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CRIMINAL LAW: A NEW DEVELOPMENT IN PROTECTING THE RIGHT OF THE ACCUSED TO DUE PROCESS AT THE PRE-TRIAL LEVEL

In the recent case of *People v. Caruso*¹ the California Supreme Court ruled police lineups must include persons physically resembling the suspect. The court overturned the robbery conviction of a defendant who was picked out of a lineup of five men.

Witnesses to the robbery had only a fleeting glance at the getaway car allegedly driven by the defendant, and other lineup participants did not physically resemble the defendant. The defendant was a large man (238 pounds) of Italian descent with dark, wavy hair and a very dark complexion. Other participants in the lineup were not his size, and none had dark complexion or dark, wavy hair.

There was no direct evidence, other than the identification by witnesses, to connect the defendant with the robbery, and the California Supreme Court concluded the lineup was unnecessarily suggestive and conducive to irreparable mistaken identification. At the police lineup the defendant did not have assistance of counsel, a right subsequently held in *United States v. Wade*² and *Gilbert v. California*³ to be guaranteed by the sixth and fourteenth amendments of the Federal Constitution.

*Stovall v. Denno*⁴ states that before a defendant may invoke an exclusionary concept he must demonstrate that the lineup "resulted in such unfairness that it infringed upon his right to due process of law".⁵ Therefore *Stovall* stands for the principal that to have been denied the right to counsel

¹Cal. 2d....., 436 P.2d 336, 65 Cal. Rptr. 336 (1968).

² 388 U.S. 218 (1967).

³ 388 U.S. 263 (1967).

⁴ 388 U.S. 293 (1967).

⁵ *Id* at 302.

at a lineup prior to the *Wade* and *Gilbert* decisions was not a deprivation of right to due process.

Mr. Justice Douglas, in his dissenting opinion in *Stovall*, commented that the deprivation of right to counsel at a lineup should be given retroactive effect as it was in *Gideon v. Wainwright*⁶ and in *Douglas v. California*⁷. However, the California Supreme Court decided Caruso had been deprived of his right to due process even though the *Wade* and *Gilbert* decisions could not be relied upon.

To understand what affect California's *Caruso* decision may have upon future lineup cases we must examine the reasoning used in recent Supreme Court decisions concerning protection of a defendant's constitutional rights at the pre-trial level. In *United States v. Wade*⁸ it was argued by counsel for the defendant that it was a violation of the fifth, sixth and fourteenth amendments to allow results of a lineup to be admitted into evidence when at the time of the lineup the defendant was not represented by counsel. The United States Supreme Court dismissed the contention that this was a violation of the fifth amendment guaranty against self-incrimination, citing *Schmerber v. California*⁹ in which the Supreme Court stated:

"We hold that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the state with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends".¹⁰

Thus noting the lineup involved no violation of Wade's privilege against self-incrimination, the court then proceeded

⁶ 372 U.S. 335 (1963).

⁷ 372 U.S. 353 (1963).

⁸ 388 U.S. 218 (1967).

⁹ 384 U.S. 757 (1966).

¹⁰ *Id.* at 761.

to the sixth amendment, and based its decision primarily upon the fact that there was a violation of the right to counsel.

This leads to the question of whether the right to counsel applies at the pre-trial level. As early as *Powell v. Alabama*¹¹ it was recognized that the period from arraignment to trial was perhaps the most critical of the proceedings¹², and that during that period the accused requires the guiding hand of counsel¹³ if the guaranty is not to prove an empty right. In *Miranda v. Arizona*¹⁴ rules established for custodial interrogation include the right to presence of counsel.

It is therefore well established that a defendant has right to counsel at the pre-trial level. The question raised in *People v. Caruso*¹⁵ is whether this right to have counsel present is, in and of itself, all that due process of law requires in order to protect the rights of the accused. The California Supreme Court in *Caruso* felt having counsel present at a lineup is not the only factor required to insure the accused due process of law. The court felt, as was also observed in the *Wade* case, a major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pre-trial identification. It was further observed in the *Wade* decision that once a witness picks the accused at the lineup the witness rarely retracts identification, and in robbery cases the lineup presents a particular hazard in that a victim's understandable outrage may excite vengeful or spiteful motives.

It does not therefore seem unlikely if a case similar to *People v. Caruso*¹⁶ reaches the Supreme Court of the United

¹¹ 287 U.S. 45 (1932).

¹² *Id* at 57.

¹³ *Id* at 69.

¹⁴ 384 U.S. 436 (1966).

¹⁵Cal. 2d....., 436 P.2d 336, 65 Cal. Rptr. 336 (1968).

¹⁶ *Id*.