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LAWYER RULED UNNECESSARY AT A LINEUP BEFORE CHARGES

By DAVID MARGOLICK

Suspects are not entitled to legal representation at police lineups held before formal legal proceedings are begun against them, the New York Court of Appeals ruled Wednesday.

In a 4-to-3 decision, the state's highest court held that whatever benefits may be derived from having lawyers present at such lineups are far outweighed by the problems created for law-enforcement personnel, witnesses and the suspects themselves.

"The assistance of counsel is not completely valueless at investigatory lineups," Judge Domenick Gabrielli wrote for the majority. "But that is not the constitutional test of whether it is required."

In a heated dissent, Judge Bernard S. Meyer contended that the untrustworthiness of witnesses' identifications proved the need for counsel at all police lineups, even those conducted before the filing of formal charges. *Leo Frank Case Cited*

"Inconvenience there may be," he wrote, "but nothing compared to the living hell imposed upon an accused person required to serve a prison sentence for a crime he did not commit. The crowning irony of this situation is that the decision in this case comes almost at the same time as the revelation, some 69 years too late, of proof positive of the innocence of Leo Frank."

Mr. Frank, convicted of the murder of a young Georgia girl in 1913, was hanged by a lynch mob while imprisoned. Recent disclosures have revealed another man was guilty of the killing.

In a police lineup, a criminal suspect and a group of volunteers - civilians or police officers in street clothes who match the suspect's general description - are lined up against a wall to give an eyewitness a chance to pick out a crime's perpetrator. Lineups are often held before formal charges are preferred, and the witness's selection is documented by investigators for use as evidence in court.

In New York City, lineups are usually held in detective squad rooms and involve about a half-dozen volunteers. In practice, some detectives said yesterday, suspects have often been given an opportunity to call a lawyer before appearing in a lineup. If a suspect refuses to appear, a district attorney may obtain a court order to compel his appearance. *Appeal Involved Four Cases*

The decision arose out of four cases from Manhattan and the Bronx in which criminal defendants had sought to suppress their identification at lineups on the grounds that each had been denied his right to

fair assistance of counsel. The four suspects were subsequently charged, tried and convicted of crimes including robbery, murder, rape, sodomy and assault.

In his opinion, Judge Gabrielli sought to distinguish the protective role attorneys play during the interrogation of suspects from what he said was the much more limited function they serve at identification confrontations.

"During interrogations, counsel may take an active role on behalf of his client, both in advising a suspect on whether to remain silent and whether to answer particular questions once the right has been waived," he wrote. "In contrast, during a lineup counsel plays the relatively passive role of an observer." Gabrielli Cites Delays

While suspects derive little benefit from having lawyers present at pre-accusation lineups, Judge Gabrielli wrote, the delays resulting from such a requirement would hinder law enforcement and, possibly, the rights of criminal suspects. Witnesses' memories would grow less certain, innocent parties would be needlessly detained and the possibility of mistaken identifications would be increased, he said. Chief Judge Lawrence H. Cooke and Judges Matthew J. Jasen and Sol M. Wachtler concurred with Judge Gabrielli.

Judge Meyer, joined by Judges Jacob D. Fuchsberg and Hugh R. Jones, chastized the "dogma" that lawyers play merely a "passive" role at lineups. He suggested that through a variety of means - for example, by altering the position or clothing or posture of a suspect or by making sure that physical disparities among the participants are minimal - "the presence of counsel will reduce even the unintentional biasing effects" encountered in lineups.

For this reason, Judge Meyer wrote, suspects should be entitled to legal representation at that time unless authorities can demonstrate "that exigent circumstances make the obtaining of counsel's presence a real and substantial detriment to the investigatory process."

Illustrations: photo of Judge Domenick Gabrielli