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GUIDELINES ON LINEUPS AND CONFRONTATIONS

On June 12, 1967, the United States Supreme Court decided in a series of cases that an accused is entitled to have a lawyer present at post-indictment lineups and that all lineups and confrontations, whether post-indictment or pre-indictment, must not be conducted by police in such a manner as to be unnecessarily suggestive and conducive to mistaken identification. The court further indicated that a confrontation by a witness with the accused, singly and not part of a lineup, is improperly suggestive by its very nature and that a lineup should always be used unless some emergency justifies a one-on-one confrontation.

The right to a lawyer at all post-indictment lineups is limited to lineups conducted after June 12, 1967. On the other hand, the right to a fundamentally fair, non-suggestive lineup or confrontation exists for all cases, regardless of whether the lineup or confrontation occurred before or after June 12, 1967.

IN COUNSEL MUST BE PRESENT AT A LINEUP

An accused has the right to have counsel present during any post-indictment lineup. Although the accused does not have a right to have counsel present at pre-indictment lineups, the absence or presence of counsel is a factor in the court's determination whether the

lineup was fundamentally fair. Thus, whenever possible, an accused should be afforded counsel at pre-indictment as well as post-indictment lineups and confrontations.

WAIVER OF RIGHT TO COUNSEL

As in the case of the right to counsel conferred in Miranda v. Arizona, the right to have counsel present at a lineup may be waived by the accused. Such a waiver is only effective if it is intelligently and understandingly made. This means that the accused: (1) must have knowledge of his rights and (2) must expressly state that he does not desire to exercise those rights. To determine whether an accused waives his right to counsel at a lineup, the following explanations should be given and questions asked:

We are going to place you in a lineup with other persons to see if certain witnesses can identify you as the person who committed the crime with which you are charged. You have a right to have a lawyer present during the lineup. If you cannot afford a lawyer, we will see that a lawyer is present on your behalf before the lineup takes place.

Questions:

1. Do you understand that you have a right to have a lawyer represent you during the lineup?
2. Do you understand that if you cannot afford a lawyer, before the lineup takes place a lawyer will be provided to represent you at the lineup?
3. Do you want to have a lawyer present at the lineup?

The explanation, questions, and the answers of the accused should be recorded for use at trial.

HOW COUNSEL'S PRESENCE MAY BE OBTAINED

Where an accused is represented by counsel, counsel should be notified of the time and place of the lineup. Where an accused is unrepresented by counsel, and does not waive counsel, representation for the accused at the lineup may be obtained by contacting the District Attorney's Office.

LAWYER'S ROLE AT LINEUP

The purpose of a lawyer's presence at a lineup is to observe the procedures used by the police, so that in any subsequent court proceeding the accused will have the lawyer as a witness to any unfair suggestive procedures employed during the lineup. In view of this purpose, the lawyer's role at a lineup is limited to: (a) observing the lineup and (b) advising his client.

Under no circumstances may a lawyer interfere with the conduct of a lineup. Nor may a lawyer properly advise the accused to refuse participation. Similarly, a lawyer may not properly advise the accused to refuse a voice test, a handwriting sample, to wear certain clothing, to assume a stance, to walk, to make a particular gesture, or to cooperate in other similar physical demonstrations. Thus, while counsel may advise his client not to make incriminating statements, counsel definitely may not advise his client to refuse to participate in the lineup or any requested physical demonstrations.

If any lawyer should so advise his client, the District Attorney's Office should be notified so that appropriate action may be considered.

ASSURING A FAIR LINEUP

While there are no hard and fast rules to assure the fairness of a lineup, the following factors will be considered by the court in determining the validity of identifications:

1. The presence of counsel at the lineup. (If the lineup is post-indictment, counsel must be present. If the lineup is pre-indictment, the absence or presence of counsel will be a factor in determining whether the lineup was constitutionally fair.)
2. A sufficient number of persons in the lineup in addition to the accused. The court suggests that the ideal number of additional persons may be six.
3. The similarity between the accused and the other persons in the lineup with regard to height, weight, coloration of hair and skin, and body type.
4. The similarity in dress between the accused and the other persons in the lineup.
5. If the accused is to wear particular clothing as a demonstration, the others in the lineup must be requested to wear the same clothing.
6. If the accused is requested to speak for voice identification, the other persons in the lineup must be asked to speak the

same words, in the same manner.

7. If more than one witness is to make an identification from the lineup, each witness must do so separately, and no witness may speak to another witness until all the witnesses complete their identification.

8. No one must indicate to a witness in any manner, which person is the accused, or which person the police believe to be guilty.

9. A written record should be made of the lineup which would include: (a) the names and addresses of all persons in the lineup; (b) a physical description of all persons in the lineup; (c) the names and addresses of all persons present; and (d) the statements of the identifying witness while making the identification.

WHEN SINGLE CONFRONTATIONS, NOT PART OF A LINEUP, ARE PERMITTED

The Supreme Court indicates that a single confrontation between an accused and an eyewitness, not as part of a lineup, is suggestive by its very nature, and should only be employed where there is a good excuse for not setting up a formal lineup. Some of the exceptional circumstances which would justify a one-on-one confrontation are:

1. Where the eyewitness may die or become otherwise unavailable during the period it would take to set up a formal lineup. For example, where the eyewitness has been shot and there is a question whether he will live, a hospital room confrontation with the accused would be justified.

2. Where the crime has just been committed and it is necessary for the police to immediately determine with certainty whether they have apprehended the right man, or whether they should continue pursuit. For example, where a bank robbery has just occurred and a man is apprehended fleeing the scene, good police practice would require an immediate confrontation between the man and the bank teller who was held up to determine whether investigation may stop, or further immediate steps should be taken to apprehend the criminal.

3. Where the accused himself requests an immediate confrontation in order to clear himself. In such cases, it should be made clear to the accused that he does not have to confront the eyewitness but that the police will accommodate him if that is what he desires. Of course, if the police deem a confrontation inadvisable at that time, there is no duty on the part of the police to arrange such a confrontation merely because it is requested by the accused.