

## **O. RIGHT TO COUNSEL - LINEUP AND HANDWRITING**

Absent exigent circumstances, a criminal defendant has the right to have his attorney present during any proceeding where "non testimonial" evidence is sought. Of course, the defendant is entitled to abandon or waive this right. The State has the burden to prove that the defendant voluntarily waived his Sixth Amendment right to counsel. In these instances, a written waiver should be obtained. The reason the defendant is entitled to have his/her attorney present is to observe the fairness of the proceedings. The attorney is not permitted to control the proceedings; he/she is there to merely observe. You should consider any suggestions offered by the attorney and, if practicable, implement them.

In the case of "show ups," it may be necessary to proceed without an attorney and it may be done "one on one." "Show Ups" usually occur during late evening or early morning hours when an individual, fitting the description of a suspect involved in a violent crime, is located. The court reasons that it is law enforcement's duty to eliminate suspects as quickly as possible because an armed and dangerous person may still be at large.

The attorney is not entitled to be present at the time the victims or witnesses are viewing photographic lineups, however, all photographs used in the lineup must be preserved as evidence for later court review. A good procedure to follow is to have the witnesses initial all the photographs for identification purposes.

It is possible to obtain "trace evidence" from suspects as incident to arrest. This trace evidence may consist of pubic hair combings, fingernail scrapings, hand swabs for gunshot residue or other possible destructible evidence. If the collection takes place after the arrest, days or even weeks, a court order should be obtained, especially if the evidence sought is blood type, known pubic or head hairs or handwriting samples. This type of evidence does not change.

**RIGHT TO COUNSEL**  
**LINEUP AND HANDWRITING**  
**SELECTED CASES**

**BLUE v State** (Right To Counsel/Lineup) bulletin no. 2. Several hours after a late night robbery, a lineup was conducted in an area where one of the suspects was apprehended. Due to the exigency of the circumstance, the officers were allowed to conduct the lineup without first obtaining an attorney for the defendant.

**ROBERTS v State** (Right to Counsel/Handwriting Exemplars) bulletin no. 5. The defendant, who was in jail, requested and was denied his right to have his attorney present while submitting handwriting samples. The Court ruled that the defendant was entitled to have his attorney present absent a waiver.

**VESSELL v State** (Post Arrest Show Up) bulletin no. 46. A few minutes after an armed robbery, the police seized a suspect and returned him to the scene. Upon return, he was positively identified by the victim/witness. The identification was upheld.

**THIEL v State** (Right to Counsel Prior to Commencement of Adversarial Proceeding) bulletin no. 125. A suspect who is not under arrest, formally charged, or seized cannot bar police initiated contact between an informant and the defendant by invoking his right to counsel during an investigative stop. In this case, a "GLASS" warrant was obtained to record conversations between the defendant and the informant. During this event, there was no actual interference with the defendant's efforts to consult an attorney nor impairment of the attorney/client relationship.

**WHITE v State** (Voice Identification Lineup) bulletin no. 133. Although this case was upheld, it was noted that placing witnesses together during a lineup was not recommended, and that care should be taken to ensure the procedure was not unnecessarily suggestive. Although it was noted that the two witnesses seemed to independently identify the same suspect, consultation between the two witnesses could have resulted in an entirely different outcome.

**DUNBAR v State** (Investigative Vehicle Stop/Search of Glove Compartment) bulletin no. 134. During a legitimate "Terry stop" and a subsequent frisk for weapons of a suspect in a vehicle, it is permissible to look inside an unlocked glove compartment for weapons since this compartment was in easy reach of the suspects and will be again when the suspects get back in their car. A search of an unlocked glove compartment incident to arrest is also permissible. This only applies to unlocked glove compartments. This case also involved a photographic lineup. This issue is not explained in the brief (134) and you should review the court's opinion for those details.

**HAAG v State** (Investigatory Seizure of Armed Robbery Suspect Leads to Show-Up) bulletin no. 298. Police respond to report of two black males wearing dark clothing and ski masks and are in process of committing home invasion/armed robbery. Police arrive within minutes and see HAAG running from the direction of the victim's residence. Police seize HAAG at gun point and handcuff him. Although he is a white male, he is dressed in black and has on dark gloves. Police transport him back to the scene where a witness identifies him by his size and clothing. Later police find an Rx bottle in the name of the victim in the rear seat of the patrol car where HAAG had been confined. They also find a gun in the area HAAG was running. Court ruled this was a proper investigative seizure and that the subsequent show-up was proper.

**ANDERSON, Jonathan v State** (Show-up) bulletin no. 302. ANDERSON and a female companion committed a home invasion/armed robbery. There was both a male and female victim. When the male did not get out his money fast enough ANDERSON shot him (the male victim) in the neck. After getting money, the suspect couple departed the area in a brown sedan. The police were notified and located the suspect vehicle. A chase ensued, during which time various articles, including the handgun used in the shooting, were tossed out of the vehicle. After stopping the vehicle, ANDERSON and his female companion, Angela ENGSTROM, were taken into custody. N.B., the female victim of the home invasion, was transported to the scene of the stop and viewed both ANDERSON, who was in handcuffs, and ENGSTROM. N.B. identified ANDERSON as the person who shot the male victim; she was unable to identify ENGSTROM. Court ruled that this was a proper show-up and that the police had an immediate need to either identify ANDERSON as the person responsible or clear him so that they could search for the suspect.