STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Appeal No. 2016AP001276 - CR
Lower Court Case No. 2012CF000104

Nelson Garcia, Jr.,

Defendant-Appellant

Appeal Of A Judgment Of Conviction Dated August 21, 2015, Milwaukee County Circuit Court Branch 26, The Hon. William S. Pocan Presiding

BRIEF OF THE DEFENDANT/APPELLANT

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ISSUES PRESENTED

1. Should the line-up identification of the Defendant-Appellant have been suppressed because the in-custody Defendant-Appellant was denied counsel during the line-up?

   Trial Court: No.

2. Should the line-up identification, and all subsequent identifications, have been suppressed because the failure of the Milwaukee Police Department to follow both DOJ procedures and MPD procedures made the line-up unduly suggestive?

   Trial Court: No.

3. Did the court err in taking away the Defendant's right to proceed *pro se* when the defendant had not disrupted trial proceedings?

   Trial Court: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The federal courts, including the Seventh Circuit Court of Appeals, have explained in several recent decisions that the Wisconsin courts have been incorrectly interpreting 6th

Amendment jurisprudence relating to the right of an accused to be represented at "critical stages" of the judicial process and the right to proceed *pro se.* This case presents both of those issues, in the context of determining when, under the Constitution, the right to counsel begins, and when a court, after recognizing a defendant's right to represent himself *pro se*, can declare the defendant has forfeited that right by his egregious conduct; oral argument and publication would serve to harmonize the actions of the circuit courts with the Constitution, so that defendant-appellants do not have to wait until state remedies are exhausted to receive Constitutionally guaranteed remedies in federal *habeas* proceedings.

STATEMENT OF THE CASE

On December 27, 2011, a branch of the M & I Bank, located at 6645 W. Oklahoma Avenue (in the City and County of Milwaukee) was robbed when a man entered and handed one of the tellers a note which read, "This is a robbery. Put the money in the bag. This is no joke." R1, p.1. Police collected surveillance video from the bank, which included footage that showed the person who robbed the bank. R89, pp. 31-34. To identify the robber, the police released portions of the surveillance video to the media; this resulted in various leads about several people as possible suspects, including the Defendant/Appellant, Nelson Garcia. R89, p. 35.

On January 2, 2012, the Defendant-Appellant, Nelson Garcia, was arrested. R86, p. 11. On January 3, 2012, Nelson Garcia,

when interviewed by police, specifically invoked his right to counsel after being read his *Miranda* rights. R86, p. 12.

The next day, January 4, 2012, a police detective assigned to the case filled out a form known as a "C.R. 215" which outlined the probable cause to believe that Nelson Garcia had committed the bank robbery. R86, pp. 13-14. The police prepared the C.R. 215 because they know they are constitutionally required to have a probable cause finding and bond set within forty-eight (48) hours of someone being arrested on an offense. R86, p. 22.

On January 4, 2012, at 1:27 p.m., Milwaukee County Court Commissioner Kevin M. Costello reviewed the C.R. 215 and made a judicial determination; he found probable cause existed to believe that Mr. Garcia violated §943.87, Wis. Stats. Robbery of a Financial Institution, and he set Mr. Garcia's bail at $50,000.00. R86, pp. 14, 25-26.; R27, pp.8-9. Mr. Garcia was in custody at the time that the police presented the C.R. 215 to Commissioner Costello, but he was not present in the courtroom where and when the commissioner found probable cause and set bail. R86, pp. 29-30.

Although bail was set upon a finding of probable cause to believe Mr. Garcia had committed the robbery, a formal complaint had not yet been prepared by the District Attorney's Office and filed with the circuit court. R86, p. 14. Nonetheless, the police understood that once the bail was set, Mr. Garcia

would have to be released from their custody if he posted the $50,000.00. R86, pp. 28-29.

Shortly after 6:00 p.m. on January 4, 2012, officers from the Milwaukee Police Department conducted an in-person line-up for two tellers (the victim teller and a witness teller) to view; Mr. Garcia was included in the line-up in the Number 4 position. R86, pp. 13, 66.

The detective running the line-up procedure learned how to do lineups both from working with other detectives and, as part of detective training school, studying the DOJ's Model Policy and Procedure for Eye-Witness Identification. R86, p. 72. The Model Policy emphasizes that the individuals in the line-up should only be viewed once, with page 21 of the Model Policy stating, "the line-up administrator should never suggest additional viewing." R86, p. 72.

The Model Policy, which the detective running the line-up was familiar with from his training, goes on to explain:

> allowing a witness to view a line-up a second time converts the procedure from a sequential to a quasi-simultaneous line-up, thereby, risking the benefits of the sequential procedure… studies have shown that a sequential procedure is much more reliable than running one (1) back to back….

R86, p. 73.

The detective acting as the line-up administrator knew and understood from his training that he was not supposed to show a witness the line-up a second time, unless the witness asked for a second viewing without suggestion form the line-up administrator. R86, pp. 73-74.

At the onset of the line-up, the detective acting as the line-up administrator gave each of the tellers Milwaukee Police Department Form PC-25, Supplement Report. R86, p. 58. The instructions given to the tellers regarding the procedure to be followed during the line-up are written on the PC-25, and were read verbatim to the tellers; no other information was given to them prior to the viewing of the line-up participants. R86, pp. 58-59.

Those instructions are as follows:

> In a moment, I am going to show you a series of individuals. The person who committed the crime may or may not be included. I do not know whether the person being investigated is include. Even if you identify someone during this procedure, I will continue to show you all individuals in the series. Do not speak, raise your hand, signal to anyone, etc., during the line-up procedure.
>
> Keep in mind that things like hair styles, beards, and mustaches can be easily changed.
>
> You should not feel you have to make an identification. It is important to exclude innocent persons as it is to identify the perpetrator.
>
> The individuals will be shown to you one at a time and are not in any particular order. Take as much

> time as you need to look at each one. After each individual, I will ask you "Is this the person you saw [commit the crime]?" Please circle yes or no below the respective number at the bottom of this form. Take your time answering the question. Upon conclusion of this process you will be interviewed by an investigator.
>
> Because you are involved in an ongoing investigation, in order to prevent compromising the investigation, you should avoid discussing this identification procedure or its results.
>
> Do you understand the way the lineup procedure will be conducted and the other instructions I have given you?

R18, pp.11-12, *(brackets in the original).*

At the completion of the viewing, neither teller had identified Mr. Garcia as the bank robber by circling the word yes under the number 4 on the respective PC-25s each was given. R89, pp. 43-48; 81.

At the completion of the viewing, prior to reviewing the PC-25 forms that the tellers had been given to fill out during the line-up, the detective acting as the line-up administrator asked the tellers if they had any questions *or would like to see the lineup a second time*. R86, pp. 74-75.

After the second viewing, conducted after the line-up administrator asked if the tellers wanted to view the line-up a second time, the witness teller still had not circled the "yes" under the number 4 on her PC-25; she ended up circling "no."

R89, pp. 46-48. After the second viewing of the line-up, conducted after the line-up administrator asked if the tellers wanted to view the line-up a second time, the victim teller circled the word "yes" under the number 4 on her PC-25. R89, p. 81.

On January 7, 2012, Nelson Garcia was charged with Robbery of a Financial Institution in violation of §§943.87 and 939.50(3)(c) Wis. Slats., in a complaint filed in the circuit court for Milwaukee County. R1.

A preliminary hearing was held on January 17, 2012; the commissioner conducting the hearing began by explaining the ground rules of her courtroom to Mr. Garcia. R64, p. 3.

> THE COURT: We are for the preliminary hearing.
>
> Mr. Garcia, I have rules in my courtroom that apply to everyone. I am not picking you out individually. I want you to listen to the testimony. *I don't want you to gesture, roll your eyes, say anything out loud, do anything that I would interpret as being a violation* of my rules.
>
> If you want to talk to your attorney, ask me or ask him, and I will let you have the time. Otherwise, I just want you to listen. Are we clear about that?
>
> THE DEFENDANT: Yeah.

R64, p. 3, *(emphasis added)*.

The hearing then ensued without incident; the commissioner never indicated that Mr. Garcia failed to conduct himself as instructed. R64, pp. 3-10. After hearing the testimony of witnesses, the commissioner found probable cause to believe that Mr. Garcia committed a felony in Milwaukee County and bound him over for trial; the State filed a one-count information with the same charge as the complaint, to which Mr. Garcia, through counsel, entered a plea of "not guilty". R64, pp. 4-10.

On April 24, 2012, counsel for Mr. Garcia, Attorney Nathan Opland-Dobs, moved to withdraw as attorney of record in the case at the request of Mr. Garcia; the court granted the request. R68, pp. 2-4.

A new attorney was appointed to represent Mr. Garcia; on November 26, 2012, the date set for the jury trial, that counsel, Attorney Melissa Fitzsimmons, through Attorney Louis Epps of the Office of the State Public Defender, moved to withdraw as she was on medical leave and would continue to be on medical leave for some time. R72, pp. 2-5. Attorney Epps made it clear that Mr. Garcia **did not** want Ms. Fitzsimmons to be allowed to withdraw. R72, p. 2.

Attorney Epps continued to represent Mr. Garcia through the next hearing on December 14, 2012, although he indicated he did not know if he would continue to be Mr. Garcia's attorney, or if new counsel would be appointed. R73, pp. 2-9.

On May 23, 2013, Attorney Thomas Harris, Mr. Garcia's new attorney, filed a Motion to Suppress Line-Up Identification on behalf of Mr. Garcia. R17. On November 14, 2013, Mr. Garcia filed a *pro se* Motion to Amend the Motion to Suppress the Line-up Identification. R18. On December 9, 2013, Attorney Harris filed a Motion to Withdraw as Counsel. R22. That motion was heard and granted on December 19, 2013, R17, pp. 2-6. During that hearing, the court specially asked Mr. Garcia if he wanted to continue the case by representing himself; Mr. Garcia stated he did not. R17, p. 4.

> THE COURT: Do you want to represent yourself?
>
> MR. GARCIA: No, I do not. I do not waive my right to counsel.

R17, p. 4.

Nonetheless, Attorney Harris indicated to the court and to Mr. Garcia that Mr. Garcia might best be served if he continued *pro se*. R17, p. 6.

> MR. HARRIS: Just for appellate purposes, Judge. I would be remiss if I didn't say it, and I'm confident in regardless to whoever takes this over, the only person that Mr. Garcia is ultimately going to be able to get to try this case that will meet his satisfaction is Mr. Garcia himself. So I wish him well.

R17, p. 6.

On March 27, 2014, a status conference was held. R77. Mr. Garcia expressed concerns to the court regarding the Suppression Motion that had been filed, but not yet heard; those concerns included Mr. Garcia's belief that his new attorney, Paul Bonneson, did not appear to want to pursue that motion, because, in his opinion, it lacked legal merit. R77, pp. 3-8.

The court again inquired if Mr. Garcia wanted to represent himself; Mr. Garcia indicated he did not. R77, p. 10.

> THE COURT: Why don't we just let Mr. Bonneson withdraw and you represent yourself. You obviously know more about the law than anybody else in the room.
>
> MR. GARCIA: No. I'm not waiving my right to counsel, Your Honor. I'm not waiving my right to effective assistance of counsel.

R77, p. 10.

Mr. Garcia explained to the court that he believed relevant caselaw he had provided to Attorney Bonneson supported his belief that he had been entitled to be represented by an attorney at the time the line-up was conducted. R77, pp. 12-13.

> MR. GARCIA: I apologize. In *Rothgery vs. Gillespie County* 554 U.S. 191, 2008, where the court held that the lower court's standard which depended on whether a prosecutor had a hand in starting judicial adversary proceedings, was wrong, and that an accusation filed with a judicial officer was sufficiently formal and the

> government's commitment to prosecute sufficiently concrete when the accusation prompted arraignment and the restrictions on the accused's liberty to facilitate the prosecution.

R77, pp. 12-13.

Mr. Garcia also indicated to the court that a recent decision in the Eastern District of Wisconsin, *U.S. v. West*, also supported his claim that it was wrong to have denied him an attorney at the line-up. R77, pp. 14-15.

The court, over the objection of Mr. Garcia, removed Attorney Bonneson, from the case, telling Mr. Garcia to proceed *pro se*; after Mr. Garcia made clear that he was not waiving his right to counsel, the court decided to not remove Attorney Bonneson. R77, pp. 16-25.

The court however, indicated that it found Mr. Garcia competent to proceed *pro se.* R77, p. 17.

Shortly thereafter, on April 7, 2014, Attorney Bonneson filed a Motion to Suppress the Line-up Identification; the legal argument advanced in the motion was that both *Rothgery vs. Gillespie County* and *U.S. v. West* both supported the proposition that the 6th Amendment guaranteed Mr. Garcia representation once the bail had been set by the court commissioner, which happened prior to the line-up. R27.

Mr. Garcia filed a motion to proceed *pro se* on July 21, 2014. R30. On July 24, 2014, Attorney Bonneson orally moved to be removed as counsel from the care; the court took the motion under advisement pending judicial rotation to the successor court. R83, pp. 2-16.

On August 13, 2014, the case had been rotated to the Honorable William S. Pocan, who, at a hearing on that same date, granted Attorney Bonneson's motion to withdraw as counsel; the Court did not address Mr. Garcia's request to proceed *pro se*. R84, pp. 2-16.

On April 21, 2015, Mr. Garcia's subsequent attorney, Attorney Douglas Bihler, proceeded with a motion hearing on the prior Motions to Suppress Lineup Identification filed by Attorneys Harris and Bonneson. R86. The defense argued (a) that Mr. Garcia had the right to representation when he requested it at the lineup, and (b) that the lineup was unduly suggestive. R86, pp. 80-90. The court denied the motion, finding that at the time of the line-up Mr. Garcia was not entitled to be represented by counsel and that the line-up procedure was not unduly suggestive. R86, pp. 91-105.

Prior to the next court date, Mr. Garcia filed a motion to have Attorney Bihler removed from the case, and to proceed *pro se* with a stand-by counsel appointed by the court. R35.

On June 29, 2015, Judge Pocan held a final pretrial. R89.

The court believed that Mr. Garcia was asking the court to appoint Mr. Bilher as his stand-by counsel, as opposed to removing him from the case, when it addressed Mr. Garcia's motion; Mr. Bilher believed this to be the case as well. R89, p. 6.

> THE COURT: All right. Well, let's talk about that latest motion. And this is a motion to proceed pro se. And with you, Mr. Bihler, apparently, serving as standby counsel. And is this, indeed, what your client is seeking today?
>
> MR. BIHLER: Yes.

R89, p. 6.

Unfortunately, the Court did not review the language of the motion with Mr. Garcia. *See* R89. In that motion, Mr. Garcia asked for an order directing Mr. Bihler "to withdraw his representation of Mr. Garcia and relieving Atty Bihler of further duties in the Above-captioned criminal action and granting Garcia's right to proceed pro se." R35, p. 1.

The court engaged Mr. Garcia in a colloquy to determine whether he was competent to represent himself. R89, pp. 8-13.

> THE COURT: I will indicate that this case is going to proceed on July 13th with or without counsel.
>
> There is. absolutely no reason for this case to have been pending as long as it has with six (6) attorneys and me now being the third Judge assigned to it.

So, we are going to bring this to a head.

But I am going to talk to Mr. Garcia this morning to ask him some questions so that I can determine whether he will be able to represent himself in this matter.

Mr. Garcia, do you understand that you have a constitutional right to have an attorney represent you?

THE DEFENDANT: Yes, I do.

THE COURT: Do you also understand that you also have a constitutional right to represent yourself?

THE DEFENDANT: I also understand that also.

THE COURT: All right. How old are you, sir?

THE DEFENDANT: I'm thirty-seven (37) years old.

THE COURT: And how far have you gone through school?

THE DEFENDANT: I've completed high school, some college.

THE COURT: And are you able to read and write English?

THE DEFENDANT: Yes, I am.

THE COURT: And what sorts of things do you regularly read?

THE DEFENDANT: Lately, case law pertaining to my case, pertaining to my attorney. Other than that, religious materials.

THE COURT: All right. And this motion that you brought here, did you write this out, or did somebody write this out for you?

THE DEFENDANT: I wrote that out myself.

THE COURT: All right. Thank you.

Now, is anyone pressuring you to represent yourself here?

THE DEFENDANT: No, they are not, Your Honor.

THE COURT: Did anyone make any promises to get you to give up your right to a lawyer?

THE DEFENDANT: No, they did not.

THE COURT: Have you ever been diagnosed with suffering from any medical or emotional problems?

THE DEFENDANT: No, I have not, Your Honor.

THE COURT: Do suffer from any medical or emotional problems that interfere with your ability to understand what is going on around you and to think for yourself and make decisions?

THE DEFENDANT: No.

THE COURT: Have you had any drugs, alcohol, or medication of any kind in the last twenty-four (24) hours?

THE DEFENDANT: No, I have not.

THE COURT: All right. Do you understand in this matter that you are charged with the crime of robbery of a financial institution, and that if

convicted, the Court can order -- Is this a Class C felony, Ms. Kronforst?

MS. KRONFORST: Yes.

THE COURT: That the Court can order that you spend up to twenty-five (25) years in custody, in prison, of fifteen (15) of those years in and ten (10) years out.

Do you understand all of that?

THE DEFENDANT: Yes, I do.

THE COURT: All right. And do you understand the element of the offense charged against you?

THE DEFENDANT: Yes, I do.

THE COURT: And have you understood the proceedings in court when you have been here?

THE DEFENDANT: Yes, I have.

THE COURT: Have you ever represented yourself in any legal proceeding?

THE DEFENDANT: No, I have not, Your Honor.

THE COURT: Do you understand that because the attorney has gone to law school and an attorney knows more about the law and court proceedings than you do?

THE DEFENDANT: I do understand that, yes.

THE COURT: Do you understand that an attorney probably knows more that you about defenses and strategies that could be useful to you in this matter?

THE DEFENDANT: Yes.

THE COURT: Do you understand that if you give up your constitutional right to an attorney, there will be no one (1) in this courtroom whose responsibility it is to look after and protect your legal rights?

THE DEFENDANT: I do understand that all.

THE COURT: Do you understand that you will be required to follow all of the same rules that would apply if you had a lawyer representing you and that the Court cannot assist you in representing yourself?

THE DEFENDANT: Yes.

THE COURT: Do you understand that you will be competing against an experienced prosecutor who is trained to see that you are convicted?

THE DEFENDANT: Yes, I do.

THE COURT: Do you understand that it is usually more difficult for a person to represent himself and easier to have the assistance of an attorney?

THE DEFENDANT: Yes, I do.

THE COURT: Do you want to give up your right to an attorney and exercise your right to represent yourself?

THE DEFENDANT: Yes, I do.

THE COURT: All right. Do you want to make any sort of statement, Mr. Bihler?

MR. BIHLER: No, Your Honor.

R89, pp. 8-13.

The court continued to operate under the incorrect assumption that Mr. Garcia was asking that Attorney Bihler appointed as stand-by counsel in explain how it planned to proceed. R89, pp. 13-14.

> THE COURT: Well, and, of course, part of Mr. Garcia's request is to have Mr. Bihler serve as standby counsel. And anyone who is a regular in this courtroom knows that I certainly have no problem with cutting people off if they are acting inappropriately or arguing beyond what the law calls for. And this case would be no exception.
>
> MS. KRONFORST: Right.
>
> THE COURT: And, if necessary, I would very quickly reinstate Mr. Bihler if need be here. So, that would be my plan.

R89, pp. 13-14.

> THE COURT: … And as I certainly made clear to Mr. Garcia, I think this is a mistake.
>
> And I think at the end of the day, you may very well be unhappy with your decision.
>
> But you are going to have to live with the consequences.
>
> But I am inclined, if this is, indeed, what you want, would be to allow you to represent yourself, and I would appoint Mr. Bihler from this point on on behalf of the County at forty dollars ($40.00) an hour as standby counsel in this case.
>
> Is that, indeed, what you want?

THE DEFENDANT: Well, Your Honor, I have prepared a statement.

THE COURT: Well, I don't need your statement.

It's a simple question. And this highlights what Ms. Kronforst indicated; and that is, you're going to follow the same rules that the attorneys follow in my courtroom.

And when I ask you questions that involves a yes or no answer, that's what I expect.

I have indicated to you that under these circumstances, I am inclined to grant your request, because I don't think under the law, I have any choice under this set of facts.

But I don't think it's a wise decision.

But if it's what you want, I will do this.

So, do you want me to allow you to proceed pro se as indicated, yes or no?

THE DEFENDANT: Yes.

THE COURT: All right. Well. The defendant appears to have knowingly and voluntarily waived his right to counsel based on the record before this Court.

It appears that the defendant is making a deliberate choice.

He is aware of the difficulties and disadvantages of proceeding without a lawyer.

And he is aware of the seriousness of the charges and what could happen to him if convicted.

I think actually I may have misspoke on the penalty. It's actually forty (40) years.

And it's twenty-five (25) in and fifteen (15) out and a maximum fine of one hundred thousand dollars ($100,000.00). Do you understand that, Mr. Garcia?

THE DEFENDANT: Yes.

THE COURT: All right. And does that change your decision in any way?

THE DEFENDANT: There are several things that you are incorrect about.

THE COURT: Yes or no? Does that change your decision in. any way?

THE DEFENDANT: Well, it changes my decision with regards to Attorney Bihler being the standby counsel.

I never requested him to be my standby counsel.

THE COURT: Well, he's the one (1) you are going to get.

Do you want to represent yourself with Mr. Bihler as standby counsel, or do you want Mr. Bihler to continue as counsel for you? Those are your two (2) choices. Pick one (1).

THE DEFENDANT: If I understand, correctly, Your Honor –

THE COURT: Stop. Your choices are to represent yourself, or you can have Mr. Bihler represent you.

If you decide to represent yourself, then Mr. Bihler will serve as your standby –

THE DEFENDANT: You are not allowing me to speak, Your Honor.

> THE COURT: You don't get to. Well, this has convinced me right here that there is something going on with Mr. Garcia.
>
> Under these circumstances, I can't believe that because this would make a mockery out of the system.
>
> He won't answer the Court's questions.
>
> I don't know how we could proceed with him as counsel.
>
> So, I think that now, Mr. Garcia, himself, has made a sort of record that would, perhaps, require me to deny his request.

R89, pp. 16-20.

Attorney Bihler represented Mr. Garcia at trial; on July 16, 2015, after a three-day trial, Mr. Garcia was found guilty of Robbery of a Financial Institution. R93, pp. 78-81. On August 20, 2015, Mr. Garcia was sentenced to twenty-five years in the Wisconsin Prison System, with fifteen years of initial confinement. R57.

Mr. Garcia now appeals.

ARGUMENT

The trial court made three errors, each of which mandates vacating the judgment of conviction and remanding the case to the circuit court for a new trial: 1. It incorrectly held that Mr. Garcia was not entitled to counsel at the line-up; 2. It erred in failing to suppress the line-up and being constitutionally unduly suggestive; and, 3. It erred in not allowing Mr. Gacia to represent himself.

A. Mr. Garcia Was Entitled To Counsel At The Line-Up Because Notifying Him Of The Charges Against Him And The Setting Of Bail Initiated The Prosecution Of The Case.

The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. AMEND. VI. As the Supreme Court has repeatedly held:

> Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him — "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."

Brewer v. Williams, 430 U.S. 387, 398 (1977) (*quoting Kirby v. Illinois*, 406 U.S. 682, 689 (1972)).

If adversary judicial criminal proceedings have commenced, a lineup procedure is a critical stage of the prosecution and

therefore the defendant is entitled to have counsel present at the lineup. *United States v. Wade*, 388 U.S. 218, 237 (1967). Testimony regarding an identification occurring after adversarial judicial criminal proceedings are commenced, but without counsel present, are inadmissible at trial unless the defendant makes an intelligent waiver of his Sixth Amendment right to counsel. *Wade*, 388 U.S. at 231, 237.

When a judicial officer notifies a defendant of the accusation against him, and imposes restrictions on his liberty to ensure that he answers that accusation, he is transformed from a mere "suspect" to an "accused" within the meaning of the Sixth Amendment, "faced with the prosecutorial forces of organized society." *Michigan v. Jackson*, 475 U.S. 625, 631-32 (1986). "Under the Sixth Amendment, the right to counsel may apply where, prior to initiation of judicial proceedings, a suspect had, in reality, 'become the accused.'" *United States ex rel. Hall v. Lane*, 804 F. 2d 79, 83 (7th Cir. 1986) (*quoting Escobedo v. Illinois*, 378 U.S. 478, 485, 84 S.Ct. 1758, 1762, 12 L.Ed.2d 977 (1964)).

Under *Kirby*, the attachment of the right to counsel thus turns not on a State's characterization of the proceedings the defendant is required to undergo, but on the very fact that judicial proceedings have commenced, placing the defendant in an adversarial relationship with the State:

> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point

> of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.

406 U.S. at 689.

It is at that point, *Kirby* held, that a "criminal prosecution[]" within the meaning of the Sixth Amendment begins, and the protections of the Sixth Amendment therefore apply from that point forward. See id. at 689-690. This rule recognizes that a "criminal prosecution[]" commences, and a person becomes an "accused," within the meaning of the Sixth Amendment as soon as "the government's role shifts from investigation to accusation." *Moran v. Burbine,* 475 U.S. 412, 430 (1986).

If adversary judicial criminal proceedings have not yet commenced, the Seventh Circuit applies a presumption that the right to counsel does not attach at pre-indictment lineups. *United States v. Larkin*, 978 F.2d 964, 969 (7th Cir. 1992). The defendant can rebut this presumption by demonstrating that, despite the absence of formal adversary proceedings, the government crossed the line from fact-finder to adversary. *Id.; see also Bruce v. Duckworth,* 659 F.2d 776, 783 (7th Cir. 1981) *(stating that government may not intentionally delay formal charges for purposes of holding lineup outside presence of defense counsel).*

Here, adversary judicial criminal proceedings commenced on January 4, 2012 at 1:27 p.m. when there was a judicial determination of the existence of probable cause to believe Mr. Garcia had robbed the bank and bail was imposed as a condition of his release. Once this judicial determination of probable cause was made, Mr. Garcia should have been provided counsel for all subsequent critical stages of the prosecution, which includes a lineup procedure.

The proceedings in this case were similar to the Louisiana procedures at issue in *Daigre v. Maggio,* 705 F.2d 786 (5th Cir. 1983), where a preliminary hearing was held to determine if probable cause existed to have the suspect bound over for a robbery. Probable cause was found, a lineup was held, and then a "bill of information" was issued charging the suspect with armed robbery. On *habeas* review, the Fifth Circuit held that although the lineup was held before the information was issued, "it appears clear that adversarial judicial proceedings had been initiated against Daigre at the preliminary examination," and therefore Daigre has a right for counsel to be present at the lineup. *Id.* at 788.

In the case at bar, the probable cause determination made by the Milwaukee County Court Commissioner functioned similarly as the preliminary examination in Daigre – a judicial determination that probable cause existed, which justified holding Mr. Garcia in custody for the bank robberies. Both procedures commenced adversarial judicial criminal

proceedings. *Wade* therefore requires that counsel be present at the lineup.

In *Rothgery v. Gillespie County*, 554 U.S. 171, 128 S.Ct. 2578 (2008), a Texas man was arrested on suspicion of being a felon in possession of a firearm. *Id*. at 2582. The next morning, a Texas court magistrate reviewed an "Affidavit of Probable Cause," describing the factual basis for the allegation. *Id.* The judicial officer found probable cause, informed Mr. Rothgery of the state law he was alleged to have violated, and set his bail at $5,000. *Id.*

The Court concluded that "a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel. *Id.* at 2592. This was true *regardless of the fact that no formal charging document had been filed, or that the prosecutor took no part in the proceedings and seemed generally unaware of the defendant's existence*; what mattered was that the "machinery of the prosecution was turned on," triggering the right to counsel. *Id.* at 2589.

In *Rothgery*, the defendant's Sixth Amendment right was triggered when he was subject to a judicial branch determination, "combin[ing] the Fourth Amendment's required probable-cause determination with the setting of bail, and is the point at which the arrestee is formally apprised of the

accusation against him.[1]" *Id.* at 2582. As in the present case, the defendant was arrested and detained; as in the present case, the police submitted a sworn probable cause affidavit; as in the present case, the defendant was informed of the law the police accused him of breaking, and which the judicial branch found probable cause of him breaking; as in the present case, the defendant was informed that his liberty was restricted until he posted cash bail, at which point his release would be conditioned upon return for further proceedings. *Rothgery*. at 2582.

After reviewing the briefs of the Defendant – which referenced *Rothgery* and its closest analysis to Wisconsin, *U.S. v. West*,[2] – the circuit court indicated that "other than some Federal cases, that at least anything from Wisconsin would seem to be more favorable to [the State's] position." R86, p. 79. Defendant's trial counsel compared Mr. Garcia to *Rothgery*,

[1] While the Court does not specifically cite *County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991), in this and other quotes, the Court makes clear that the Texas procedure in question is designed towards complying with the requirements of *Riverside.*

[2] *United States v. West,* 2009 Dist. LEXIS 121970, 2009 WL 5217976 (March 2009) (*unpublished*) *(analyzing a Milwaukee County probable cause determination in light of Rothgery and concluding that the Sixth Amendment right to counsel attaches at that hearing). West* was cited in a 2015 Decision from the Eastern District, *United States v. Corey Mitchell,* Case No. 15-CR-47, E.D. Wisconsin, Slip Opinion, September 17, 2015. Both Wisconsin federal cases, in which a line-up was suppressed because the defendant was not represented in it after having bail set by a Milwaukee County Court Commissioner, are included in the Appendix to this Brief.

arguing that the probable cause determination was "adversarial, because the proceeding is directed against Mr. Garcia. It's not a joint application for bail. It's not a joint request that he remain in custody. It's a proceeding that's adverse to Mr. Garcia." R86, pp. 85-86. Counsel then compared Mr. Garcia to Rothgery directly, noting that the probable cause determination in *Rothgery* was, like the probable cause determination in Mr. Garcia's case, designed to comply with federal constitutional rights under *Riverside. Id.* At the close of the Defendant's argument, the court asked, "And you don't have any Wisconsin law to support your position?"
33, p. 90.

The State's argument was, essentially, that in Wisconsin there is no such thing as a critical stage until a Criminal Complaint has been filed. R86, p. 90. This is exactly the sort of formalism, disparate impact, and "absurd distinctions" the Supreme Court warned against in *Rothgery.*[3] 128 S.Ct. at 2588. When the prosecutor argued "it is an interesting legal argument, but

[3] In flatly rejecting a rule that adversarial criminal proceedings begin at prosecutorial involvement, the Court explained that it "would have the practical effect resting attachment on such absurd distinctions as the day of the month an arrest is made, or the sophistication, or lack thereof, of a jurisdiction's computer intake system." *Rothgery,* 128 S. Ct. at 2588. The Court then went on to enumerate computer systems that provide arrest and detention information as one such absurd distinction. *Id.* Mr. Garcia's receipt of his arrest and detention information via computer system seems to have been considered by the Court, but was completely ignored by the circuit court.

unfortunately, Wisconsin law is against the defendant on this matter," the State essentially argued that when it comes to the Sixth Amendment to the United States Constitution, Wisconsin law trumps the Supreme Court. [4]

This search for Wisconsin authority was error.

As the Supreme Court of Wisconsin has clearly stated, "the Supremacy Clause of the United States Constitution compels adherence to United States Supreme Court precedent on matters of federal law, although it means deviating from a conflicting decision of this court." *State v. Jennings,* 2002 WI 44, ¶ 3.

[4] Rather, States must comport their constitutional jurisprudence to align with new Supreme Court precedent. *See, e.g., Ex Parte Cooper,* 43 So. 3d 547 (Ala. 2009) (*overturning prior state Sixth Amendment attachment holdings to reflect Rothgery*); *DeWolfe v. Richmond,* 434 Md. 403, 76 A.3d 962, 976-77 (2012) (*Maryland law must adapt to include Sixth Amendment attachment at pre-arraignment bail hearings); Rebecca Yoder, Rothgery v. Gillespie County: Applying the Supreme Court's Latest Sixth Amendment Jurisprudence to North Carolina Criminal Procedure,* 33 CAMPBELL L. REV. 477, 484-85 (2010) (*analyzing Rothgery to conclude that Sixth Amendment attachment under the U.S. Constitution is earlier than North Carolina law currently acknowledges); Carla J. Patat, Dancing the Texas Two-Step: What Does Rothgery v. Gillespie County Mean for the Sixth Amendment Right* to Counsel in South Carolina, 60 S.C.L. REV. 1013, 1027 (2008) (concluding the same for South Carolina law); *Craig M. Bradley, Interrogation and Silence: A Comparative Study, 27 WIS. INT'L L.J. 271, 273 (2009) (concluding that under Rothgery, Sixth Amendment attachment begins at a judicial officer's Riverside determination).*

As the *Rothgery* concurrences of Justices Roberts and Alito clarified, 128 S. Ct. at 2592-95, Sixth Amendment attachment at a Riverside hearing does not mean that every defendant requires counsel prior to the District Attorney's Office filing charges; rather, it means that the right to counsel has attached, and counsel must be provided before a critical stage of the proceeding. *Id.* A lineup procedure is a critical stage of the prosecution and therefore the defendant is entitled to have counsel present at the lineup. *United States v. Wade*, 388 U.S. 218, 237 (1967).

As in the present case, the prosecution in *Rothgery* argued that formal judicial proceedings did not begin until the District Attorney's Office filed charges. The lower court "reasoned that because 'the decision not to prosecute is the quintessential function of a prosecutor' . . . the State could not commit itself to prosecution until the prosecutor signaled that it had." *Id.* at 2588. The Court concluded, "[u]nder this standard of prosecutorial awareness, attachment depends not on whether a first appearance has begun adversary judicial proceedings, but on whether the prosecutor had a hand in starting it. That standard is wrong."

Rothgery at 2588.

The Court elaborated to say:

> But what counts as a commitment to prosecute is an issue of *federal law unaffected by allocations*

> *of power among state officials under a State's law*, and under the federal standard, *an accusation filed with a judicial officer is sufficiently formal*, and the government's commitment to prosecute it sufficiently concrete, *when the accusation prompts arraignment and restrictions on the accused's liberty to facilitate the prosecution.* From that point on, the defendant is faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law that define his capacity and control his actual ability to defend himself against a formal accusation that he is a criminal. By that point, it is too late to wonder whether he is "accused" within the meaning of the Sixth Amendment, and it makes no practical sense to deny it. *It would defy common sense to say that a criminal prosecution has not commenced against a defendant who, perhaps incarcerated and unable to afford judicially imposed bail, awaits preliminary examination on the authority of a charging document filed by the prosecutor*, less typically by the police, and approved by a court of law. All of this is equally true whether the machinery of prosecution was turned on by the local police or the state attorney general.

Rothgery at 2588-*89 (internal citations and quotation marks omitted) (emphasis added).*

Despite this flat rejection that prosecution can only begin by the filing of a complaint by the District Attorney in *Rothgery,* the circuit court used the same standard to determine adversarial attachment in Mr. Garcia's case.

> THE COURT: You're saying at the arrest, the arrest and the probable cause stage, once that

occurs, the investigation has to stop, or it's part of the adversarial process?

MR. BIHLER: I'm saying, once they go before a Judge for judicial determination of probable cause and to set bail, that that becomes an adversarial proceeding, and that triggers the right to counsel.

…

THE COURT: All right.

And I did read through the materials prior to proceeding today.

And as you could probably tell from my initial questioning of you, Mr. Bihler, I really was not following your argument.

I guess I sort of agreed with the State's position on this.

I think that it's -- I don't think the critical stage, that is, the adversarial process, I start from until we have charges filed.

I think this is part of the investigation. I think Ms. Kronforst is correct in
Wisconsin. And that's why I inquired initially as to whether there was any additional law, because I knew briefs were somewhat dated.

And I just wanted to make sure we had everything up to date.

So, I am going to rule against you on that first issue, on the right to counsel.

R86, pp. 89-93.

In *Rothgery,* the Supreme Court denounced the prosecution's position "that an attachment rule unqualified by prosecutorial involvement would lead to the conclusion that the State has statutorily committed to prosecute every suspect arrested by the police, given that state law requires [a probable cause hearing] for every arrestee." *Id.* at 2590. In response, the Court declared "The answer, though, is that the State has done just that, subject to the option to change its official mind later." *Id.*

In the present case, a Milwaukee County Court Commissioner reviewed a statement from police, found probable cause that Mr. Garcia had violated a specific Wisconsin statute, and determined that the deprivation of his liberty could constitutionally be continued until such time as Mr. Garcia posted $50,000.00 cash bail and agreed to return to court for further proceedings associated with these formal accusations.

He signed an official form[5] that informed Mr. Garcia of which Wisconsin Statutes he was accused of violating and setting the conditions for his release, and notably, had this form delivered to the Sheriff, the jail, the District Attorney's Office, and to Mr. Garcia. The only way that the present matter could be more like the *Rothgery* case is if Milwaukee County had – as many Wisconsin counties do – walked him into the same room as the

[5] This form is titled CR-215: Probable Cause Statement and Judicial Determination. Notably, the legal authorities authorizing its use are cited as the 4th Amendment of the U.S. Constitution and Wis. Stat. § 970.01 – the statutory section dedicated to "Initial appearance before a judge." R27, bottom of pages 8 and 9.

judicial officer authorizing the deprivation of Mr. Garcia's liberty. The machinery of prosecution had been turned on.

The Court made clear in *Rothgery* that the *sine qua non* for determining whether attachment occurred is judicial imprimatur to allegations of criminal conduct – whether the government used the judicial machinery to signal a commitment to prosecute. 128 S.Ct. at 2591. And the Court did not distinguish law enforcement from the prosecutor; they are both "the government" for purposes of attachment. *Id.* at 2589.

Here, the government – in the form of the Milwaukee Police Department – submitted allegations to a court commissioner that there was probable cause to charge Garcia with a bank robbery. The Court Commissioner concurred and issued a finding of probable cause. The Court Commissioner's finding of probable cause legitimized Garcia's continued detention even though he was arrested without a warrant.

By the time police requested a judicial finding of probable cause, the government had crossed the line from fact-finder to adversary. The officers were no longer looking, open-endedly, into *who might have* committed the crime; rather, they had a suspect under arrest and requested judicial approval to continue gathering evidence about *that specific suspect*. In this respect, the facts of this case fit neatly into the definition provided by *Rothgery* for what counts as a commitment to prosecute: "An accusation filed with a judicial officer is

sufficiently formal, and the government's commitment to prosecute it sufficiently concrete, when the accusation prompts arraignment [6] and restrictions on the accused's liberty to facilitate the prosecution." *Id.*

Rothgery therefore provides ample support for the Defendant's argument that his Sixth Amendment right to counsel attached when the court commissioner found probable cause to charge him with robbing a bank. Because the lineup procedure was a critical stage of the prosecution and occurred after the right to counsel attached, the fact that Garcia was not provided counsel before the lineup occurred merits the suppression of all evidence obtained from that lineup, including the subsequent tainted in-court identifications that did not have an origin independent of said lineup.

Mr. Garcia was entitled to his requested attorney at his lineup. The Defendant respectfully requests this Court overturn the error of the lower court, vacate his judgment of conviction, and remand this case back to the circuit with an order that the line-up of January 4, 2012 be suppressed

[6] Note that the Supreme Court specifically indicated that "arraignment" in this context is not a term-of-art unique to each state's criminal procedures. *Rothgery*, 128 S. Ct. at 2584-86. Rather, for Sixth Amendment attachment purposes, "arraignment" can mean a preindictment hearing aimed at determining probable cause and fix bail if the offense is bailable. *Id*. at 2586.

B. Independent Of The Question Of Representation At The Line-Up, The Court Erred In Not Suppressing The Line-Up Identification As Being Unduly Suggestive.

Beyond being performed without requested counsel, Mr. Garcia's lineup was unduly suggestive.

"A criminal defendant is denied due process when identification evidence admitted at trial stems from a pretrial police procedure that is so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *State v. Benton*, 2001 WI App 81, ¶ 5, 243 Wis. 2d 54, 625 N.W.2d 923 *(quotation marks and quoted authority omitted).* The United States Supreme Court has explained that misidentification, not suggestiveness, is "the primary evil to be avoided" when evaluating police practices resulting in an out-of court identification. *Neil v. Biggers*, 409 U.S. 188, 198 (1972). For, "[i]t is the likelihood of misidentification which violates a defendant's right to due process." *Id.* Thus, while "[s]uggestive confrontations are disapproved because they increase the likelihood of misidentification," it is the "unnecessarily suggestive ones [that] are condemned for the further reason that the increased chance of misidentification is gratuitous." *Id.*

When challenged, each pretrial identification "must be considered on its own facts," and will be set aside only if the "identification procedure was so impermissibly suggestive as

to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377, 384 (1968).

This Court has succinctly explained its approach in cases where a challenge is made to an out-of-court identification:

> In reviewing a trial court's determination whether a pretrial identification should be suppressed, we apply the same rules as the trial court. First, we decide whether the pretrial procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. The defendant has the initial burden on this issue. If the defendant shows that the procedure was impermissibly suggestive, the State must prove that the identification was reliable under the totality of the circumstances in order for the identification to be admissible.

Benton, 2001 WI App 81, ¶ 5 *(quotation marks and quoted authority omitted*).

On review of a motion to suppress an out-of-court identification, appellate courts employ a two-step analysis. *State v. Dubose*, 2005 WI 126, ¶ 16. The circuit court's "'findings of evidentiary or historical fact'" are upheld "'unless they are clearly erroneous.'" *Id. (quoting State v. Kieffer*, 217 Wis. 2d 531, 541, 577 N.W.2d 352 (1998)). Whether those facts demonstrate a violation of the defendant's constitutional rights "presents a question of law, which [appellate courts] review de novo." *Id*.

The law in Wisconsin requires each law enforcement agency to "adopt written policies for using an eyewitness to identify a suspect upon viewing the suspect in person or upon viewing a representation of the suspect. The policies shall be designed to reduce the potential for erroneous identifications by eyewitnesses in criminal cases." §170.50(2), Wis. Stats. Each law enforcement department, in drafting the polices, "shall consider model policies" and "factors that influence an eyewitness to identify a suspect or overstate his or her confidence level in identifying a suspect". §§170.50(4) & (5), Wis. Stats. Furthermore, each "agency shall biennially review policies" relating to its line-up procedures.

In the instant case, *neither teller identified Mr. Garcia* as the bank robber after a complete viewing of the line-up. Based on the instructions given by the detective, it was possible that the robber was not among the individuals in the line-up. The instructions *did not* say that the witnesses should fail to mark some or all of the numbers associated with individuals as either "yes" or "no" and then mark that response at a subsequent showing. The instructions told the witness to take as much time as you need. It was only after the detective, in violation of the Model Policy, asked if the witnesses wanted to see the line-up again, that one of the witnesses decided that Mr. Garcia, Number 4, *the only number not circled "yes" or "no" on her PC-25*, was the person who committed the robbery. That procedure, making a decision about one, and only one,

member of a line-up was tantamount to having only one person appear in the line-up at all.

While it is true that all six members of the line-up were viewed again, the witnesses each had only one number that they had not already eliminated, thus their focus was only on one person, number 4, the defendant, Nelson Garcia. Even the officer running the line-up that knew that a focused line-up on one person was not a fair proceeding. Consider his testimony:

> Q. All right. Now, when someone indicates that they would like to see the line-up again, a particular number, would there ever be a case where you would bring out just that particular number?
>
> A. No. I always instruct them the exact same way that if they want to see just one (1) or two (2) people in the line-up, we would have to show them the entire line-up over.
>
> Q. Why?
>
> A. Just to make it fair to the person whose line-up it is.

R86, p. 93.

Only in a world of "alternative facts" can a distinction be made between viewing a single person, and viewing the only person who was not checked off one way or the other the first time. [7]

[7] Nor can a defense of the line-up procedure be made based on an argument that "this is how it is always done." Considering that argument in the context of other Constitutional claims show how

Furthermore, the PC-25 form and the instructions that were used updated on "12/05", some seven years prior to the lineup. R18, pp.11-12. The detective running the line-up, as noted above, was doing what he had been taught to do by other detectives, including knowingly ignoring the Model Policy's admonition of offering to do a second viewing prior to a witness asking for one because of the impact that has on the identification's reliability. The policies and practices of the Milwaukee Police Department utilized in the identification procedures violated the statutes; the line-up was *per se* illegal and should therefore be suppressed.

Given that the procedures utilized by the police were unduly suggestive, the question turns to the reliability of Dean's identification in spite of the police practices. *Dubose*, 2005 WI 126, ¶ 24. To answer that question, courts look to the totality of the circumstances surrounding the identification, *Biggers*, 409 U.S. at 199, because "evidence from a suggestive identification would [nonetheless] be admissible if a court can find it reliable under the totality of the circumstances," Dubose, 2005 WI 126, ¶ 24.

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absurd that would be. ("The State has *always* struck all of the Black jurors from the jury panel. The police *always* beat suspects with a rubber hose until they confess. The police *always* enter a home and search it before deciding if they should get a warrant.") If indeed this practice is normal, the question is, how many people have been convicted because of wrongly conducted line-up procedures?

The Supreme Court has established five "factors to be considered in evaluating the likelihood of misidentification." *Biggers*, 409 U.S. at 199-200. They are,

> the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Id. at 199-200; see also Dubose, 2005 WI 126, ¶ 24 (*enumerating same criteria).*

The third and fourth criteria make suppressing the identification appropriate.

Regarding the accuracy of the witness's prior description, the victim teller testified as follows:

> Q Do you remember what the bag looked like?
>
> A It was dark in color, like a—like a grocery recycle bag.
>
> Q Like a canvas bag?
>
> A Yes.
>
> Q Do you remember at one point telling the police that it was green?
>
> A Yes.

Q Later did you think perhaps it was a different color?

A Yes. It was dark in color. I knew it wasn't a bright blue. I knew what it wasn't, but I was nervous, and so it was a dark green or blue bag. Grocery bags are those colors, so I assumed.

Q Why were you nervous?

A I was scared.

R89, 58-59.

Q Did you give them a description of what this person looked like?

A Yes.

Q Do you remember generally what that description was?

A Yes.

Q What was that?

A I said he was about 5'4, 165. It was hard to tell because, he had a heavy coat on, like a down-filled black jacket, with a navy blue hood, and a tan knit cap with--cap with a visor.

R89, p.63

Q …[Do] you remember talking to Detective Anderson, who is to the right of the district attorney, on the day of the robbery?

A Yes.

Q And do you remember them asking you about whether the actor was wearing gloves or not?

A Yes.

Q And do you remember-- Do you recall telling Detective Anderson that you did not believe that the suspect was wearing any type of gloves?

A Yes.

Q But we saw in the security video, which you say you've seen before, as the robber was exiting that the robber had clearly had gloves on his hand. Do you remember seeing that on the first video she showed you today?

A Yes.

Q So you're wrong about whether the suspect wore gloves or not, correct?

A Correct.

Q And you also told the police--Detective Anderson that the suspect was 5'4, correct?

A I'm 5'4, and when I was addressing him, he seemed to be the same height as I. That's where I got 5'4 from. He didn't seem taller than me. Seemed like I could look right at him, so—

Q That's perfectly legitimate.

You had a form that you filled out for the bank. They have an ID form; is that correct?

A Yes.

Q And in that form you wrote down that the actor was 5'4 inches, correct?

A Yes

R89, 77-78.

The teller is very sure about the description she gave (even though she was wrong about gloves, and the color of the bag she was handed), she was even able to particularize why she knew the robber was 5'4" tall: he was standing directly in front of her and he didn't seem any taller than she.

However, the arresting officer recorded Mr. Garcia's height.

Q And is there somewhere on that, is that a report that you generated on or about the time that you arrested Mr. Garcia?

A Yes.

Q And if you look at that report, will you -- will it refresh your recollection as to Mr. Garcia's height?

Q And without reading the form, can you tell me what his height is?

…

A He's listed as five foot, nine inches.

R92, p. 23.

Regarding the level of certainty demonstrated by the witness at the confrontation, it has already been noted that she could not identify Mr. Garcia before the impermissibly suggestive second viewing.

Thus, two key factors point to the likelihood of misidentification. The other witness was never able to identify Mr. Garcia in the line-up procedure.

The testimony from the victim witness should have been suppressed; the judgment of conviction should be vacated and the case remanded to the circuit court for a trial without the identification testimony of the teller witnesses.

C. The Court Erred in Revoking Mr. Garcia's Right to Represent Himself.

The court trial court erred in denying Mr. Garcia to exercise his right of self-representation.

In *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525 (1975), the Supreme Court established that the Sixth Amendment—by its text, structure, and history—guarantees to every criminal defendant the "right to proceed without counsel when he voluntarily and intelligently elects to do so." 422 U.S. 806, 807 (1975). The Court has repeatedly emphasized that "respect for the individual . . . is the lifeblood" of our Constitution. E.g.,

Illinois v. Allen, 397 U.S. 337, 350-51, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970), (*Brennan, J., concurring*).

Thus, even though in most criminal cases a defendant would be better served with the assistance of counsel "than by [his] own unskilled efforts," an individual's choice to represent himself generally "must be honored out of 'that respect for the individual.'" *Faretta*, 422 U.S. at 834 (*quoting Allen*, 397 U.S. at 350-51).

When a defendant knows the risks of forgoing counsel and voluntarily elects to assume those risks, the principle of individual liberty—enshrined in the Constitution—commands that his decision be respected, in order that he may present his defense. Even to his detriment, a criminal defendant remains the captain of his own fate.

The Court recognized that cases could arise where the conduct of a defendant in exercising his right to self-representation, would be so disruptive to the court proceedings that it would make a shamble of a trial, and set forth procedures to be followed in the event that there was such an occurrence. *Faretta*, 422 U.S. at 834, fn. 46.

> We are told that many criminal defendants representing themselves may use the courtroom for deliberate disruption of their trials. But the right of self-representation has been recognized from our beginnings by federal law and by most of the States, and no such result has thereby

> occurred. Moreover, the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct. *See Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353. Of course, a State may—***even over objection by the accused***—appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary. *See United States v. Dougherty*, 154 U.S.App.D.C. 76, 87 89, 473 F.2d 1113, 1124—1126.
>
> The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law. Thus, whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'

Faretta, 422 U.S. at 834, fn. 46 ***(emphasis added)***.

Thus, the first mistake that the court made was to seek the permission of Mr. Garcia in appointing a stand-by counsel, much less a stand-by counsel that Mr. Garcia did not want. His consent was irrelevant. The court committed Constitutional error, however, when it denied Mr. Garcia's right to self-reorientation because he wanted to make sure he understood what the court was asking him. As shown above, after answering, simply and succinctly, no less than twenty-five questions poised to him by the court, Mr. Garcia, wanting to make sure he understood the choice the court was giving him(a

choice that he shouldn't have had to make because he was not required to agree to any stand-by counsel) began his answer to the court "If I understand, correctly, Your Honor -", at which point the court stated "Well, this has convinced me right here that there is something going on with Mr. Garcia. Under these circumstances, I can't believe that because this would make a mockery out of the system. He won't answer the Court's questions." *Supra*.

Trying to understand a court's question is not the standard for losing a Constitutional right under the standard set forth by the Court in its reference to *Illinois v. Allen.*

That standard is much higher.

> We cannot agree that the Sixth Amendment, the cases upon which the Court of Appeals relied, or any other cases of this Court so handicap a trial judge in conducting a criminal trial. The broad dicta in *Hopt v. Utah*, *supra*, and *Lewis v. United States*, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892), that a trial can never continue in the defendant's absence have been expressly rejected. *Diaz v. United States*, 223 U.S. 442, 32 S.Ct. 250, 56 L.Ed. 500 (1912). We accept instead the statement of Mr. Justice Cardozo who, speaking for the Court in *Snyder v. Massachusetts*, 291 U.S. 97, 106, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934), said: 'No doubt the privilege (of personally confronting witnesses) may be lost by consent or at times even by misconduct.' Although mindful that courts must indulge every reasonable presumption against the loss of constitutional rights, *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019 1023,

> 82 L.Ed. 1461 (1938), we explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.

Illinois v. Allen, 397 U.S. 337, 343-44, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970) *(footnotes omitted).*

In the instant case, the defendant's conduct rose nowhere near the level of disruptiveness described by the Supreme Court. Courts routinely admonish counsel in the course of proceedings, to hold a *pro se* defendant to a higher standard than that is unreasonable.

Moreover, the court erred because it never gave Mr .Garcia the opportunity to be re-instated as his own counsel, which the *Allen* court mandates.

> Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.

Allen, 397 U.S. at 344.

Thus, as the Seventh Circuit, citing *Faretta* and *Imani v. Pollard, 826 F.3d 939 (7th Cir., 2016)*, stated, the court must grant a properly requested right to self-representation.

> The Constitution guarantees all defendants the right to counsel during a criminal trial. *Faretta v. California*, 422 U.S. 806, 807 (1975). it is equally well established, however, that a criminal defendant may waive that right and proceed *pro se* when he knowingly and voluntarily elects to do so. *Id.* at 834-35. ***When such a waiver is timely made by a competent defendant, a trial court may not deny it.*** *Imani v. Pollard*, No. 14–3407, 826 F.3d 939, 943-45, 2016 WL 3434673, at *3 (7th Cir. June 22, 2016).

United States v. Banks, 828 F.3d 609, 614 (7th Cir., 2016). ***(bold emphasis added)***.

In the instant case, the defendant made a clear and unequivocal request to represent himself, and the trial court granted it, but held that Mr. Garcia forfeited the exercise of that right by his conduct. The excuse the used in revoking Mr. Garcia's right to self-representation fails to meet Constitutional muster; and, without allowing Mr. Garcia the opportunity to regain the ability to exercise his right to self-representation after it was stripped from him, was also a constitutional error.

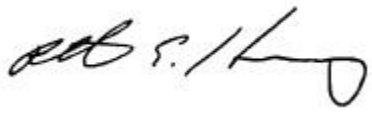
CONCLUSION

The trial court erred as a matter of law when it held that Mr. Garcia was not entitled to legal representation at the line-up,

and therefore should have suppressed testimony regarding the identification made there. Independent of that error, the court should have suppressed testimony regarding the identification made at the line-up because the procedures used at the line-up were unduly suggestive and promoted misidentification. Independent of either of those errors, the court erred as a matter of law when it ruled Mr. Garcia forfeited the right to represent himself.

As a result of any of these errors, Mr. Garcia's judgment of conviction should be vacated, and his case remanded to the circuit court for a new trial.

Dated: August 8, 2017



Robert E. Haney
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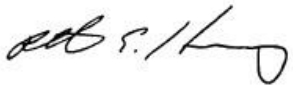
FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is.1097 words.

August 8, 2017



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CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.62(4)(b)

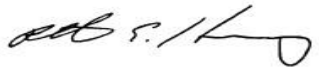
I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.62(4)(b).

I further certify that: This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

August 8, 2017



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CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with §809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the records have been so reproduced to preserve confidentiality and with appropriate references to the record.

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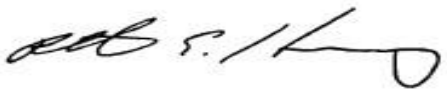

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