STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2016AP1276-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NELSON GARCIA, JR.,

Defendant-Appellant-Petitioner.

On Review of a Decision in the Wisconsin Court of Appeals Affirming a Judgment of Conviction in the Milwaukee County Circuit Court, the Honorable William S. Pocan presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

OTHER AUTHORITIES CITED

ISSUES PRESENTED

1. Does a defendant have a Sixth Amendment right to counsel at a lineup that is conducted after a court commissioner finds probable cause and sets bail in a proceeding intended to comply with *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991)?

Both the circuit court and the court of appeals ruled that no right to counsel attached at the probable cause proceeding.

2. Is a lineup procedure impermissibly suggestive when it violates the requirements of the Department of Justice *Model Policy and Procedure for Eye-Witness Identification*?

Should this Court abandon the *Biggers/Brathwaite*[1] reliability test in favor of a rule excluding identifications resulting from such lineup procedures?

The circuit court and the court of appeals applied the current standards governing challenges to lineups and other eyewitness identification evidence. Under those standards, both the circuit court and the court of appeals concluded that the evidence was admissible.

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[1] *Neil v. Biggers*, 409 U.S. 188 (1972), and *Manson v. Brathwaite*, 432 U.S. 98 (1977).

3. Was Mr. Garcia denied his constitutional right to represent himself at trial when the trial court hypothesized at a pretrial hearing that he would be disruptive if allowed to proceed *pro se*?

The circuit court denied Mr. Garcia's request to proceed *pro se*. The court of appeals upheld that decision.

STATEMENT OF THE CASE AND FACTS

On December 27, 2011, a man robbed a branch of the M & I Bank on Oklahoma Avenue in the City of Milwaukee. The man entered the bank and handed a teller a note which read, "This is a robbery. Put the money in the bag. This is no joke." (1: 1). Police collected surveillance video from the bank, which showed the robber. (89: 31-34). In an effort to identify the man, the police released portions of the surveillance video to the media. The police received tips about multiple possible suspects, including Mr. Garcia. (89: 35, 36).

On January 2, 2012, Mr. Garcia was arrested. (86: 12; App. 127). When interviewed by police the next day, he invoked his right to counsel and did not make a statement. (86: 13; App. 128).

Judicial Determination of Probable Cause:

On January 4, 2012, a police detective assigned to the case filled out a form known as a "C.R. 215"

which set forth the probable cause to believe that Mr. Garcia had committed the bank robbery. (2; App. 238; 86: 14-15; App. 129-130). Police prepared the C.R. 215 because they were aware of the constitutional requirement that in order to continue to hold a suspect in custody there must be a judicial finding of probable cause within 48 hours of arrest. (86: 23; App. 138).

That same day, a Milwaukee County court commissioner reviewed the C.R. 215 and made a finding of probable cause to believe that Mr. Garcia violated Wis. Stat. §943.87 which prohibits robbery of a financial institution. The commissioner set bail at $50,000 cash. (86: 15, 26-27; App. 130, 141-42; 2: 2; App. 139). Milwaukee County's procedure required that police take the C.R.215 form to the court commissioner in either the preliminary hearing or intake courtroom. (86: 24-25; App. 139-140). While Mr. Garcia was in custody at the time that the police presented the C.R. 215 to the commissioner, he was not present in the courtroom. (86: 30-31; App. 145-146). Police understood that once the bail was set, Mr. Garcia would be released from custody if he posted the $50,000. (86: 29-30; App. 144-145).

Although bail was set following the probable cause determination, the district attorney's office had not yet filed a formal complaint. (86: 15; App. 130). Police did not present the C.R. 215 to the district attorney's office for approval. (86: 17; App. 132).

Lineup:

Later that day, Milwaukee police officers conducted an in-person lineup which they presented to two bank tellers—one to whom the robber spoke (D.L.) and another who witnessed the interaction (B.C.). Mr. Garcia was included in the lineup in the No. 4 position. (86: 14, 27, 67; App 129, 132, 162).

The lineup administrator, Detective Patrick Pajot, gave each teller Milwaukee Police Department Form PC-25, Supplement Report, which gave instructions about the lineup procedure. (86: 59; App. 154). Those instructions were also read verbatim to the tellers. (86: 9-16; App. 124-131).

At the completion of the lineup, neither teller identified Mr. Garcia as the bank robber on the PC-25 forms. (89: 43-48, 81). Prior to reviewing the tellers' PC-25 forms, Detective Pajot asked them if they had any questions or would like to see the lineup again. (86: 63, 74-75; App. 158, 169-170). The detective testified that he had conducted hundreds of lineups and that he asked that question "almost every time." (86: 63; App. 168). When the detective asked D.L. if she wanted to see the lineup again, he did not know that she had not circled "yes" or "no" on the form for the person in the No. 4 position. (86: 70; App. 165).

One of the tellers asked to see one person again, and the other asked to see one or two people again, but they did not give position numbers for those individuals. (86: 64; App 159). The detective

told them that he would have to show them the entire lineup again. (86: 64; App 159).

After the second lineup viewing, B.C., the teller who witnessed the robbery but did not speak to the suspect, still had not circled either "yes" or "no" under No. 4 on her PC-25 form; she said that the person in the No. 4 position "seemed to have the same youthful face and facial features" as the person she saw rob the bank. However, she stated that she was not positive it was him and ultimately circled "no" on the form. (86: 66; App. 161; 89: 46-48). At trial, she testified that she had been "70 percent certain" that suspect No. 4 in the lineup was the robber. (89: 47).

After the second viewing of the lineup, D.L., the teller who had interacted with the suspect, circled the word "yes" under the No. 4 on her PC-25. (86: 68; App. 163). She stated that she was 100 percent positive that No. 4 was the robber. (86: 67; App. 162). She said the same thing at trial. (89: 72; App. 167). When asked what stood out about Mr Garcia that caused her to identify him during the lineup, D.L. testified, "He had a very nice complexion, and that sealed the deal. I recognized him." (89: 72; App. 167). D.L. identified Mr. Garcia as the robber in court. (89: 70).

Detective Pajot testified that D.L. told him she had concentrated solely on the robber's face because he had a hood up over his head. She stated that No. 4 had the same complexion color, shape of mouth and height as the robber. (86: 68-69; App. 163-164). The

detective testified that D.L. told him that "when the defendant came out during the first lineup, she believed that that was the person who had robbed the bank. She asked to see the lineup the second time because there was some facial hair that looked a little bit different on him." (86: 69; App. 164). D.L. told police the robber was 5'4" tall. (89: 77-78). Mr. Garcia is 5'9" tall. (92: 23).

Detective Pajot testified that he learned how to do lineups both from working with other detectives and, at detective training school, where he was taught using the Wisconsin Department of Justice *Model Policy and Procedure for Eye-Witness Identification*. [2] (App. 210-237; 86: 73-74; App. 168-169). The DOJ's Model Policy emphasizes that the line-up should only be viewed once and that additional viewing should occur "only upon request of the witness." (Model Policy, 20; App. 229). The Model Policy directs that "the line-up administrator should never suggest additional viewing." (Model Policy, 21; App. 230; 86: 72; App. 168).

The Model Policy contains the following explanation of the importance of limiting a lineup to a single viewing:

> [A]llowing a witness to view a line-up a second time converts the procedure from a sequential to a quasi-simultaneous line-up, thereby, risking

[2] *Available at:* http://www.doj.state.wi.us/dles/tns/EyewitnessPublic.pdf

> the benefits of the sequential procedure… studies have shown that a sequential procedure is much more reliable than running one (1) back to back….

(Model Policy, 121; App. 230; 86: 74; App. 169).

Detective Pajot knew from his training that he was not supposed to show a witness the lineup a second time, unless the witness asked for a second viewing without suggestion from the lineup administrator. (86: 73-74; App. 168-169). The detective explained the discrepancy between the DOJ Model Policy and the procedure he used by drawing a distinction between "asking" and "suggesting." He said, "I had asked if anyone had any questions or would like to see it a second time. I didn't suggest that they should see it a second time." (86: 75; App. 170).

Pretrial proceedings:

On January 7, 2012, Mr. Garcia was charged with robbery of a financial institution in violation of Wis. Stat. §§943.87 and 939.50(3)(c). (1).

Mr. Garcia was represented by six different attorneys during the pendency of this case. On April 24, 2012, Attorney Nathan Opland-Dobbs, moved to withdraw at Mr. Garcia's request. The court granted the motion. (68: 2-4). Attorney Melissa Fitzsimmons was then appointed. On November 26, 2012, the date set for the jury trial, Attorney Fitzsimmons moved to withdraw due to medical issues. (72). That motion

was granted. Attorney Louis Epps made one court appearance and told the court that the State Public Defender would be appointing a private bar attorney. (73).

Attorney Thomas Harris was then appointed. On May 23, 2013 he filed a motion to suppress the lineup identification. (17). On November 14, 2013, Mr. Garcia filed a pro se motion to amend the suppression motion. (18). On December 9, 2013, Attorney Harris moved to withdraw as counsel on the basis that Mr. Garcia had filed a complaint against him with the Office of Lawyer Regulation. (22). The court granted that motion. (75: 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. (75: 4).

At a status conference on March 27, 2014, Mr. Garcia expressed concerns about the suppression motion that had been filed, but not yet heard, including Mr. Garcia's belief that his fifth attorney, Paul Bonneson, did not appear to want to pursue that motion, because he thought it lacked legal merit. (77: 3-8). Mr. Garcia told the court that he believed case law he had provided to Attorney Bonneson supported his belief that he had been entitled to counsel when the lineup was conducted. (77: 12-13). Mr. Garcia included specific citations to legal authority:

> 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 told the court that a recent federal district court decision, which he identified as *United States v. West*, also supported his claim that he was entitled to counsel at the lineup. (77: 14-15). The court, over Mr. Garcia's objection, 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 kept Attorney Bonneson on the case. (77: 16-25). However, the court indicated that it found Mr. Garcia competent to represent himself. (77: 17).

Shortly thereafter, on April 7, 2014, Attorney Bonneson filed a motion to suppress the lineup identification. The legal argument advanced in the motion was the same argument Mr. Garcia had previously articulated in court, citing *Rothgery vs. Gillespie County,* 554 U.S. 191 (2008), and *United States v. West*, No. 08-CR-157, 2009 WL 5217976 (E.D. Wis. Mar. 3, 2009). (27).

Subsequently, on July 21, 2014, Mr. Garcia filed a motion to proceed *pro se*. (30). On July 24, 2014, Attorney Bonneson orally moved to withdraw.

The court took the motion under advisement pending judicial rotation to the successor court. (83: 2-16). On August 13, 2014, the case had been transferred to the Honorable William S. Pocan, who, granted Attorney Bonneson's motion to withdraw. The court did not address Mr. Garcia's request to proceed pro se. (84: 2-16).

Attorney Douglas Bihler was appointed as Mr. Garcia's sixth attorney, and on April 21, 2015 the court held a hearing on the motions to suppress the lineup identification filed by Attorneys Harris and Bonneson. (86). 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. (86: 81-91). The court denied the motion. (86: 104; App. 186).

The court then addressed Mr. Garcia's motion to proceed *pro se*. Although Mr. Garcia had filed the motion, the court addressed Attorney Bihler:

> 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.

(87: 7; App. 192). But Attorney Bihler was wrong. That was not what Mr. Garcia wanted. In his written motion, Mr. Garcia asked for an order directing Attorney 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." (35: 1). Mr. Garcia did not request that Mr. Bihler remain as stand-by counsel or in any capacity.

The court then engaged Mr. Garcia in a colloquy to determine whether he was competent to represent himself. (87: 9-14; App. 194-199). The court asked him 24 questions about, among other things, his understanding of his right to counsel, his education, his language proficiency, his understanding of the charges against him, and his understanding of the potential benefits of counsel and drawbacks of self-representation. Mr. Garcia gave succinct, appropriate answers to all of these questions. (87: 9-14; App. 194-199).

During the colloquy, the court ascertained that Mr. Garcia understood that if he proceeded pro se there would be "no one in the courtroom" whose responsibility it was to look after Mr. Garcia and protect his legal rights. (87: 13; App. 198). But the court continued to operate under the incorrect assumption that Mr. Garcia was asking that Attorney Bihler be appointed as stand-by counsel. (87: 13-14; App. 198-199).

> 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.

(87: 13-14; App. 198-199)(emphasis added).

Although the court advised Mr. Garcia that the court believed he was making a mistake, the court ultimately declared:

> 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.

(87: 18; App. 202). The court then finally asked, "Is that, indeed, what you want?" (87: 18; App. 202). Mr. Garcia responded:

> 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.

(87: 16-20; App.200-204).

The judge added the following justification for his decision:

> Quite frankly, and I will let the record reflect, the record would otherwise not have any way of knowing this, but Mr. Garcia has, as the record will indicate, he's been argumentative with the Court.
>
> He refuses to answer the Court's direct questions. He says he wants to make a speech to the point where, of course, the record would not be clear, the deputy actually got up from his chair. He was standing next to him.
>
> Because, of course, the deputy knows that this is the sort of situation which might require me to removing (sic) Mr. Garcia from the courtroom.
>
> During the trial, all parties must show respect to the Judge and to the jury so that we can proceed.
>
> Mr. Garcia has not been able to do that even at this simple motion hearing.

(87: 22-23; App. 206-207).

The Trial:

Attorney Bihler represented Mr. Garcia at trial. The State presented evidence D.L.'s identification of Mr. Garcia from the lineup and in court and B.C.'s uncertain identification from the lineup. The State also presented testimony that police spoke to three people who knew Mr. Garcia and told them that Mr. Garcia was a suspect in the bank robbery. Police displayed a still photograph taken from the surveillance video to the three witnesses. (91: 28-29; 92: 35-36). Two of the witnesses

said that they were certain that the photo depicted Mr. Garcia. (91: 24, 28-29). The prosecutor conceded in closing that the photo was "not going to win picture of the year for clarity." (93: 11).

The jury heard that the release of the surveillance video to the public also resulted in callers who identified various other possible suspects. (89: 35, 36). Some of the callers indicated that they were 100 percent certain that the robber in the video was a Mark Johnson. (89: 36-37). Mr. Johnson was able to prove that he was not in Wisconsin at the time of the robbery. (89: 37).

Following the three-day trial, Mr. Garcia was found guilty. (93: 78-81). The court sentenced him to a 25-year prison term with fifteen years of initial confinement. (57).

At sentencing, Mr. Garcia maintained his innocence. (94: 27).

Appellate proceedings:

Mr. Garcia appealed. He argued that the lineup should have been suppressed because he was denied the right to counsel and because the lineup was unnecessarily suggestive and unreliable in violation of his constitutional right to due process. He also argued that the circuit court deprived him of his constitutional right to represent himself.

The court of appeals affirmed on all grounds. *State v. Garcia*, Case No. 2016AP1276-CR (Slip op.

April 10, 2018). The court upheld the circuit court's denial of Mr. Garcia's motion to suppress the lineup identification. The court held that the proceeding at which the court commissioner found probable cause and set bail did not trigger a right to counsel. (Slip op., at 13; App. 113). The court further held that Mr. Garcia had failed to show that the lineup was "so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification." (Slip op., at ¶42; App. 118). Finally, the court held that Mr. Garcia was not unconstitutionally deprived of the right to represent himself because he forfeited the right by his conduct. (Slip op., ¶ 48; App. 122).

This Court granted Mr. Garcia's petition for review.

ARGUMENT

I. The probable cause proceeding initiated adversary criminal proceedings against Mr. Garcia such that he was entitled to counsel at all critical stages that followed, including the lineup.

In *United States v. Wade*, 388 U.S. 218 (1967), and *Gilbert v. California*, 388 U.S. 263 (1967), the United States Supreme Court held that a post-indictment pretrial lineup at which the accused is exhibited to identifying witnesses is a critical stage of the criminal prosecution. The Court held that police conduct of such a lineup without notice to and in the absence of counsel denies the accused his Sixth (and

Fourteenth) Amendment right to counsel. *Gilbert*, 388 U.S. at 272. Testimony regarding an identification occurring as a result of such a lineup is inadmissible at trial unless the defendant makes an intelligent waiver of his Sixth Amendment right to counsel. *Wade*, 388 U.S. at 231, 237.

In *Kirby v. Illinois*, 406 U.S. 682 (1972), the Court held that the right to counsel attaches "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Id.*, at 689.

Here, prior to the lineup, Mr. Garcia was arrested, and a detective assigned to the case filled out a form known as a "C.R. 215" which set forth the probable cause to believe that Mr. Garcia had committed the bank robbery. (86: 14-15; App. 129-130; 2: 1; App. 138). The form was taken to a court commissioner presiding in a courtroom. (86: 24-25; App. 139-140). The court commissioner reviewed the C.R. 215 and made a finding of probable cause to believe that Mr. Garcia committed the crime of robbery of a financial institution. The commissioner set bail at $50,000 cash. (86: 15, 26-27; App. 130, 141-142; 2: 2; App. 139). Mr. Garcia was in custody at the time that the police presented the C.R. 215 to the commissioner, but he was not present in the courtroom. (86: 30-31; App. 146-46).

This procedure is the method used by the Milwaukee County Circuit Court to comply with

County of *Riverside v. McLaughlin*, 500 U.S. 44 (1991), which requires that a judicial determination of probable cause be made within 48 hours of an arrest. (86: 23; App.138; Slip op. ¶ 21).

At issue here is whether the proceeding at which the court commissioner made a determination of probable cause to believe that Mr. Garcia committed the bank robbery and set his bail was "the initiation of adversary judicial criminal proceedings," *Kirby,* 406 U.S. at 689. If so, then the lineup that was conducted later that day was a critical stage of the prosecution at which Mr. Garcia was as much entitled to the aid of counsel as at his trial. *Wade*, 388 U.S. at 237.

Kirby was decided long before *Riverside* and could not have addressed whether the various hearing procedure adopted by different jurisdictions in order to meet the minimum requirements of *Riverside* would initiate adversarial criminal proceedings and trigger the right to counsel. However, since *Riverside*, the Court decided *Rothgery v. Gillespie Cty., Tex.*, 554 U.S. 191, 211, 128 S. Ct. 2578, 2590 (2008), which shed light on the matter. [3]

[3] In *Rothgery* the Court addressed the question whether adversarial criminal proceedings were commenced in the context of a civil rights action under 42 U.S.C. §1983 premised on Gillespie County, Texas' failure to appoint counsel to Rothgery following a probable cause hearing.

Rothgery involved a probable cause proceeding nearly identical to the one in this case. The Supreme Court described it as follows:

> The arresting officer submitted a sworn "Affidavit Of Probable Cause" that described the facts supporting the arrest and "charge[d] that ... Rothgery ... commit[ted] the offense of unlawful possession of a firearm by a felon-3rd degree felony," After reviewing the affidavit, the magistrate judge "determined that probable cause existed for the arrest." The magistrate judge informed Rothgery of the accusation, set his bail at $ 5,000, and committed him to jail, from which he was released after posting a surety bond.

Id., at 196. The hearing occurred without any involvement of a prosecutor. *Id.,* at 198. The Court held that this probable cause hearing marked the commencement of adversary criminal proceedings against Rothgery, such that he was entitled to counsel at all critical stages of the prosecution that followed. The Court said:

> This Court has held that the right to counsel guaranteed by the Sixth Amendment applies at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty. The question here is whether attachment of the right also requires that a public prosecutor (as distinct from a police officer) be aware of that initial proceeding or involved in its conduct. We hold that it does not.

Id., at 194.

Just as in *Rothgery*, at the proceeding in this case, probable cause was found by a judicial officer based on a sworn police statement, cash bail was set, and Mr. Garcia was informed of the charge against him. The only distinction is that Rothgery, unlike Mr. Garcia, physically appeared before the judicial officer.

In Mr. Garcia's case, the court of appeals found this distinction to be dispositive. (Slip op., ¶ 27; App 111). The court noted that in *Rothgery* the Supreme Court referred to the "first appearance." 554 U.S. at 194. Thus, the court of appeals concluded that the holding of *Rothgery* is limited to a hearing where the defendant *physically* appears.

This attempt to distinguish *Rothgery* is flawed in a few ways. First, there is no reason to suppose that when the Court said "first appearance" it must have meant only a *physical* appearance by the accused. While it is true that Rothgery physically appeared before the judicial official, nothing in the opinion suggests that the Supreme Court found this fact dispositive.

Besides, such a literal reading of the Supreme Court's language in this regard would invalidate Milwaukee County's probable cause procedure. In *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, the Supreme Court held that the Fourth Amendment requires a prompt judicial determination of probable cause as a prerequisite to an extended pretrial

detention following a warrantless arrest. The Court's task in *Riverside* was determining what "prompt" meant. *Riverside,* 500 U.S. at 47. The Court in *Riverside* described *Gerstein* as requiring that "persons arrested without a warrant must promptly be *brought before* a neutral magistrate for a judicial determination of probable cause." *Id.,* at, 53, citing *Gerstein*, 420 U.S. at 114 (emphasis added). If the requirement of *Gerstein* and *Riverside* that the arrestee be promptly "brought before" a magistrate requires literal compliance, then Milwaukee County's procedure for complying with *Riverside and Gerstein* is inadequate, and Mr. Garcia's rights under those decisions were violated when he was not physically brought to court.[4]

But despite the Supreme Court's "brought before" language, this Court has held that compliance with *Gerstein* and *Riverside* does not require a physical court appearance by the accused. *State v. Koch*, 175 Wis. 2d 684, 698, 499 N.W.2d 152, 160 (1993). If an accused can be figuratively "brought before" a magistrate on paper, there is no basis to conclude he cannot figuratively "appear" on paper as well.

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[4] Mr. Garcia was arrested on January 2, 2012, and he did not make a physical appearance in court until January 7, 2012 (63). Arguably, such a literal reading of *Gerstein* would also invalidate the proceedings used in a number of counties where the accused appears by video.

Finally, to allow the right to counsel to rise or fall on the presence or absence of a physical appearance at the hearing elevates form over substance to an absurd degree. In such a universe, an accused in another county that brings arrestees to court for the probable cause determinations has the right to counsel at a subsequent lineup, but the Milwaukee County arrestee does not simply because Milwaukee County has chosen to dispense with the inconvenience of walking him to court. Such an arbitrary distinction cannot dictate when constitutional rights attach.

In *United States v. West*, No. 08-CR-157, 2009 WL 5217976 (E.D. Wis. Mar. 3, 2009), the federal district court was presented with essentially identical facts and concluded that the "paper" probable cause procedure used in Milwaukee County was sufficient to initiate adversarial criminal proceedings and trigger the right to counsel at subsequent critical stages. That court rejected the same rationale the court of appeals has applied here to try to distinguish *Rothgery*. The court in *West* aptly observed:

> A conclusion regarding a defendant's Sixth Amendment right to counsel based on form, i.e. the physical appearance before a judicial officer, rather than substance, i.e. a judicial officer finding probable cause, fixing bail, and the arrestee being informed of the preliminary charges against him, would lay the groundwork for absurd results that are antithetical to constitutional aims.

Id., at 9. See also, *United States v. Mitchell*, No. 15-CR-47, 2015 WL 5513075 (E.D. Wis. Sept. 17, 2015), *aff'd,* 657 F. App'x 605, 2016 WL 6427284 (7th Cir. 2016).

The absurdity of the result of relying on such a superficial distinction is clearer still when one compares the protections afforded to those arrested pursuant to warrants versus warrantless arrestees under such a scheme. This Court has said that adversary judicial proceedings which trigger the right to counsel are initiated with the filing of a criminal complaint or the issuance of an arrest warrant. *State v. Harris,* 199 Wis.2d 227, 235 n. 3, 544 N.W.2d 545 (1996) (citing ***Jones*** *v. State,* 63 Wis.2d 97, 105, 216 N.W.2d 224 (1974)). And this Court has also made the following observation about the probable cause determination required under *Gerstein* and *Riverside*:

> The post-arrest probable cause determination is required to fulfill *the same function* for suspects arrested without warrants as the pre-arrest probable cause determination fulfills for suspects arrested with warrants. In both cases, a neutral magistrate is required to determine whether there is probable cause to believe an offense was committed by the suspect. The probable cause determination which is made when an arrest warrant is issued obviously does not involve an adversary hearing or personal appearance; therefore, these should not be requirements for a probable cause determination following a warrantless arrest.

State v. Koch, 175 Wis. 2d 684, 698, 499 N.W.2d 152, 160 (1993) (Internal citations omitted, emphasis added). An arrest warrant triggers the right to counsel. The *Riverside* post-arrest probable cause determination serves the same function as the pre-arrest probable cause determination required for an arrest warrant. Neither proceeding requires a physical appearance by the accused. Consequently, there is no principled basis to conclude that although the pre-arrest proceeding triggers the right to counsel, the post-arrest proceeding—which serves the same function—does not.

The court of appeals also found it constitutionally significant that unlike the CR-215 form used in Milwaukee County, the form in *Rothgery* used the word "charges." The court of appeals emphasized that no criminal "charges" had been filed against Mr. Garcia. (Slip op., ¶28). This is a false distinction. The Supreme Court in *Rothgery* was plainly not referring to the filing of formal "charges" by a prosecutor, as the Court specifically held that the probable cause proceeding initiated adversary criminal proceedings and triggered the right to counsel regardless of whether a prosecutor was even aware of the proceeding. *Rothgery*, 554 U.S. 205-06. When the Court in *Rothgery* spoke of "charges" it was plainly referring to accusations. Thus, the Court held that the probable cause proceeding was "the point at which the arrestee [was] formally apprised of the accusation against him." *Id.*, at 195. The accusation in *Rothgery*, like the one here, was an accusation by a police officer.

The court of appeals declared that the CR-215 form "did not accuse or charge Garcia." (Slip op., ¶28). The form stated: "I have probable cause to believe that the arrested person committed the following offense(s) . . . Robbery Of Financial Institution 943.87." The form went on to state, "I believe the person committed this offense because" and then summarized the evidence against Mr. Garcia. (2: 1; App. 238). Under any definition of "accusation," this form contained one.

The court of appeals intimated that perhaps it was significant that Mr. Garcia had not pointed to anything in the record to show that he was "informed" of this accusation, *i.e.*, served with a copy of the form. (Slip op., ¶ 26, n. 1; App. 111). But the procedure Milwaukee County used required that the form be provided to the accused. The pre-printed form bore a "distribution" direction that specifically included "Arrested Person/Counsel." (2: 2; App. 239). This stands to reason. Setting bail serves no conceivable purpose if the accused is not told about it.

Whether the right to counsel has attached cannot turn on whether the particular jurisdiction has chosen a *Riverside* review that is completed by way of an entirely paper process or through an arrestee's physical appearance before a judicial officer. Under *Rothgery,* adversary judicial criminal proceedings are initiated with a judicial officer finding probable cause to sustain the arrest, fixing bail, and informing the arrestee of the preliminary charges upon which he is being held. It is this

utilization of the "judicial machinery" that signals a commitment to prosecute and thus triggers an arrestee's right to counsel under the Sixth Amendment. *Id.* at 211-212. As the Court made clear in *Rothgery,* a police officer can set the "judicial machinery" in motion without a prosecutor even being informed of a defendant's arrest.

Mr. Garcia was unconstitutionally denied counsel at his lineup. The identification that resulted was inadmissible at trial and should have been suppressed. See *Wade*, 388 U.S. at 230. D.L.'s in-court identification must be suppressed as well absent proof by the State by clear and convincing evidence that it derived from a source independent of the lineup. *Id., at* 240.

II. The lineup procedure was unduly suggestive, the result was unreliable, and the identification should have been suppressed.

A. Overview of the law regarding due process and the exclusion of identifications resulting from suggestive procedures.

To prevent the injustice that occurs because of mistaken eyewitness identification evidence, the Supreme Court held in *Stovall v. Denno*, 388 U.S. 293 (1967), that a criminal defendant has a due process right to exclude evidence derived from improper pretrial identification procedures. The current state of the law of the United States Supreme Court in this

area is encapsulated in its decisions in *Neil v. Biggers*, 409 U.S. 188 (1972) and *Manson v. Brathwaite*, 432 U.S. 98 (1977). Those decisions set forth a two-prong test that Wisconsin has adopted. *State v. Powell*, 86 Wis. 2d 51, 271 N.W.2d 610 (1978).

Under this test, the court must first decide whether the identification procedure was unduly suggestive. If it was, then the court must determine whether the evidence should be admitted anyway because it is nonetheless reliable as judged by a five-factor test. The factors include:

> [1] the opportunity of the witness to view the criminal at the time of the crime, [2] the witness' degree of attention, [3] the accuracy of the witness' prior description of the criminal, [4] the level of certainty demonstrated by the witness at the confrontation, and [5] the length of time between the crime and the confrontation.

Biggers, 409 U.S. at 199.

Under this approach, the "linchpin" of the admissibility question is whether the eyewitness evidence is reliable. *Brathwaite*, 432 U.S. at 114; *Powell*, 86 Wis. 2d at 63-66. The defendant has the initial burden to show that the identification procedure was unduly suggestive. If he does so, then the burden shifts to the State to show that the identification was nonetheless reliable under the totality of the circumstances. *Powell,* 86 Wis. 2d at

66.[5] Once the defendant shows that the out-of-court identification was improper, the state has the burden of showing that the subsequent in-court identification derived from an independent source and was thus free of taint. *Id*.

Whether an identification is tainted by a suggestive lineup procedure is a question of law subject to *de novo* review. *State v. Benton*, 2001 WI App 81, ¶ 5, 243 Wis. 2d 54, 60, 625 N.W.2d 923.

B. D.L.'s identification of Mr. Garcia should have been suppressed under existing law because the lineup was unduly suggestive, and the State did not prove that the result was nonetheless reliable.

Here, Mr. Garcia moved to suppress the lineup identification, arguing that the lineup procedure was unduly suggestive and that the State could not establish that the result was nonetheless reliable. (26). Mr. Garcia maintains that under existing law,

[5] In its decision in this case, the court of appeals conflated the two prongs of the due process inquiry into one question. The court incorrectly stated that the five *Biggers* factors are used to determine whether the procedure was impermissibly suggestive (the first prong) when they are actually used to evaluate whether, although suggestive, the procedure resulted in an identification that was nonetheless reliable (the second prong). Having made that mistake, the court then incorrectly assigned to the defendant the burden of proof as to the five *Biggers* factors. (Slip op., ¶¶32-34, 42; App. 114, 118).

the lineup identification should have been suppressed.

The lineup procedure was unduly suggestive. The police detective who conducted the lineup asked the witnesses if they wanted to see the lineup again. (86: 63, 74-75; App. 158, 169-170). He did this even though he was trained to conduct lineups using the Wisconsin Department of Justice Model Policy and Procedure for Eye-Witness Identification. (86: 73-74; App. 168-169). He knew that he should not show a witness the lineup a second time, unless the witness asked for a second viewing without suggestion from the lineup administrator. (86: 73-74; App. 168-169).

The Model Policy explains that when conducting photo arrays and lineups, "[w]itnesses viewing photo arrays and lineups should view the suspect and fillers one at a time (sequentially) rather than all at once (simultaneously)." (Model Policy, 5; App. 214). The Model Policy goes on to explain why this matters:

> When witnesses are given a simultaneous presentation of multiple photographs or lineup subjects, they tend to make relative judgments, comparing one person to the next and identifying the person who looks the most like the actual perpetrator. Obviously, this tendency does not pose a problem if the perpetrator is present in the array—because if the perpetrator is present, selecting the person who looks the most like the perpetrator will lead to selecting the correct person. However, when the perpetrator is absent from the array, witnesses still tend to make

> identifications of the person in the array who looks the most like the suspect. If the perpetrator is absent from the array, that person will be a filler or an innocent suspect. To overcome this tendency, researchers have learned that presenting subjects one at a time—sequentially—helps witnesses to make absolute judgments rather than comparative ones. Studies show that witnesses given a simultaneous presentation make approximately twice as many identifications of innocent people as witnesses shown a sequential presentation.

(Model Policy, 5 (footnotes citing scientific studies omitted); App. 214).

Even when a proper sequential lineup is conducted, the benefits of that procedure are lost if the witnesses are allowed to view the lineup more than once. The Model Policy explains:

> 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….

(Model Policy 21; App. 230; 86: 74; App. 170).

Therefore, the Model Policy emphasizes that the individuals in a lineup should be viewed only once and that additional viewing should occur "only upon request of the witness." (Model Policy, 20; App. 229). The Model Policy directs that "[i]f this occurs, it

must be thoroughly documented. The line-up administrator should never suggest additional viewing." (Model Policy, 20-21; App. 229-230; 86: 72; App. 167).

Here, although the detective was trained with the Model Policy, he did not follow it. He offered no reason why departing from the policy was necessary. Aside from his feeble protestation that he merely "asked" but did not "suggest" (86: 75; App. 170), the detective could offer no explanation except to say that was how he had always done it. (86: 63; App. 158). It was only after viewing the lineup a second time that D.L. became 100 percent positive that suspect No. 4 was the robber. (86: 68; App. 163; 89: 47).

It is important to bear in mind that Mr. Garcia was only in the lineup in the first place because he resembled the suspect in the surveillance video and, unlike Mr. Johnson, who was also identified from the video, Mr. Garcia was unable to provide an iron-clad alibi. Nothing else connected Mr. Garcia to the crime. The lineup was conducted in a manner that increased the likelihood that the witnesses would compare the subjects and choose the one who most closely resembled the robber. This Court has recognized the "relative judgment" danger. See *State v. Hibl*, 2006 WI 52, ¶ 40, 290 Wis. 2d 595, 612, 714 N.W.2d 194, 202. This lineup was suggestive.

Although the State had the burden at the suppression hearing to prove the identification was nonetheless reliable, the State did not call D.L. and

presented very little testimony bearing on reliability. Regarding the first factor—the witness' opportunity to view the suspect during the crime—the only evidence was that D.L. was the teller who interacted with the robber, and he was wearing a hood. The State did not present evidence regarding the length of time she was able to view the robber. (86). Later, at trial, it would be established that less than a minute passed between the robber entering the bank and leaving. (89: 34-35; 38). The robber stood opposite the witness for only part of that time, and she had to look away for part of that time to comply with the robber's demands. (89: 60). In addition to a hood that was pulled up, the robber was also wearing a hat with a visor. (89: 63).

Regarding the second factor—the witness's degree of attention—the detective testified that D.L. told him that she "concentrated solely on the perpetrator's face because he had a hood up over his head. And this person had the same complexion colored, shape of his mouth, and his height was the same." (86: 67-68; App. 162-163). Regarding the third factor—the accuracy of the witness' prior description—the State presented no evidence. The State presented no evidence establishing that D.L. was correct in her assessment that Mr. Garcia's height was the same as the height of the robber she had described to police. Later at trial it would be established that D.L was wrong about the height match. She originally described the robber as 5'4" and said "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—" (89: 78). Mr. Garcia is 5'9" tall. (92: 23). Additionally, D.L. said the robber had not worn gloves, although the surveillance video established that he had (89: 43), and she said the bag he handed her for the money was green when it was not. (89: 58-59).

Regarding the fourth factor—level of certainty—the detective testified that D.L. was 100 percent positive after the second run-through of the lineup. (86: 67-68). Regarding the fifth factor—the amount of time between the crime and the lineup—eight days had passed. The passage of time does not weigh either in favor of or against reliability.

The only factors that really militated in favor of reliability were the witness's "concentration" on the robber's face and her level of certainty. However, the witness's concentration is counterbalanced by the very short period of observation, the presence of the hood and brimmed hat, and the obvious stress of the situation.[6] And the witness's certainty only materialized after the second viewing of the lineup, which afforded her the opportunity to compare the

[6] Not surprisingly, the witness would later testify at trial that she had been "nervous" and "scared." (89: 58-59). The ill-effects of stress on the accuracy of eye-witness identifications is well-known. See Deffenbacher, et. al., *A Meta–Analytic Review of the Effects of High Stress on Eyewitness Memory,* 28 Law & Hum. Behav. 687, 694 (2004) (analyzing 27 studies).

participants and confirm that Mr. Garcia was the one who looked most like the robber she remembered.

In its decision, the court of appeals skipped the question of suggestiveness and simply applied the five *Biggers/Brathwaite* reliability factors. Opinion, ¶ 40; App. 117). The court ruled that the identification was reliable. This was likely due to in part to the fact that the court improperly assigned the burden of proof regarding reliability to Mr. Garcia. (Slip op., ¶ 42; App. 118). Furthermore, the court trivialized the detective's departure from proper lineup procedure, ignoring the "relative judgment danger"—the reason *why* allowing witnesses to view a lineup twice compromises the results.

Mr. Garcia maintains that under *Biggers* and *Brathwaite,* D.L.'s identification should have been suppressed because the State did not prove that the results of the unnecessarily suggestive procedure the detective employed were nonetheless reliable. *Powell,* 86 Wis. 2d at 66. Furthermore, D.L.'s in-court identification of Mr. Garcia should have been suppressed as well because the State failed to prove that it derived from an independent source and was free of the taint of the improper lineup. *Powell*, 86 Wis. 2d at 65-66.

If this Court declines to fashion a new rule, as Mr. Garcia suggests below, then this Court should require that the *Biggers/Brathwaite* reliability factors be rigorously applied. The science surrounding eyewitness identification demonstrates

that the *Biggers/Brathwaite* test will do nothing to lessen the danger of false convictions unless it is applied with considerably more rigor than it was in this case.

The test is meaningless if it can be passed, as here, with perfunctory testimony by the detective that the witness said that she got a good look at the criminal and she is "positive" about her identification. The burden of producing some true indication of reliability must be correctly assigned to the State, and that burden must be meaningful.

C. This Court should reject the outdated *Biggers/Brathwaite* reliability test in cases such as this and fashion a rule that accounts for what is now known about the dangers of suggestive procedures and the unreliability of the identifications that result.

Mr. Garcia maintains his innocence. (94: 27). Put simply, he was convicted because he looked like the bank robber. He and a number of other men were called to the attention of police following the release of a poor quality photo from a surveillance video. He was placed in a lineup that was conducted in a manner that encouraged the witnesses to choose the man who most closely resembled the robber. Mistaken eye-witness identifications happen. Innocent men are convicted. See *State v. Avery*, 86-1831-CR (Ct. App. Aug. 5, 1987) (*per curiam*).

Although Mr. Garcia maintains that he should prevail under existing law, the broader issue here—one that should concern this Court—is that the *Biggers/Brathwaite* reliability test that has been static since the 1970's is out-dated and has long been out of step with what is known about the dangers of suggestive procedures and the weaknesses of eyewitness identification.

One serious problem with the existing five-factor reliability test is that the factors do not necessarily relate to reliability at all. Questions were raised about the test not long after it was adopted. *See* Wells *et al.*, *Eyewitness Identification Procedures*, 22 L. & Hum. Behav. at 631. Initially, the questions raised two related points.

First, the five criteria were heavily weighted toward what psychologists call "self-report" variables—that is, variables that are assessed by asking the subject to assess it him or herself. Donald P. Judges, *Two Cheers for the Department of Justice's "Eyewitness Evidence: A Guide for Law Enforcement"*, 53 Ark. L. Rev. 231, 265 (2000). For instance, the witness's opportunity to view is assessed by asking the eyewitness to estimate how long the offender's face was in view and whether the witness's view was blocked during any part of this time. The problem is that self-reports can be very unreliable. In fact, eyewitnesses' estimates of time during witnessing are greatly overestimated, especially when there is stress or anxiety at the time of witnessing, and the proportion of time that a person's face is blocked is

greatly underestimated by eyewitnesses. Rosenberg, *Rethinking the Right to Due Process*, 79 Ky. L. Rev. at 278-79. In effect, relying on self-reports means the very eyewitness whose memory is being called into question is being asked to assess his or her own memory.

Second, as other courts have noted, the *Biggers/Brathwaite* reliability criteria are not particularly relevant to eyewitness identification accuracy. *See State v. Long,* 721 P.2d 483, 488-91 (Utah 1986). Indeed, some of the factors are "flatly contradicted" by empirical studies. *Id.,* at 491. For instance, the empirical evidence does not show a close correspondence between the description given by the eyewitness and the likelihood that the identification is accurate. Rosenberg, *Rethinking the Right to Due Process*, 79 Ky. L. Rev. at 277. Similarly, the empirical evidence shows that a witness's confidence in the accuracy of his or her identification is not strongly related to accuracy at all. Wells *et al.*, *Eyewitness Identification Procedures* 22 L. & Hum. Behav. at 621-22. Yet a jury is very likely to be impressed by such confidence and to "overbelieve" the witness as a result. *Id.* at 620-21, 624. *See also Brian L. Cutler and Steven D. Penrod, Mistaken Identification: The Eyewitness, Psychology and the Law* (1995). In this case, D.L. testified to being "one hundred percent" confident in her identification (86: 67-68; App. 162-163), a number that the research suggests would have impressed the jury although it bore no relationship to actual reliability.

Some time ago, this Court rejected the *Biggers/Brathwaite* reliability test in cases involving one-person showup identifications. *State v. Dubose*, 2005 WI 126, ¶ 33, 285 Wis. 2d 143, 699 N.W.2d 582, 593. The Court said, "Over the last decade, there have been extensive studies on the issue of identification evidence, research that is now impossible for us to ignore." *Id.*, at ¶29. The Court cited numerous works of legal and scientific scholarship and reached the following conclusion:

> These studies confirm that eyewitness testimony is often "hopelessly unreliable." The research strongly supports the conclusion that eyewitness misidentification is now the single greatest source of wrongful convictions in the United States, and responsible for more wrongful convictions than all other causes combined. In a study conducted by the United States Department of Justice of 28 wrongful convictions, it determined that 24 (85 percent) of the erroneous convictions were based primarily on the misidentification of the defendant by a witness. In a similar study conducted by the Innocence Project at the Benjamin Cardozo School of Law, mistaken identifications played a major part in the wrongful conviction of over two-thirds of the first 138 postconviction DNA exonerations. These statistics certainly substantiate Justice William J. Brennan, Jr.'s concerns in *Wade* that "the annals of criminal law are rife with instances of mistaken identification."

Id., at ¶ 30 (citations omitted). With regard to showup identifications, this Court announced:

> [W]we now adopt a different test in Wisconsin regarding the admissibility of show-up identifications. We conclude that evidence obtained from an out-of-court showup is inherently suggestive and will not be admissible unless, based on the totality of the circumstances, the procedure was necessary.

Id., at ¶ 33. Although *Dubose* was limited to showup identifications, its rationale applies as well to other flawed identification procedures. Thirteen years have passed since this Court decided *Dubose*, and the United States Supreme Court has yet to reconcile its due process jurisprudence in this area with scientific reality. Mr. Garcia asks this Court to step into this void.

In the interest of fundamental fairness, Mr. Garcia proposes that this Court fashion a rule excluding identifications resulting from a photo array or lineup when: (1) it was conducted simultaneously rather than sequentially, or (2) the administrator departed from the Model Policy in such a way as to convert the sequential array or lineup into a simultaneous or quasi-simultaneous one, unless doing so was necessary. There are a number of ways the Court can fashion such a rule.

First, the Court can extend the rationale in *Dubose* and base a new rule on Article I, Section 8 of the Wisconsin Constitution. *Id*., at ¶ 36.[7] The Court

[7] Undersigned counsel acknowledges that the petition for review did not specifically ask that his Court consider (continued)

in *Dubose* described the state constitutional justification for its new rule regarding the admissibility of showup evidence:

> We find strong support for the adoption of these standards in the Due Process Clause of the Wisconsin Constitution, Article I, Section 8. It reads in relevant part: "No person may be held to answer for a criminal offense without due process of law...." Based on our reading of that clause, and keeping in mind the principles discussed herein, the approach outlined in *Biggers* and *Brathwaite* does not satisfy this requirement. We conclude instead that Article I, Section 8 necessitates the application of the approach we are now adopting, which is a return to the principles enunciated by the United States Supreme Court's decisions in *Stovall, Wade*, and *Gilbert*.

Id., at ¶39. Again, although *Dubose* was limited to showup evidence, much of its rationale applies as well to other flawed identification procedures.

Article I, Section 8 of the Wisconsin Constitution as a basis for a rule barring the admissibility of the lineup. Mr. Garcia asks that the Court overlook this, as undersigned counsel is successor counsel and did not draft the petition. Mr. Garcia submits that it is not possible to consider the propriety of a new rule of admissibility without considering whether a rule like the one this Court fashioned in *Dubose* is appropriate. Further, the State will have an opportunity to respond to the argument, and it will be fully briefed.

Alternatively, this Court could adopt a new rule based on its "administrative authority to promote the efficient and effective operation of the state's court system," a duty based on Art. VII, sec. 3 of the Wisconsin Constitution. *State v. Jennings*, 2002 WI 44, ¶ 14, 252 Wis. 2d 228, 647 N.W.2d 142, *quoting In re Grady*, 118 Wis. 2d 762, 783, 348 N.W.2d 559 (1984). This administrative power and duty includes "the inherent power to adopt those statewide measures which are absolutely essential to the due administration of justice in the state." *Jennings*, 2002 WI 44, ¶ 14, *quoting In re Kading*, 70 Wis. 2d 508, 518, 235 N.W.2d 409 (1975).

The rule Mr. Garcia proposes would be an appropriate use of this Court's superintending authority much like the rule requiring that juvenile confessions are inadmissible unless recorded. *In re Jerrell C.J.*, 2005 WI 105, ¶ 47, 283 Wis. 2d 145, 699 N.W.2d 110. Here, as in that case, Mr. Garcia "is not asking this court to regulate police practice." Rather, he is requesting a rule governing the admissibility of evidence. *Id.*

This Court does not invoke its superintending authority lightly, *Jennings*, 2002 WI 44, ¶ 15. However, the impact of suggestive procedures and mistaken eyewitness identification evidence is great, not only on the criminal justice system, but also on public trust in that system. Further, flawed identifications affect public safety as well, for when flawed evidence leads to a wrongful conviction, the real perpetrator remains free. These circumstances

make a better approach to eyewitness identification evidence "absolutely essential to the due administration of justice in the state" and therefore justify the court's invocation of its superintending authority.

The rule Mr. Garcia proposes is particularly necessary and appropriate where, as here, the conviction was based entirely on eyewitness identifications with no corroboration in the form of inculpatory statements, physical evidence, or other connection to the crime.

III. Mr. Garcia was unconstitutionally denied the right to represent himself at trial.

Mr. Garcia was not satisfied with his lawyers. His reasons were rational. The circuit court repeatedly suggested to Mr. Garcia that he should just represent himself. (77: 3, 10, 17, 24). Perhaps the court could have forced him to do so, but it did not. Finally Mr. Garcia said he wanted to represent himself and filed a motion two months before the scheduled trial date. (30). The court found him competent and granted his motion, and then turned on a dime and forced him to proceed with a lawyer he did not want. The decision was a function of the trial judge's impatience and not any "serious obstructionist misconduct" on Mr. Garcia's part.

Whether an individual is denied a constitutional right is a question of constitutional fact that this Court reviews independently as a question of law. S*tate v. Cummings*, 199 Wis. 2d 721, 748, 546

N.W.2d 406 (1996). Questions of constitutional fact require the Court to determine what happened and whether the facts found fulfill a particular legal standard. *State v. McMorris*, 213 Wis. 2d 156, 165, 570 N.W.2d 384 (1997). A trial court's findings of historical or evidentiary fact are upheld unless they are clearly erroneous. *Id.* Whether the historical facts satisfy the relevant constitutional standard is reviewed *de novo*. *Id.* An improper denial of a defendant's constitutional right to self-representation is a structural error subject to automatic reversal. *State v. Imani,* 2010 WI 66, ¶ 21, 326 Wis. 2d 179, 197, 786 N.W.2d 40, 49.

In *Faretta v. California*, the defendant declared that he wanted to represent himself at trial. The trial court denied him that right. The United States Supreme Court held that the constitution does not permit a state to "hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense." *Faretta*, 422 U.S. 806, 807 (1975). The Court held that the right to self-representation was grounded in the Sixth Amendment, Due Process, and the common law.

The Court recognized that "in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts." *Id.* at 834. Nonetheless, the Court insisted that "personal liberties are not rooted in the law of averages. The right to defend is personal." The Court declared:

> [A]lthough he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law."

Id., quoting *Illinois v. Allen*, 397 U.S. 337, 350-351 (Brennan, J., concurring).

The Supreme Court in *Faretta* contemplated that some defendants might seek to abuse the right to self-representation. The Court said:

> 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.

Faretta, 422 U.S. at 834, n. 46. The Court cited *Illinois v. Allen*, 397 U.S. 337 (1970), for the proposition that "serious obstructionist misconduct" could be the basis for denying a defendant the right

to represent himself. *Allen* set forth the standard to be used to determine whether a defendant had, by his conduct, forfeited the right to be present at his trial. The Court said:

> 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.*

Allen, 397 U.S. at 343 (emphasis added).

The court of appeals rejected Mr. Garcia's reliance on this language in *Allen*, although *Allen* was the case to which the *Faretta* Court directed him. (Slip op., ¶ 46; App. 120). Instead of the language from *Allen* or *Faretta*'s requirement of "serious and obstructionist misconduct," the court of appeals looked exclusively to this Court's decision in *State v. Cummings*, 199 Wis. 2d 721, 546 N.W.2d 406 (1996), in which the Court said "the triggering event for forfeiture is when the 'court becomes convinced that the orderly and efficient progression of the case [is] being frustrated . . .'" 199 Wis. at 754, n. 15. (Slip op., ¶ 46; App. 120). The Court in *Cummings* drew this language from the decision of the court of appeals in

State v. Woods, 144 Wis. 2d 710, 715, 424 N.W.2d 730 (Ct. App. 1988).

Both *Cummings* and *Woods* involved defendants who refused to cooperate with multiple attorneys in an effort to delay their trials. This Court explained the necessity for the rule it announced:

> Therefore, this court holds that there may be situations, such as the one before us, where a circuit court must have the ability to find that a defendant has forfeited his right to counsel. If it did not, an intelligent defendant such as Newton could theoretically go through tens of court-appointed attorneys and delay his trial for years.

Cummings, 199 Wis. 2d at 756.

Here, the court of appeals did not explain why the *Cummings* standard was the appropriate one to apply to the question whether a defendant who is competent to represent himself has forfeited the right to do so by his pretrial conduct. The court made no mention of *Faretta*'s requirement of "serious and obstructionist misconduct." Instead, the court of appeals decided a case involving the constitutional right to self-representation with only the most cursory reference to *Faretta*.

The *Cummings* standard makes sense where a defendant is manipulating the system to prevent his case from ever going to trial, but it is a poor fit here. It stands to reason that whenever a defendant is permitted to represent himself, the trial will likely be at some moments and to some degree less "orderly" or

"efficient." In fact, even when a defendant is represented, a trial can be rendered more or less orderly and efficient depending on the attorney. To allow a court to rescind the right to self-representation at the first sign of frustration of the trial's "orderly and efficient progression" would grant the court license to rescind the right in virtually every case. That is even more true where, as here, the trial has not yet commenced, and the court speculates that the *pro se* defendant *may* frustrate orderliness or efficiency.

Under *Faretta*, the question here is whether Mr. Garcia "deliberately engage[d] in serious and obstructionist misconduct." 422 U.S. at 834, n. 46. See *Washington v. Boughton*, 884 F.3d 692, 705 (7th Cir. 2018) (citing *Faretta* and noting that the trial court would have been justified in terminating self-representation if defendant sought to "use the courtroom for deliberate disruption of his trial."); *United States v. Brock*, 159 F.3d 1077, 1079 (7th Cir. 1998) (applying *Faretta*'s "serious obstructionist misconduct" standard and finding it met where defendant "refused to cooperate, even minimally, with the court" and obstructionist misconduct persisted even after several contempt citations.)

Furthermore, when answering this question, courts must "indulge every reasonable presumption against the loss of constitutional rights." *Allen*, 397 U.S. at 343, 90 S. Ct. at 1061, citing *Johnson,* 304 U.S. at 464, 58 S.Ct. at 1023.

Here, Mr. Garcia declared that he wanted to represent himself, and the circuit court found, after a thorough colloquy, that he was competent to do so. (87: 18; App. 203). The court asked Mr. Garcia 24 questions to which he gave succinct, direct, and appropriate answers. (87: 9-14; App. 193-198). Then, having concluded that Mr. Garcia was competent to represent himself, the court denied him that right when he gave answers to two questions that frustrated the court. (87: 20; App. 204).

Mr. Garcia's appointed counsel, Attorney Bihler, incorrectly told the circuit court that it was Mr. Garcia's wish that he be appointed as standby counsel. (87: 7; App. 191). The court accepted this assertion and noted that "part of Mr. Garcia's request is to have Mr. Bihler serve as standby counsel. (87: 13; App. 197). The circuit court engaged in a lengthy colloquy with Mr. Garcia, found him competent to represent himself, and indicated it would allow him to do so. (87: 8-13, 15-18; App. 192-197, 199-202). The court said it would appoint Mr. Bihler as standby counsel. (87: 18; App. 202). The court then finally asked, "Is that, indeed, what you want?" (87: 18; App. 202). This was the first opportunity for Mr. Garcia to clarify that he had never requested that Attorney Bihler continue as standby counsel. Mr. Garcia responded:

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

(87: 18; App. 202). In the following exchange, the court stopped Mr. Garcia and directed him to give a simple "yes" or "no" answer to the question whether he wanted to proceed pro se, which he did.

> 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.

(87: 16-20; App. 200-204).

The circuit court was very quick to revoke Mr. Garcia's right to represent himself. It is unknown what Mr. Garcia's "statement" would have been that the court prevented him from making. The judge was certainly acting within his authority when he stopped Mr. Garcia and demanded direct answers to his questions. But it was also perfectly reasonable for Mr. Garcia to want to clarify that he had never asked to have Attorney Bihler as standby counsel, when everybody seemed to think he had, and when his request had actually been that Mr. Bihler have no further involvement in his case. (35).

It was only then that the court shifted from assuming Mr. Garcia *wanted* Mr. Bihler as standby counsel to suggesting that Mr. Bihler would be appointed whether Mr. Garcia wanted it or not. The court was entitled to appoint standby counsel over Mr. Garcia's objection. *Faretta* 422 U.S. at 834, n. 46. However, some slight confusion on Mr. Garcia's part was understandable at that point. Hence, Mr. Garcia's response, "If I understand correctly, Your

Honor--," which displeased the judge. His final transgression was to interrupt the court once immediately after the court interrupted him.

It is worth noting that the judge never warned Mr. Garcia that he was engaging in conduct that might jeopardize his right to represent himself. In the analogous context of forfeiture of the right to counsel through conduct, such warnings are not required, but are "strongly recommended." S*tate v. Suriano*, 2017 WI 42, ¶ 1, 374 Wis. 2d 683, 688, 893 N.W.2d 543, 545. Although a warning may not have been a prerequisite to a finding that Mr. Garcia had forfeited his right to proceed *pro se*, its absence is certainly relevant to whether Mr. Garcia's unsatisfactory answers could fairly be characterized as "serious and obstructionist misconduct."

In an effort to justify the circuit court's decision, the court of appeals pointed to the circuit court's statements after deciding to require Mr. Garcia to proceed with Attorney Bihler. The court of appeals said, "The trial court noted for the record that Garcia's demeanor had been so 'argumentative' that the bailiff had moved to Garcia's side in preparation for removing him from the courtroom if necessary." (Slip op., ¶18; App. 107).

Actually, the circuit court judge's attempt to make a record justifying his decision added very little. The court noted nothing about Mr. Garcia's demeanor that caused concern. There is no mention of him raising his voice, speaking in a disrespectful

tone, having belligerent or agitated body language, etc. In fact, the court was displeased with the words Mr. Garcia spoke—what the court characterized as his desire to "make a speech"—and what the court saw as his refusal to answer the court's questions. And the reference to the deputy rising is unenlightening. All one can really infer is that the deputy anticipated that he might be called upon to remove Mr. Garcia, whether that was based on anything unusual in Mr. Garcia's manner or simply the deputy's experience with the impatience of this particular judge is anyone's guess.

The court again addressed the issue in its ruling on Mr. Garcia's motion to reconsider its decision, reiterating that the basis for its decision had been Mr. Garcia's failure to respond to questions with "yes" or "no" answers and his objection to Attorney Bihler as standby counsel, which the court viewed as a delay tactic—nothing about problematic demeanor or misconduct on Mr. Garcia's part. (97: 3-4).

The court of appeals then searched beyond the hearing for support for the circuit court's position, and found it in Mr. Garcia's "four changes of counsel due to his disagreements with and complaints about them, including to the State OLR, with the resulting trial delays." (Slip op., ¶ 49; App. 122). Perhaps the circuit court would have been justified in concluding that Mr. Garcia had forfeited his right to counsel under *Suriano*, 2017 WI 42. However, Mr. Garcia's tendency to complain about his lawyers, even to the

point of filing OLR complaints, portended nothing about his ability to behave appropriately while representing himself. Once Mr. Garcia waived his right to counsel and was found competent to represent himself, his inability to get along with lawyers became a moot point.

The court of appeals described a record "replete with examples of Garcia's disregard for the constraints of the courtroom and his insistence on making long prepared statements asserting various unfounded legal arguments and accusations." (Slip op., ¶ 49; App. 122). That is not a fair characterization.

An examination of the transcripts of all of the hearings leading up to the court's denial of Mr. Garcia's right to represent himself reveals five court appearances at which Mr. Garcia spoke at any length. (73, 74, 77, 83, 85). In each case, Mr. Garcia had the court's permission to speak, and at no time did he persist in speaking after being told to stop. Mr. Garcia's lengthiest statement occurred at a status conference more than a year before the hearing at which the court addressed Mr. Garcia's motion to proceed *pro se*. (77: 3-8, 10, 12-15). Mr. Garcia sought the permission of the court to read the statement, which the court granted, and Mr. Garcia responded, "Thank you. I really appreciate it." (77: 3). As far as can be ascertained from the record, Mr. Garcia was polite and respectful throughout. Other than to admonish Mr. Garcia to slow down a number of times, the court continued to allow him to speak and

found nothing to fault in his conduct. Ultimately, the court determined that his statement was too long and directed him to file it in writing; he stopped talking. (77: 17).

Mr. Garcia's statements centered around concerns about access to discovery and his attorneys' performance. On two occasions, including the one where Mr. Garcia made his longest statement, his displeasure centered on his attorney's refusal to argue that he was unconstitutionally denied counsel at the lineup—the same argument that is presented at part I of this brief, *supra*. (77: 6-8, 12-15; 83: 6-7). This argument is far from "unfounded." Two branches of the federal district court for the Eastern District of Wisconsin have agreed with Mr. Garcia.[8] It was reasonable for Mr. Garcia to want to make a record regarding a legitimate constitutional argument that his attorney would not raise. The court certainly did not have to allow Mr. Garcia to go on at such length, but he can hardly be accused of "disregarding the constraints of the courtroom" (Slip op., 49; App. 122) when he spoke only with the

[8] *United States v. West*, No. 08-CR-157, 2009 WL 5217976 (E.D. Wis. Mar. 3, 2009); *United States v. Mitchell*, No. 15-CR-47, 2015 WL 5513075 (E.D. Wis. Sept. 17, 2015), *aff'd,* 657 F. App'x 605, 2016 WL 6427284 (7th Cir. 2016).

express permission of the court and was polite. (73: 4; 74: 4; 77: 3, 11; 83: 7; 84:12; 85: 12).

Nothing about Mr. Garcia's behavior at these hearings or at any other time indicated "disregard for the constraints of the courtroom." His tendency to complain at length about his lawyers may have been annoying, but it did not suggest that he would not adhere to the rules of the court at a *pro se* trial. The court of appeals' search of the entire record to support the circuit court's action did not uncover anything suggesting that Mr. Garcia would deliberately engage in serious obstructionist misconduct if he represented himself at trial.

The circuit court went from granting Mr. Garcia the right to represent himself to rescinding it in the space of three pages of transcript based on Mr. Garcia's responses that could, at most, be described as mildly irritating. A judge cannot have such a sensitive trigger and still fulfill his obligation to "indulge every reasonable presumption against the loss of constitutional rights." *Johnson*, 304 U.S. at 464. The circuit court would have done well to heed the advice of the court of appeals in *State v. Seymer*, 2005 WI App 93, 281 Wis. 2d 739, 699 N.W.2d 628. In that case, the court found that the record did not support the trial judge's characterization of Seymer's conduct at his *pro se* trial and that the trial court had improperly terminated Seymer's cross examination of the alleged victim. The court said:

> We are sympathetic to the problems that unrepresented litigants cause trial courts. However, given the constitutional rights in play during criminal trials, trial judges would be well advised to dig into their reserves of patience and understanding when dealing with *pro se* litigants.

Id., at ¶10, n. 6. There is no more evidence of the "argumentative" conduct the trial court described in this case than there was of the "insolent, disrespectful, flippant, and uncivil" conduct the trial court imagined in *Seymer*.

The court of appeals applied the wrong legal standard and relied on an unfair characterization of the record. Neither court "indulge[d] every reasonable presumption against the loss of constitutional rights" *Johnson*, 304 U.S. at 464. Neither court gave Mr. Garcia's constitutional right to represent himself the serious consideration it was due.

CONCLUSION

Mr. Garcia asks that this Court vacate his conviction and order a new trial at which evidence of D.L.'s lineup and in-court identifications of Mr. Garcia shall be excluded.

Dated this 7th day of February, 2019.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 13,161 words.[9]

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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.

Dated this 7th day of February, 2019.

Signed:

PAMELA MOORSHEAD
Assistant State Public Defender

[9] In an order dated February 5, 2019, this Court granted counsel's motion to increase the word limit for this brief to 13,500 words.

CERTIFICATION AS TO 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, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 7th day of February, 2019.

Signed:

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APPENDIX

INDEX
TO
APPENDIX