POLICE / PROSECUTOR UPDATE

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In Issue 34 of the PPU (August, 1994), we looked at a U.S. Supreme Court case which dealt with a suspect's invocation of the right to counsel during custodial interrogation. In that case, the Court held, based on the Fifth Amendment to the United States Constitution, that when a suspect says something during interrogation that *might* be a request for a lawyer but is not really clear, the interrogating officer is *not* required either to stop the questioning or attempt to clarify whether the suspect was actually asserting his right to counsel. As observed in that Issue of the PPU, Indiana required police to "stop and clarify." That is, any further questioning should be narrowly limited to clarifying whether the suspect actually did want a lawyer present. However, we noted this was based on the belief the Fifth Amendment required it, which it did not. Recently, our Supreme Court discussed whether "stop and clarify" is still required by the *Indiana* Constitution. It is not.

The defendant, Taylor, during custodial interrogation, said "I guess I really want a lawyer, but, I mean, I've never done this before so I don't know." Taylor contended this was a request for counsel and, under the Indiana Constitution, interrogation should have ceased. Taylor's theory was that the right to counsel is broader under the Indiana Constitution than the Federal Constitution. It is not. Under our Constitution, a suspect's request for counsel must be clear and unequivocal. According to our Supreme Court, a statement is either an assertion of the right to counsel or it is not. In the Court's view, Taylor's statement was an expression of doubt, not a request.

The Court also rejected the contention that the Indiana Constitution requires police to limit further interrogation to clarifying questions. While nothing prevents police from attempting to clarify ambiguous statements about counsel, it is not constitutionally required. But, as was stated in Issue 34, clarification is probably still good police practice.

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Also recently, the Supreme Court decided a case in which identification evidence was at issue, specifically a pretrial lineup. The defendant, Goudy, claimed the lineup was so impermissibly suggestive as to lead to a mistaken identification. The question in such cases is whether law enforcement officials conducted the lineup in such a fashion as to lead a witness to make a mistaken identification.

First, we will look generally at the applicable law. The participants in a lineup should be selected so that the suspect does not stand out so strikingly that he is virtually alone with respect to identifying characteristics. A lineup should consist of at least five or six individuals. There should not be a *marked* difference in hair style or color, complexion, age, or physical build. Police should generally not inform a witness that a suspect is in the lineup. Finally, when more than one witness views a lineup, care must be taken to keep them separated.

With this in mind, the Court upheld Goudy's videotaped lineup on the following facts. There were six participants, including Goudy. All six were young African-American males. All six were wearing black baseball caps turned backwards. One of the six (not Goudy) was wearing a white tee-shirt, was of a muscular build, and was noticeably shorter than the other five. However, the remaining five were all wearing dark. One (not Goudy) was slightly taller than the others and had no mustache. The other four (including Goudy) were of roughly the same height and build, and each wore a small mustache. Basically, then, four of the lineup participants were of roughly the same age, dress, height, weight, and general appearance. The lineup was proper.

Right to Counsel

Taylor v. State, ___ N.E.2d ___ (Ind. 12/03/97).

Lineup

Goudy v. State, ___ N.E.2d ___ (Ind. 11/26/97)
Pierce v. State, 369 N.E.2d 617 (Ind. 1977);
Porter v. State, 397 N.E.2d 269 (Ind. 1979);
Little v. State, 475 N.E.2d 677 (Ind. 1985);
Harris v. State, 619 N.E.2d 577 (Ind. 1993);
Bray v. State, 443 N.E.2d 310 (Ind. 1982);
Parsley v. State, 557 N.E.2d 1331 (Ind. 1990);
Heck v. State, 552 N.E.2d 446 (Ind. 1990);
Arnold v. State, 510 N.E.2d 167 (Ind. 1987).

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