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

REPLY BRIEF AND APPENDIX OF THE DEFENDANT/APPELLANT

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REPLY TO THE STATE'S STATEMENT OF THE CASE

In reply to the State's Statement of the case, Mr. Garcia would make several important observations.

First, on page two of the State's Response, the State maintains that both Mr. Ridley and Ms. Patek identified Mr. Garcia as being the person depicted in photographs made from surveillance footage in the bank. Response, p. 2. The source for this statement is the testimony of Lt. Spano, not the witnesses themselves. Response p. 2.

This is what Mr. Ridley testified to at trial on direct examination by the State:

> Q. Did you also look at a photo and say that that was, in fact, Nelson Garcia?
>
> A. His mug shot, yes, I did.

R90: p. 62.

Regarding the photo from the surveillance footage, Mr. Ridley testified as follows when asked about his signature on that photograph:

> Q. On that photo?
>
> A. Yes.
>
> Q. And why was it that you put your signature on that photo?
>
> A. I believe I said it resembles him. I don't believe I said it is him.
>
> Q. Now, in addition to the signature of yours, that's your handwriting. Did you, also, in your own handwriting put the date?

A. I'm not -- I'm not quite sure. I may have.

Q. Now, you're saying today that you said that it was -- that it resembled Mr. Garcia?

A. Yes. I did not say it was him.

Q. You did not say it was him?

A. No. I did not.

R90: p. 66.

Q. And you put your name and initials on that photo?

A. Yes, I did.

Q. Stating that only it resembled him?

A. I believe so. That were my exact words, ma'am.

R90: p. 67.

The State even pressed Mr. Ridley further on this point after testimony disclosed that Mr. Ridley and Mr. Garcia had a conversation regarding the discovery in this case while they were both assigned to the same pod in the county jail while the case was pending. R90: pp. 102-04. (This portion of the transcript is included in the appendix to this Reply Brief.)

Mr. Ridley maintained this position on cross-examination. R90: pp. 105-06. (This portion of the transcript is included in the appendix to this Reply Brief.)

Ms. Patek's testimony was similar when asked about the photo taken from the surveillance footage:

Q And when he showed you this photo, what did you say?

A I-- I didn't know what to say. He said, does this look like him or is this him, and I said I don't know--I didn't know. It--it kind of looks like him. I don't think-- I don't know. It's been a long time. I don't really remember.

Q I'm showing you what's marked as Exhibit 11. Would you please identify what this is for the record?

A A picture of somebody on there and then my signature.

Q So it's a picture with your signature. Did you put your signature on there?

A Uh-huh.

Q Is that a yes or no?

A Yes.
Q And why did you put your signature on there?

A Because the detective told me to. No, he said does this look like him? I said, yeah, it kind of looks likes him.

He said sign this saying it looks like him.

Q Well, actually you had testified that he said either does this look like him, or is this him? Now, which is it?

A I said it looks like him.

Q So you're saying that you said it looks like him?

A Yeah.

R91: pp. 17-18.

Moreover, Det. Spano never contradicted Mr. Ridley's statement about being shown both a mug shot of Mr. Garcia and a photograph from the surveillance footage. *See* R91: pp. 24-37. In fact, Det. Spano testified that instead of having a witness write that the witness positively identifies the person in photograph, he simply has them sign the photograph and writes in his report that the witnesses identified the suspect. R:91, pp. 32-33. (This portion of the transcript is included in the appendix to this Reply Brief.)

Thus, it is only correct to say what the witnesses testified to at the trial; their conflicting testimony means that one cannot say what testimony the jury believed (that of Officer Spano or that of the tellers who participated in the line-up) in deciding that Mr. Garcia was the bank robber.

Another exception taken to the facts set forth by the State is that Mr. Garcia waited until the eve of trial to invoke his right to self-representation, and did so for the purpose of delaying the trial. The final pre-trial was July 13, 2015. Mr. Garcia mailed his motion to proceed *pro se* on April 29, 2015. R:30, p. 3. In it, he never asked for an adjournment of the trial. R:30. At the final pre-trial, he never asked to adjourn the trial. Mr. Garcia knew how to ask for an adjournment, because he had done so in prior court filings. R:39, p. 2, (Page 902 of Appendix to the Brief). It makes sense that Mr. Garcia would ask for an adjournment for new counsel to prepare a defense, but he would not ask for an adjournment, because he was prepared. Moreover, the State cannot point to anywhere in the transcript where such a request was made by Mr. Garcia. In fact, Mr. Garcia wrote to the court when his first attorney asked to withdraw for medical reasons, asking that she not be allowed to withdraw so close to his trial date. R20. (Included in the Appendix to this Reply.)

REPLY ARGUMENT

A. The State's Position On The Initiation Of Criminal Adversarial Proceedings Is Not Based On Current Federal Law

From a procedural standpoint both the State and Mr. Garcia agree that he was arrested without a warrant and that a court commissioner made a judicial determination that there was probable cause to hold Mr. Garcia, and set his bail. Both the State and Mr. Garcia recognize that if criminal adversarial proceedings were initiated by the probable cause determination made by the court commissioner, then Mr. Garcia was entitled to have counsel at the lineup that was subsequently held. Brief, p. 30, Response, p. 5.

Due to some confusion on the part of the state, or at least expressed confusion (Response, p. 6.), Mr. Garcia wants to make it clear that he is not making an argument that he should have been represented when the commissioner reviewed the probable cause statement and set his bail. Mr. Garcia is contending that once those charges were articulated and bail was set restricting his freedom, he was entitled to counsel from that point forward.

The key to this issue is whether criminal proceedings were initiated with the pronunciation of the charges against Mr. Garcia and the setting of his bail.

Initially, the State relies on *Jones v. State*, for the proposition that until a warrant is issued the right to counsel does not attach. Response, p. 5. The problem with this argument and statement of law is that *Jones* is a 1974 case, and the State is trying to use it to show that the United States Supreme Court's 1992 *Riverside* case, and it's *Rothgery* case, from 2008, were made inapplicable by its writing.

The State does address language from *Rothgery* stating there are two elements to determine whether criminal proceedings

have commenced: a probable cause determination and the setting of bail. Brief, pp. 26-27.

Why was Mr. Garcia being held in jail? Because bail had been set against him. Why was there bail? Because a determination had been made that probable cause existed to believe that he had committed a crime.

Thus, criminal adversarial proceeding had commenced against Mr. Garcia and from that point forward, he was entitled to counsel under the Sixth Amendment. As noted in the Brief, the intuition of criminal proceedings by the filing of a document by the police with a court official, as opposed to a prosecuting attorney, makes no difference in determining when the adversarial process has been initiated. Brief, p. 31 *(quoting Rothgery* at 2589*).*

The State ignores the two Eastern District cases, *West* and *Mitchell,* which held that the process used in Milwaukee County for deciding bail based on a determination of probable cause to believe a crime has been committed by a court commissioner triggers the requirement of the right to counsel for pre-trial lineups. Brief, p. 27.

There is a timeline that can be followed regarding this Sixth Amendment jurisprudence. That time line is as follows:

> First in 1974, as articulated in the *Jones* case, the right to counsel attached upon the filing of the criminal complaint.
>
> Second, in 1992, *Riverside* was decided by the United States Supreme Court, requiring that there must be a determination of whether probable cause exists to continue to hold an individual in custody, and imposing bail.
>
> Third, following the *Riverside* decision, States, including Texas and Wisconsin, amended their laws to reflect the *Riverside* requirements within

> a 48-hour period. In Wisconsin this included the process overseen by the court commissioner, while in Texas it was the implementation of the initial hearing described *Rothgery*.
>
> Fourth, following *Rothgery*, states were forced to recognize that the procedures that had been put in place to implement *Riverside*, whether originally intended to or not, initiated adversarial criminal proceedings under the Sixth Amendment. (This includes Alabama, Maryland, North Carolina, South Carolina, and, Texas. Brief, p. 29.)
>
> Fifth, the Eastern District of Wisconsin, in harmony with Seventh Circuit Jurisprudence, recognized that the finding of probable cause and the setting of bail by court commissioners in Milwaukee County triggers one's right to counsel, specifically in the context of a pre-trial line-up. Brief, pp. 24-27.

The essence of the State's argument is that because there was no involvement by a prosecuting attorney, the court commissioner's determination cannot be the initiation of legal proceedings. This argument was rejected by the Supreme Court.

> [A]n 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 [within 48 hour a determination] for every arrestee." .... The answer, though, is that the State has done just that, subject to the option to change its official mind later. The State may rethink its commitment at any point: it may choose not to seek indictment in a felony case, say, or the prosecutor may enter *nolle prosequi* after the

> case gets to the jury room. But without a change of position, a defendant subject to accusation after [a judicial determination of probable cause and the setting of bail] is headed for trial and needs to get a lawyer working, whether to attempt to avoid that trial or to be ready with a defense when the trial date arrives.

Rothgery, 128 S.Ct. at 2590.

Thus, Mr. Garcia was entitled to have an attorney present at the line-up, so the conviction should be reversed, the matter remanded to the circuit court, and evidence resulting from the line-up excluded from any future trial.

B. The State's Own Attorney General Says The Line-Up Procedure Was Impermissibly Suggestive.

Regarding the lineup, the instructions that were to be followed mandated that each witness to the lineup take their time and mark the Box below each number yes or no. R:3, pp. 2-3.

In fact, the exact instructions were:

> You should not feel you have to make an identification. It's important to exclude innocent persons as it is to identify the perpetrator. Individuals will be shown to you one at a time and there are no particular order. Take as much time as you need to look at each one and after each individual I'll 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 in answering the questions. Upon conclusion of this process, you'll be interviewed by an investigator.

R:3, pp. 2-3.

That was not done during the first viewing by either of the eyewitnesses. None of the instructions included an option of

asking to have a second opportunity to view the lineup. The second viewing was overly suggestive per the standards set by the Wisconsin Department of Justice: the form being used by the witnesses no longer contained 6 boxes to mark; rather, they contained one empty box. The second viewing was not a disinterested showing of all six participants; instead it was a viewing of a single person.

This was borne out by what one of the witnesses herself said:

> [Officer] ... Does anybody have a question any questions or would you like to see the lineup a second time?
>
> Female: What?
>
> Officer: Would you like to see the lineup a second time? That's., that's all the participants.
>
> Female: Just one. Can I see one just one
>
> Officer: What we'll do is we'll have everyone come out one at a time.
>
> Female: Ok.
>
> Officer: Ok? Is that ok? Any questions?
>
> Female: Well I just.. I thought we could see like one individual.

R:3, p. 4.

Ironically, the failure of the police to have the witnesses follow directions (to mark yes or no after viewing each suspect) and to then conduct a second viewing (where the witnesses are interested in only one person, not all six), would probably not have happened if Mr. Garcia had a lawyer present to insure there would be no irregularities at the line-up.

Nonetheless, by conducting what amounted to a one-person line-up, the procedure used by the police (even it is what they always do), was impermeably suggestive.

In fact, the State, by Attorney General Van Hollen, acknowledges that suggesting a second viewing to the witnesses, who did not make a positive identification of anyone after the first viewing, is impermissibly suggestive. R:3, pp. 25-26.

> k. Request for Additional Viewing. Only upon request of the witness, the witness may view one or more of the subjects again after the lineup has been completed. If this occurs. it must be thoroughly documented. The lineup administrator should never suggest additional viewing.
>
> > *Explanation*: Allowing a witness to view a lineup a second time converts the procedure from a sequential to a quasi-simultaneous lineup, thereby risking the benefits of the sequential procedure. In the interest of facilitating an identification, a witness who asks to see the lineup a second time may be permitted to do so, ***but because this diminishes the value of the identification it should not be offered without request***.

R:3, pp. 25-26 ***(emphasis added).*** (J.B. Van Hollen, Attorney General, Wisconsin Department of Justice, *MODEL POLICY AND PROCEDURE FOR EYEWITNESS IDENTIFICATION*).

The impermissibly suggestive procedure used at the line-up changed the results of the line-up from having no one identified by either witness, to having both witnesses identify Mr. Garcia. The trial court's ruling on the admissibility of the line-up evidence should be reversed, the judgment vacated, and the case remanded to the circuit court for further proceedings.

C. Once The Court Granted The Invocation To Proceed Pro Se, There Were No Sufficient Grounds To Revoke That Invocation And Not Allow Rehabilitation.

The State admits that "the court made the initial finding that Garcia validly waived his right to counsel". Response, p. 26.

That admission means the question is not should Mr. Garcia have been allowed to represent himself, but rather did the court have grounds to revoke the right after the right was granted?

The State points to all sorts of behavior by Mr. Garcia that it claims justifies revoking the right that had been granted by the court. The problem is, of course, that the complained of behavior all happened *prior* to the time the court initially granted Mr. Garcia the right to self-representation.

As discussed in the Brief, after granting that right, the only misbehavior that Mr. Garcia engaged in that could in any way be called disruptive, was that he was attempted to clarify what the court had said about what it perceived was his request that Mr. Bihler be allowed to be his standby counsel. Mr. Garcia never asked the court to make Mr. Bihler his standby counsel, and as he tried to explain the court's misinterpretation of his written request, the court shut him down and revoked his right to represent himself.

As noted in the Brief, the standard for *revoking* the right to self-representation after it has been granted is disruption *in front of the jury*. The State does not deny this, therefore it cannot argue that the trial court had grounds to revoke Mr. Mr. Garcia's right to representation.

At best, the State's argument is, that the court, if it had considered things differently, could have denied Mr. Garcia the right to represent himself, if in fact he was asking for an

adjournment to delay the trial, based on that fact coupled with its version of past behaviors.

Whether the court could have made that initial ruling differently is irrelevant to this case. The issue is not should the court have granted him that right, but rather once granted did the court have grounds to take it away and deny Mr. Garcia the right to rehabilitate himself.

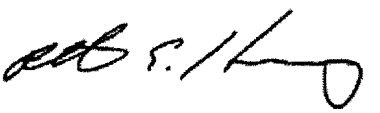
As noted in the Brief, Mr. Garcia had, or should have had, the ability to rehabilitate himself and continue with his representation. Mr. Garcia was given no chance to rehabilitate himself in the court.

Because the trial court improperly revoked the right to self-representation after granting it, and because it never allowed Mr. Garcia the ability to rehabilitate himself, fuss allowing him to represent himself in front of the jury, the Judgment of conviction should be vacated, and the matter returned to the Circuit Court for further proceedings.

CONCLUSION

Based on all of the above, the judgment of conviction should be vacated, and evidence from the line-up suppressed at any future trial.

Dated December 19, 2017



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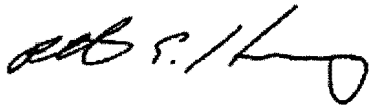
FORM AND LENGTH CERTIFICATION

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 2983 words.

Dated December 19, 2017



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CERTIFICATE OF COMPLIANCE
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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.

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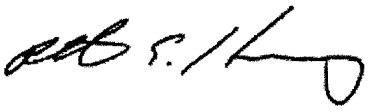

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CERTIFICATION OF APPENDIX

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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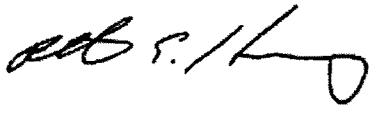

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