



LEGAL QUESTIONS ANSWERED

LAWYERS PRESENCE AT A PHYSICAL LINE-UP

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QUESTION: *After a person is charged with a crime and the police are conducting lineups post charging, does a lawyer representing the defendant have a right to be present in the lineup room with the witnesses viewing the lineup?*

ANSWER: To answer this question, we will assume two things. First, we will assume that the phrase "post charging" refers to after the suspect has been "formally charged." Second, we will assume that the lineup is a physical lineup rather than a photographic lineup. It should be noted that photographic lineups are not considered a critical stage in a prosecution; therefore a suspect does not have a right to counsel during a photo lineup.

Now we will consider physical lineups that take place after formal charges (indictment, arraignment, first appearance). In *Gilbert v. California*, the United States Supreme Court addressed this very issue. In *Gilbert*, the defendant was indicted for robbery and murder and was appointed counsel. Approximately sixteen (16) days after the defendant was indicted, the police conducted a physical lineup that included the defendant. The defendant's attorney was not notified and was not present during the lineup. Details of the lineup are as follows:

The lineup occurred on March 26, 1964 after Gilbert had been indicted and had obtained counsel. It was held in an auditorium used for that purpose by the Los Angeles police. Some ten to thirteen prisoners were placed on a lighted stage. The

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witnesses (approximately 100) were assembled in a darkened portion of the room facing the stage and separated from it by a screen. They could see the prisoners but could not be seen by them. State and federal officers were also present and one of them acted as “moderator” of the proceedings.

Each man in the lineup was identified by number, but not by name. Each man was required to step forward into a marked circle, to turn, presenting side profiles as well as a face and back view, to walk, to put on or take off certain articles of clothing. When a man’s number was called and he was directed to step into the circle, he was asked certain questions: where he was picked up, whether he owned a car, whether, when arrested, he was armed where he lived. Each was also asked to repeat certain phrases, both in a loud and in a soft voice, phrases that witnesses to the crimes had heard the robbers use: “Freeze, this is a stickup; this is a holdup; empty your cash drawer; this is a heist; don’t anybody move.”

Either while the men were on the stage, or after they were taken from it, it is not clear which, the assembled witnesses were asked if there were any that they would like to see again, and told that if they had doubts, now was the time to resolve them. Several [witnesses] gave the numbers of men they wanted to see, including Gilbert’s. While the other prisoners were no longer present, Gilbert and 2 or 3 others were again put through a similar procedure. Some of the witnesses asked that a particular prisoner say a particular phrase, or walk a particular way. After the lineup, the witnesses talked to each other; it is not clear that they did so during the lineup. They did, however, in each other’s presence, call out the numbers of men they could identify.ⁱⁱ

Subsequently, at trial, various witnesses identified Gilbert as a perpetrator. Gilbert’s attorney objected, arguing that the witnesses’ in-court identification of Gilbert was tainted by the illegal lineup. Ultimately, the United States Supreme Court heard the case and agreed with Gilbert. The Supreme Court noted that, in the United States *v. Wade*ⁱⁱⁱ, they held that a post indictment physical lineup at which the accused is exhibited to witnesses is a “critical stage” in the criminal prosecution. Defendants are afforded a *Sixth Amendment* right to counsel at “critical stages” of their prosecution.

Additionally, they held that, if the police conduct such a lineup without notice to the defendant’s attorney *and in the attorney’s absence*, they are violating the defendant’s *Sixth Amendment* right to counsel. The rationale behind this rule is that a lineup in the absence of counsel might deny the accused his right to a fair trial by tainting the in-court identification of the suspect. This is due to the fact of the inherent danger of eyewitness identification, the suggestibility of physical lineups, and the unlikelihood that the accused to reconstruct what occurred at the lineup. Therefore, in *Gilbert*, the Supreme Court found that the police violated Gilbert’s *Sixth Amendment* right to counsel by denying him his attorney at the physical lineup. The case was sent back to a lower court to determine if there was some other basis for admission of the in-court identification.

Now to answer the question presented. As previously stated, a defendant has a *Sixth Amendment* right to counsel at a physical lineup if the suspect has been formally charged. The purpose of this right is to allow the defendant's attorney to identify if he or she believes the lineup was impermissibly conducted or impermissibly suggestive in such a manner as to deny the suspect a fair trial by tainting the later in-court identification. As such, the defendant's attorney must be allowed to view the lineup, to see and hear what is said to witnesses and to hear what witnesses may say during the lineup. Therefore, the attorney would need to be in a place where he or she could properly and fully view the lineup and the witnesses and hear what is said in order to protect the rights of the accused.

Note: Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor regarding questions on specific cases. This answer is not intended to constitute legal advice on a specific case.

CITATIONS:

ⁱ 388 U.S. 263 (1967)

ⁱⁱ *Gilbert v. United States*, 366 F.2d 923 (9th Cir. 1967)

ⁱⁱⁱ 388 U.S. 218 (1967)