

**IN THE DISTRICT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA**

THE STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
vs.)	Case No. CF-2003-1612
)	Judge Tom C. Gillert
CEDRIC LUMAR JENKINS,)	
CLEON CHRISTOPHER JOHNSON,)	
And RONALD STEVEN MASON, JR.)	
Defendant.)	

**MOTION TO PROHIBIT THE STATE FROM CONDUCTING AN
UNDULY SUGGESTIVE CORPORAL LINEUP WITH BRIEF IN SUPPORT**

Comes Now Ronald Steven Mason by and through his attorney of record Kevin D. Adams and moves this Court to enter an order prohibiting the State of Oklahoma from conducting an unduly suggestive lineup in violation of his Oklahoma and United States constitutional Rights. In the alternative the Defense request that the Court issue an order guaranteeing the defendant certain due process protections. In Support of the Motion the Defendant shows the Court the following;

PROCEDURAL BACKGROUND

On July 11, 2003 the State of Oklahoma filed a *Motion for Appearance in Lineup* requesting that the Court issue an order the Defendant Ronal Mason to appear in a lineup. On the same day an Order was signed Ordering the Defendant Ronald Mason to appear in a lineup.

On July 15, 2003 after receiving the Motion and Order in the mail Counsel for Mr. Mason located Mr. Hawkins, the attorney for the State, and had a conference with the

Honorable Carlos Chappelle. During that conference Counsel for the Defendant expressed concerns about his client appearing in a physical lineup because the witness, Teneania Mathis, had already failed to identify Mr. Mason after viewing a photo lineup containing Ronal Mason's picture. Counsel was concerned that to place Mr. Mason in a physical lineup for a witness that had already viewed his photograph in a photo lineup would be unduly suggestive. Counsel for the Defendant also expressed other concerns relating to conditions that may be unduly suggestive. During the conference Mickey Hawkins attorney for the state commented that defense counsel could be present at the lineup and could have a photo of the lineup but "was not going to control the conditions of the lineup." At the conclusion of the conference it was agreed that the lineup would not occur until Counsel for the Defendant had an opportunity to research and brief the issue and that the State would have an opportunity to respond.

Factual Background of the Case

Ronald Mason is conjointly charged along with Cedric Jenkins and Cleon Johnson in the first-degree murder of Brandon McGee, which occurred on April 5, 2003. (See Amended Information filed April 17, 2003) Originally only Cedric Jenkins was charged with the murder of Brandon McGee.(See information filed April 9, 2003) Cedric Jenkins is also charged with shooting Teneania Mathis in the hip which occurred at the same time that Brandon McGee was killed.

On at least one occasion Teneania Mathis has viewed a photo lineup of Ronald Mason and has been unable to pick Ronald Mason out as a suspect. (See Attached Exhibit

A, Bates page 139.) Furthermore, Teneania Mathis, has told the Tulsa Police that the same individual who shot her in the hip is the same individual who shot and killed Brandon McGee. (See attached exhibit B, Bates pages 61) As stated in the state's own motion "Defendant Cedric Lumar Jenkins admitted that he shot Teneania Mathis in the hip." *Motion for Appearance in Lineup*, page 1 paragraph 2 last line.

Despite Teneania Mathis's failure to identify Ronald Mason when shown a photo lineup. And despite Teneania Mathis's statements that the same person who shot her is the person who shot and killed Brandon McGee and Cedric Jenkins's confession that he shot Teneania Mathis; the State of Oklahoma is attempting to have Teneania Mathis identify the Defendant, Ronal Mason, as the killer of Brandon McGee. (See the State's *Motion for Appearance in Lineup*.)

ARGUMENTS AND AUTHORITIES

1. CORPORAL IDENTIFICATIONS AFTER THE INSTITUTION OF CRIMINAL CHARGES IS A CRITICAL STAGE REQUIRING THE PRESENCE OF COUNSEL.

In *United States v. Wade*, 388 US 218 (1967) the United States Supreme Court found that Corporal Identifications ;

Since it appears that there is grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial, there can be little doubt that for Wade the post-indictment lineup was a critical stage of the prosecution at which he was as much entitled to such aid [of counsel] . . . as at the trial itself.

United States v. Wade, 388 US 218, 237 (1967)

The principle that post-indictment pretrial corporal identifications is a “critical stage” requiring the presence of Counsel has been repeatedly re-affirmed by the United States Supreme Court and has been adopted by state appellate Courts including the Oklahoma Court of Criminal Appeals. In *Thompson v. State*, 438 P2d 287, paragraph 6 the Oklahoma Court of Criminal Appeals stated;

In all cases triable after June 12, 1967, we are bound by the rule enunciated in *Wade v. United States*, supra,

Thompson v. State, 438 P2d 287, paragraph 6 (Ok. Cr. 1968)

In *Thompson v. State* the Court of Criminal Appeals even went as far as to make suggestions that officials follow certain procedures for conducting corporal lineups.

Since lineups will continue to serve as an important aid in the enforcement of criminal laws, we recommend that officials follow the following procedures:

1. The suspect should be advised of his right to be represented by counsel and to have counsel present if he so desires. He should be further advised that he does not have a right to refuse to participate in the lineup.
2. The witness or victim attending such lineup should be advised of the purpose for which it is being conducted but the officers should not, directly or indirectly, single out one suspect and suggest that he is the person being sought.
3. Other people participating in the lineup should be of the same general weight, height, age, color and race, whenever possible, and the suspect should not be clothed in such a manner as to attract special attention or make him stand out from the other persons in the lineup.
4. The names of all persons participating in the lineup should be recorded and preserved together with the names of the officers conducting said lineup.
5. The suspect's waiver of his right to counsel and voluntary participation in said lineup should be recorded and it should also be recorded if he has counsel present during the lineup.

6. Not more than one victim should be present at the lineup at the same time. Victims previously having attended a lineup should not be allowed to converse with other victims prior to their viewing the lineup.
7. Pictures of the persons participating in the lineup, taken at the lineup, could be of invaluable aid to the trial judge before whom the identification question is raised.
8. Lineups should be conducted whenever possible during daylight hours and witnesses not connected with the police should be encouraged to attend in order that they might later testify as to the method in which the lineup was conducted.
9. Lastly, we emphasize that type written records of the manner and mode of conducting the lineup should be prepared and preserved for their later use.

Thompson v. State, 438 P2d 287, paragraph 7 (Ok. Cr. 1968)

2. THE MAGISTRATE HAS JURISDICTION OVER A FORMAL PRE-TRIAL LINE UP.

In *Moss v. District Court of Tulsa County*, 756 P2d 1250 (Ok. Cr. 1988) the Oklahoma Court of Criminal Appeals ruled that an examining magistrate has the discretion to decide whether or not a pretrial lineup should be performed.

Therefore, we hold, under the circumstances of this case, it is clearly within the discretion of the magistrate concerning the matter in which he will verify the identification of the defendant. In the event he concludes a lineup is required, it should be [756 P.2d 1251] conducted by the appropriate authorities. Likewise, insofar as *Moss v. Hicks*, 738 P.2d 155 (Okla. Cr. 1987) conflicts with this decision, it is hereby OVERRULED.

IT IS THEREFORE THE ORDER OF THIS COURT that the writ of prohibition shall issue in part. Insofar as the defendant's preliminary hearing has not been

completed, the Honorable Respondent's order is void; the magistrate's jurisdiction has not been concluded. It is further ordered that the examining magistrate shall proceed with the preliminary examination and is authorized to exercise his discretion concerning whether or not a lineup should be conducted. However, it is suggested that in the event such becomes necessary, that it should be conducted by proper authorities.

Moss v. District Court of Tulsa County, 756 P2d 1250, 1252 (Ok. Cr. 1988)

3. THE CONSTITUTIONAL BASIS AND REASONING BEHIND THE REQUIREMENT THAT AN ACCUSED BY PROVIDED COUNSEL AT A POST-INDICTMENT PRE-TRIAL CORPORAL LINE-UP.

The corporal lineup presents a great risk for injustice. These risk were identified by Justice Brennan when he delivered the opinion of the Court in *United States v. Wade*, 388 U.S. 218 (1967);

But the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial. The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: "What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent -- not due to the brutalities of ancient criminal procedure." *The Case of Sacco and Vanzetti* 30 (1927).

United States v. Wade, 388 U.S. 218, 229 (1967)

The Court went on to describe some of these dangers in eyewitness identification;

A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification. A commentator has observed that "the influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor -- perhaps it is responsible for more such errors than all other factors combined." Wall, Eye-Witness Identification in Criminal

Cases 26. Suggestion can be created intentionally or unintentionally in many subtle ways. And the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest.

United States v. Wade, 388 U.S. 218, 229-230 (1967)

The presence of Defense Counsel at a lineup not only assists the Defendant but also assist law enforcement and the prosecution. In discussing the presence of defense counsel at a pre-trial corporal lineup Justice Brennan quoted from *Miranda v. Arizona* in making the following observation;

“An attorney is merely exercising the good professional judgment he has been taught. This is not cause for considering the attorney a menace to law enforcement. He is merely carrying out what he is sworn to do under his oath -- to protect to the extent of his ability the rights of his client. In fulfilling this responsibility the attorney plays a vital role in the administration of criminal justice under our Constitution.”

In our view counsel can hardly impede legitimate law enforcement; on the contrary, for the reasons expressed, law enforcement may be assisted by preventing the infiltration of taint in the prosecution's identification evidence. That result cannot help the guilty avoid conviction but can only help assure that the right man has been brought to justice

United States v. Wade, 388 US 218, 239 (1967)

The presence of counsel and the lessening of the unduly suggestive factors involved in the line are the first lines of defense.

.....the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself. The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation, with the State aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching,

intentional or unintentional, and with little or no effective appeal from the judgment there rendered by the witness -- "that's the man"

United States v. Wade, 388 US 218, 236 (1967)

In *Moore v. Illinois*, 434 U.S. 220 Justice Powell also commented on the value of having defense Counsel present at a corporal lineup and the Defense Counsel's role at that lineup when he wrote;

If an accused's counsel is present at the pretrial identification, he can serve both his client's and the prosecution's interests by objecting to suggestive features of a procedure before they influence a witness' identification.

Moore v. Illinois, 434 U.S. 220, 225 (1977)

4. THE DANGER OF IRREPARABLE HARM CAUSED TO THE DEFENDANT BY UNDULY SUGGESTIVE LINEUPS

As stated by the United States Supreme Court in *United States v. Wade*, 388 U.S. 218, 229 (1967) once a witness makes an identification that witness is inclined to stick with that identification.

Moreover, "it is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial."

United States v. Wade, 388 US 218, 229 (1967)

If the witnesses identification is brought about through unduly suggestible techniques that the witness may not even be consciously aware of the false identification. The unconscious nature of the false identification coupled with the tendency of a witness

not to recant their identification makes an unduly suggestive identification even more dangerous.

5. THE MAGISTRATE’S AUTHORITY TO CONTROL THE MANNER IN WHICH THE LINEUP IS CONDUCTED.

In *Moss v. District Court of Tulsa County*, 756 P2d 1250 (Ok. Cr. 1988) the Oklahoma Court of Criminal Appeals stated that the preliminary examination magistrate was “authorized to exercise his discretion concerning whether or not a lineup should be conducted.” *Moss v. District Court of Tulsa County*, 756 P2d 1250,1252 (Ok. Cr. 1988)

While defense counsel was unable to find a case directly addressing the issue of whether a magistrate has the power to control the manner in which a lineup is conducted, it is the position of the defense that the magistrate’s power to control the lineup is inherent in the court’s decision of *Moss v. District Court of Tulsa County*, 756 P2d 1250 (Ok. Cr. 1988).

Certainly if the Court is vested with the power to determine whether or not a lineup should even be conducted than the Court is capable of placing restrictions on the lineup to ensure unduly suggestive techniques will not be employed. The United States Supreme Court and the Oklahoma Supreme Court have already found that a post-indictment pretrial corporal identification is a critical stage of the prosecution requiring presence of counsel and due process protection. Since the preliminary examination magistrate has authority over pre-trial line-ups certainly that magistrate is empowered to control the manner of the lineup to ensure that the Constitutional Due Process Rights of

the Defendant are protected and that the recommended procedures of the Oklahoma Court of Criminal Appeals are followed.

REQUESTED DUE PROCESS PROTECTIONS

The witness Teneania Mathis has been unable to identify the Defendant, Ronald Mason, despite being shown photo lineups containing the Defendant's photo. The state of Oklahoma should not be allowed to continue to conduct lineups until the State receives the identification that they desire. Every time this or any other witness is shown a photo of the Defendant, Ronald Mason, that witness has been tainted for any future identification.

The first request of the Defense is that the Court exercise its discretion and prohibit the state of Oklahoma from conducting a Corporal Lineup with any witness that has been previously shown a photograph of the Defendant, Ronald Mason.

In the alternative, the Defense request that the Court conduct a hearing so that it may determine the extent to which any witness the state wishes to view the lineup has been influenced by the investigation into this matter. It is suggested by the defense that at that hearing the court should inquire into whether the witness the state wishes to view the lineup has been shown photographs of the defendant, the circumstances in which that witness has viewed the defendant's photo, the number of times that witness has viewed the defendant's photo, whether the witness has ever been shown the Defendant's photo by itself, what the witness has been told regarding the identity of the assailant and whether the witness has viewed any photos of the defendant either during news accounts

or internet access. (See Attached Exhibit C Photo of the Defendant Available on the Internet.)

If the Court allows the pretrial lineup in this matter the Defendant request the participation of every individual whose photo has been previously shown to the witness also participate in the lineup. The reason being is that if the defendant is the only individual who is common to both procedures than the lineup would be unduly suggestive.

The Defense also request that the lineup be conducted in accordance with the recommended procedures of the Oklahoma Court of Criminal Appeals as described in *Thompson v. State*, 438 P2d 287, paragraph 7 (Ok. Cr. 1968).

Furthermore, the defense requests that the Court authorize the recording of the lineup by either a video or a certified court reporter. The Defense believes this request is supported by recommend procedures number seven and nine as described in *Thompson v. State*, 438 P2d 287, paragraph 7 (Ok. Cr. 1968).

It is the position of the Defense that these procedures are necessary to protect the integrity of the corporal lineup and the due process rights of the defendant. These request are **not** made with the intent to impede the legitimate further investigation of this matter or allow a guilty man to go free. Perhaps Justice Brennan best stated it when he said;

In our view counsel can hardly **impede legitimate law enforcement**; on the contrary, for the reasons expressed, law enforcement may be assisted by preventing the infiltration of taint in the prosecution's identification evidence. **That result cannot help the guilty avoid conviction but can only help assure that the right man has been brought to justice**

United States v. Wade, 388 US 218, 239 (1967), *emphasis added*

Finally, it is the defense's position that it is necessary for the Court to establish guidelines for the photo line up because the state has expressed its unwillingness to heed the objections of Defense Counsel regarding potentially unduly suggestive conditions of the lineup. When defense Counsel expressed his concerns regarding the lineup and a desire to ensure that others whose pictures were shown to the witness also participated in the lineup Mr. Hawkins responded by saying that defense counsel could be present at the lineup and could have a photo of the lineup but "was not going to control the conditions of the lineup."

CONCLUSION

Therefore, Counsel for the Defendant respectfully request that the Court issue an order precluding the State from conducting another lineup in this matter and in the alternative the defense request that this Court conduct a hearing so that it may determined the extent to which any witness the state wishes to view the lineup has been influenced by the investigation into this matter.

If the Court does allow the photo lineup the Defense request that the Court, and not the state or the defense, control the conditions of the lineup to ensure that the lineup meets the requirements of due process of law and the recommended procedures of the Oklahoma Court of Criminal Appeals as described in *Thompson v. State*, 438 P2d 287, paragraph 7 (Ok. Cr. 1968).

Respectfully Submitted,

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CERTIFICATE OF HAND DELIVERY

I hear by certify that a copy of the foregoing instrument was hand delivered on July 16, 2003 to the office of the following:

Mickey Hawkins
Assistant District Attorney
Tulsa County Courthouse
500 S. Denver
Tulsa, OK 74103

Kevin D. Adams