.111 (a) and 3.130 (c) are not part of the Constitution, that they are without force and effect. They provide plain, simple rules regarding the appointment of counsel. In the instant case a judicial proceeding occurred without Respondent being represented by counsel. The absence of counsel prejudiced Respondent. Thus, the rules should be given affect and Respondent provided with a remedy.

Wh n an accused is entitled t counsel at a lineup and counsel is not afforded, evidence of the lineup is inadmissible. Rirbv v. Illinois. supra; United States v. Wade. supra; Sobczak v. State. supra. Since counsel was not afforded to Respondent at his lineup or the hearing which preceded it, Respondent was entitled to have evidence thereof excluded at his trial. Id. It was not necessary for Respondent to show prejudice, as prejudice can be presumed when counsel is not provided. Id.; Hamilton v. Alabama, 368 U.S. 52, 82 S.Ct. 157, 7 L. Ed. 2d 114 (1961). If counsel had been provided, the proceedings would no doubt have been more favorable to the accused. See id. And the lineup would not be inherently suspect. See United States v. Wade. supra. For these reasons, reversible error should be found to exist without a showing of prejudice. In addition evidence of the victim's in court identification must be excluded because the Petitioner used evidence of the pretrial counselless lineup to bolster the testimony. Gilbert v. California, 388 U.S. 263 (1967).

In any event, there was prejudice to the Respondent in this case. The victim of the robbery positively identified another as the culprit (T 44). When the victim first described the robber he indicated that the robber weighed 145 pounds which was the weight of Mr. Green, the person positively identified by the victim (T 20, 23, 29). Only after seeing the Respondent did the victim indicate the robber weighed forty pounds more or 185

pounds (T20, 23). Moreover, prior to the lineup in which Respondent stood, the victim was advised there was a new suspect and that the person originally indentified would not be in the lineup (T 31). Thus, there are strong indications the identification of Mr. Green which occurred prior to the identification of Appellant was accurate. The recantation of the prior identification and the identification of Respondent raise serious questions about the suggestiveness of the identification procedures that give rise to a likelihood of irreparable misidentification. Respondent was prejudiced.

CONCLUSION

Wherefore, based on the foregoing authority, Respondent respectfully requests that the decision of the Fourth District Court of Appeal be affirmed and the Respondent be granted a new trial.

Respectfully submitted,

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By
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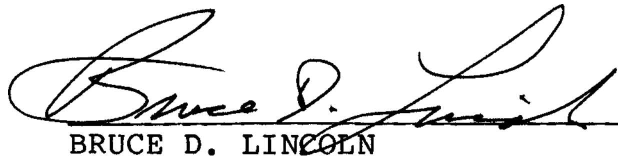
CERTIFICATE **OF** SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondent's Brief on the Merits has been mailed to Joy B. Shearer, Assistant Attorney General, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401, this 15th day of June, 1987.



BRUCE D. LINCOLN

SUMMARY OF THE ARGUMENT

Adversary judicial proceedings and the right to counsel may attach prior to the filing of an idictment or information. On the federal level, it has been held, that a defendant is entitled to be represented by an attorney when "the accused is confronted, just as at trial, by the procedural system, or his expert adversary, or by both," even if this is prior to the filing of a formal charging document. The states are free to require counsel at earlier stages of the proceedings, if they choose.

In Florida an accused is entitled to counsel at adversarial preliminary hearings. These hearings occur when there is a delay by the state in filing formal charges. An indigent, in Florida, is entitled to counsel "in all prosecutions for offenses punishable by imprisonment." It is required by the Florida Rules of Criminal Procedure that counsel be appointed when formal charges are filed "or as soon as feasible after custodial restraint or upon his first appearance before a committing magistrate, whichever occurs earliest."

In the case at bar, the Defendant, was arrested and taken before a magistrate, prior to a lineup being conducted. The State Attorney was significantly involved in the case against the Defendant prior to the filing of the Information. The State Attorney directed the arrest of the Defendant and obtained a court order requiring him to stand in a lineup. At no time did the Defendant waive his right to counsel. Additionally,

Defendant's request to represent himself, during the lineup, was refused. In this case the lineup was a critical stage of the prosecution and the lack of representation proved to be very prejudicial. The witness who identified the Defendant at the lineup had previously identified another suspect and had adjusted his description of the suspect after selecting the Defendant at the lineup. By the time the trial took place and the Defendant was represented by court appointed counsel, the damage was already done and was irreversible.

Respectfully submitted,

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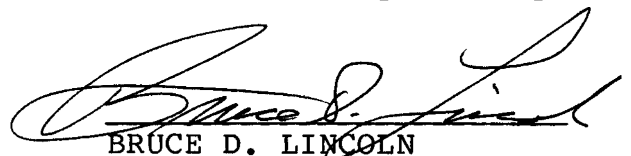
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Amendment to Respondent's Brief on the Merits has been mailed to Joy B. Shearer, Assistant Attorney General, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401, this 10th day of July, 1987.



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