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State of Utah v. Carl Archie andrew, Amd Kenneth Ervin : Brief of Amicus Curiae

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff & Respondent,

vs.

CARL ARCHIE ANDREW, and
KENNETH ERVIN,

Defendants & Appellants.

Case No.
11158

BRIEF OF AMICUS CURIAE

Appeal from the Judgment of the Fifth Judicial District Court
in and for Juab County
Honorable C. Nelson Day, Judge

FILED

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The errors and improprieties committed below add up to a gross miscarriage of justice since the record demonstrates that the defendants are very probably innocent.

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| A. The record demonstrates that the defendants are very probably innocent. | 8 |
| B. The errors and improprieties below cumulatively demonstrate that this conviction is a gross miscarriage of justice. | 9 |
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The trial court committed prejudicial error by excluding evidence of the good character and good reputation of the defendants. This error requires reversal of the conviction in and of itself.

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IN THE SUPREME COURT OF THE STATE OF UTAH

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Defendants & Appellants.

Case No.
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BRIEF OF AMICUS CURIAE

THE INTEREST OF THE AMERICAN CIVIL LIBERTIES UNION, UTAH AFFILIATE AS AMICUS CURIAE

The Utah Affiliate of the American Civil Liberties Union is an association dedicated to the preservation of constitutional rights and liberties. We believe that the rights of all citizens are threatened when the rights of any citizen are denied. We believe that there is no

greater challenge to the liberty and security of free citizens than occurs when a miscarriage of justice results in the conviction of men very probably innocent. We urge upon this Court that the present case is such a case, one in which the appellants, though very probably innocent, have been convicted by reason of errors of law and denials of constitutional rights which occurred in the proceedings below.

STATEMENT OF THE KIND OF CASE AND DISPOSITION IN THE LOWER COURT

Your Amicus concurs with the Statement of the Case and Statement of Disposition below contained on pages 1 to 3 of the Appellants' Brief.

RELIEF SOUGHT ON APPEAL

We request this Court to reverse the conviction and remand the case for a new trial. We further request that the Court order the exclusion of eye witness identification evidence obtained in violation of defendants' rights.

STATEMENT OF FACTS

Shortly after 6:00 p.m. on June 26, 1967 (Tr. 60), Mrs. Gaydra Jackman was severely beaten over the

head with a pistol and robbed of seven dollars and a watch by a stranger who entered her home in Juab County, about four blocks from Highway 91 and some five miles from Nephi, Utah (Tr. 32). The intruder was accompanied by another man who was outside the Jackman house for most of the time during the course of the incident. Both of these men were described by Mrs. Jackman as Negroes.

On June 29, 1967, the defendants Carl Andrew and Kenneth Ervin were arrested in Rawlins, Wyoming and brought to Utah on July 1, 1967. The basis for the arrest was that defendants were Negroes somewhat resembling the description given by Mrs. Jackman and they had passed through Juab County on Highway 91 on the afternoon of June 26th, accompanied by Kenneth Ervin's mother and his nine year old brother. The sheriff's department had learned of their presence in the county from a service station operator in Levan, Utah. Indeed, Kenneth Ervin had left his name and his mother's address in Rawlins with the service station operator because Kenneth had rented a tow chain to use in towing his disabled car to Rawlins. Kenneth left his name, Rawlins address, and a cash deposit, intending to return the chain and recover his deposit on his return trip to Los Angeles (Tr. 167-168). A witness testified that two other men driving an old car came into her parents' restaurant in Levan at about 3:00 p.m. on June 26th. The witness described one man as dark, medium height and slender, "more Mexican than Negro," and wearing a charcoal and

white jacket (Tr. 201). The witness also described this man as "sarcastic" (Tr. 198) and testified that they drove north toward Nephi (Tr. 199). The witness further testified that the defendants were not these men (Tr. 199). Except for the fact that the witness described the man as more Mexican than Negro her description of that man basically matched the victim's description of her assailant.

Defendant Carl Andrew is employed as a gravel-crusher in Rawlins. Defendant Kenneth Ervin is a 26-year old computer operator employed in Los Angeles (Tr. 160). On June 25, 1967, Ervin left Los Angeles by car on a two-week vacation to visit his mother in Rawlins (Tr. 161). His car broke down in Levan, Utah (Tr. 165). Upon learning that his car needed major repairs (Tr. 91), he called his mother and told her of his predicament (Tr. 166). Mrs. Ervin arranged to drive to Levan, accompanied by her nine year old son and by Carl Andrew, a neighbor and friend, to pick up Kenneth and tow his disabled car to Rawlins. They arrived at Levan at approximately noon on June 26th (Tr. 231). Ervin and Andrew disconnected the drive shaft on Ervin's car (Tr. 167), and chained Ervin's car to the back of Mrs. Ervin's car with the rented chain. They then left Levan at about 1:45 or 2:00 p.m. (Tr. 220, 168), stopping in Nephi for some hamburgers (Tr. 169), and making several other stops, near Mona, north of Provo, in a gas station in Salt Lake County, and at the Last Chance Cafe in Parley's Canyon. Two disinterested witnesses placed defendants in Salt Lake

County between 5:00 and 6:00 p.m. A fourteen year old boy testified that the two chained cars drove into his father's gas station at "106 South State Street, Salt Lake County" (Tr. 181), at, he guessed, about 5:00 p.m. (Tr. 182). On cross-examination, he admitted he was not sure about the time and it could have been as late as 9:00 p.m. But another witness, the co-owner of the Last Chance Cafe, located in Parley's Canyon east of Salt Lake City, was positive the defendants stopped at his place around 5:30 and certainly no later than 6:00 p.m. (Tr. 190, 193-4). This would have made it virtually impossible for defendants to have been at the Jackman home at the time the crime was committed.

The defendants testified in their own behalf and denied any connection with the assault on Mrs. Jackman. Ervin's mother and nine year old brother also denied the defendants committed the crime. The defense sought to introduce evidence of the good character and good reputation of the defendants through a neighbor who attended church with the Ervin family and knew both Kenneth Ervin and Carl Andrew well and knew their reputation in the community, but the trial court limited such testimony to reputation for veracity. The testimony of Andrew's employer was also limited to reputation for veracity (Tr. 213, 214, 217).

The prosecution's case turned almost exclusively on the victim's in-court identification. There were no fingerprints, and no real or scientific evidence. Yet

the victim admitted that she had never before seen a Negro close up (Tr. 69), and did not have her glasses on at the time and without her glasses she had difficulty seeing things more than four feet away (Tr. 70). The only corroboration of the victim's identification was the notably weak testimony of Don Hatch Warner, a witness who drove by the Jackman house at about 4:45 p.m. (Tr. 127), and noticed as he passed, a car with a white back (Tr. 134), parked in the yard. (Mrs. Ervin's car is two-tone, red and white.) This witness also testified that he saw a tall Negro in the yard, but could not see his face (Tr. 135). Nevertheless, he identified Andrew as the man he saw because the man walked slowly (Tr. 129), the way he saw Andrew walk in court (Tr. 130). The witness admitted he could not be positive in his identification (Tr. 135). Significantly, the witness testified to seeing only one car in the Jackman yard (Tr. 131) and further testified that he did not see another parked car on his way back to Nephi (Tr. 132). Since it is clear that Ervin's car was inoperative, the failure to account for that car is another significant gap in the prosecution theory.

The victim testified that she saw defendants in a lineup at the state prison conducted on July 5, 1967. She admitted to having some difficulty in identifying defendant Ervin at the lineup. She had difficulty identifying Ervin at the lineup even though the two defendants were the only men in the lineup matching the description she had given of the men who had entered her home (Tr. 63, 64, 66, 68). Indeed, of the other four

men in the lineup, two were not even Negroes and each of the other two Negroes had such distinctive features that they could be eliminated for that reason. One of the other Negroes was totally, even strikingly bald. The other man was stocky (Tr. 67) and had a noticeably flattened nose which the witness could recall at trial, two months later (Tr. 66).

The defendants were not advised of their right to have counsel present at the lineup and no counsel for defendants was present (Hearing on Motion for New Trial P. 7). Though the victim's trial testimony gives the impression that she did actually identify both defendants at the lineup, the statement of the county attorney shows she was not able to make a positive identification of defendant Ervin immediately after the lineup. By reason of the denial of counsel at the lineup, the witness' failure to identify Ervin at the lineup was not known to the defense until after the trial was over.

On August 15, 1967, the day defendants were arraigned on the information, the district attorney took a sworn deposition from Gaydra Jackman, under oath, without notice to defendants or their attorney. This deposition was conducted in the courtroom itself by the district attorney as if it were part of the formal proceedings. By leading, repetitive and suggestive questions concerning the witness' certainty as to the identity of the defendants, the district attorney tended to suggest and fix the witness' testimony, in violation

of the defendants' right to be present at a deposition and their basic right of confrontation.

ARGUMENT

POINT I

THE ERRORS AND IMPROPRIETIES COMMITTED BELOW ADD UP TO A GROSS MISCARRIAGE OF JUSTICE SINCE THE RECORD DEMONSTRATES THAT THE DEFENDANTS ARE VERY PROBABLY INNOCENT.

A. THE RECORD DEMONSTRATES THAT THE DEFENDANTS ARE VERY PROBABLY INNOCENT.

The prosecution theory of the case requires one to accept the hypothesis that a young man with an unblemished record and a responsible well-paying job would leave his mother and nine year old brother sitting out in a car on the road or in a stranger's yard while he entered the home of a stranger and committed an assault and robbery on a young mother. Against this theory of the case are the facts that Ervin has a completely unblemished record and Andrew has only a conviction for writing a bad check back in the 1930's; no gun or other weapon was found in a search of defendant's possessions, the stolen watch was not found; no fingerprints or other scientific or real evidence connect the defendants with the crime, they have always

and repeatedly denied any guilt including by testimony at trial, a disinterested witness testified to seeing defendants with the two cars chained together at his service station in Salt Lake County at a time when it would have been virtually impossible for them to have been there if they had committed the crime, and both Ervin's mother and Ervin's young brother deny defendants' guilt. Further, despite the victim's positive identification of defendants at trial, the affidavit of the county attorney shows that she had initial difficulty in recognizing defendant Ervin at the lineup shortly after the crime when her recollection was freshest and less subject to suggestion. Given these facts, it should be perfectly clear that this case is no run of the mill robbery and assault conviction. Yet despite the weakness of the prosecution case and the strong showing of the innocence of defendants, the jury brought in a verdict of guilty for both defendants after only 45 minutes of deliberation.

We will show that this verdict was a direct result of numerous and significant errors, some of constitutional dimensions and all extremely prejudicial.

B. THE ERRORS AND IMPROPRIETIES BELOW CUMULATIVELY DEMON- STRATE THAT THIS CONVICTION IS A GROSS MISCARRIAGE OF JUS- TICE.

The errors below kept the jury from hearing probative evidence of the good character of the defendants

and rendered unreliable the key prosecution evidence, the in-court identification of the defendants by the victim. Errors below also tainted and rendered unreliable the only real corroborative evidence, the testimony of the witness, Dan Hatch Warner.

POINT II

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY EXCLUDING EVIDENCE OF THE GOOD CHARACTER AND GOOD REPUTATION OF THE DEFENDANTS. THIS ERROR REQUIRES REVERSAL OF THE CONVICTION IN AND OF ITSELF.

The law is clear and well settled that defendants in a criminal case may introduce evidence of law abiding character and good reputation on the substantive question of guilt or innocence. The rule is stated clearly and simply in *American Jurisprudence Second*, 29 Am. Jur. 2d § 388, and in *Corpus Juris Secundum*, 22A C.J.S. § 676, and these treatises cite scores of cases for the proposition but there is probably no better statement of the rule than that of this court in *State v. Blue*, 17 Utah 175, 53 P. 978 (1898). Mr. Justice Bartch, speaking for the unanimous court, stated at 17 Utah 183:

“The law is well settled, at least by the weight of recent authority, that in every criminal case the defendant is entitled to prove his good character. Where one is charged with an offense, such evidence is admissible, regardless of the decisive

or indecisive character of the other testimony; and it is within the province of the jury to give it such weight, in view of all the other evidence, as it may be entitled to receive. When a person is charged with the commission of an act which is wholly inconsistent with his former conduct and uniform course of life, justice demands that, in this extreme moment of his existence, when he is about to be deprived of life or liberty, reduced to shame and disgrace, he be permitted to show the important fact of his good character. *Such fact, considered in connection with the criminating facts, may of itself be sufficient to render it highly improbable that the accused would commit the crime charged, and raise a reasonable doubt in the minds of the jury . . . History and experience teach us that there are cases in which the accused's sole defense is a good character, and yet this may outweigh the most positive proof.*" (Emphasis added.)

While another Utah case has considered the appropriateness of evidence of general good character to a charge of a crime involving a particular kind of wrongdoing, *State v. Thompson*, 58 Utah 291, 199 P. 161 (1921), it is clear that under the rule of *State v. Blue* and the well settled rule of law, that general good character was relevant to disprove guilt of the infamous and atrocious crimes of which the defendants Ervin and Andrew was accused. *State v. Van Kuran*, 25 Utah 8, 69 P.60 (1902). See also *State v. Peterson*, 110 Utah 413, 174 P. 2d 843 (1946), *State v. Barretta*, 47 Utah 479, 155 P. 343 (1916), *State v. Brown*, 39 Utah 140, 115 P. 994 (1911).

Despite the clearly established rule, the trial court erroneously limited the testimony of character and reputation to reputation for truthfulness and veracity. When a defense witness, a neighbor who attended church with the defendants, was asked, if she knew the reputation of the defendants in the community, the trial judge specifically stated to defense counsel at page 214 of the transcript:

“The only question to which you may ask is to the truthfulness and veracity. You may first inquire as to whether or not the witness knows the general reputation in the community in which they live for truthfulness. If she answers that question yes, then you may ask what that reputation is”

By reason of this ruling of the court, the neighbor who knew defendants Ervin and Andrew socially and testified she attended church with them was only permitted to be asked about defendants' reputation for truthfulness and defendant Andrew's employer, who had employed him for about six years and had known him for twelve years, was similarly limited in his testimony to Andrew's reputation for truthfulness. When the witness was asked, “What type of employee has he been,” the witness was not allowed to answer because the court ruled it to be “irrelevant and immaterial.”

Clearly, these rulings were error.

Given the posture of this case, in which defendants were being tried for a brutal and infamous crime in a community in which they were strangers from out of

state, their good character and good reputation were matters vital to their defense. Indeed, good reputation and alibi are the only defenses available to counter a criminal charge premised upon a mistaken eye-witness identification. Defendants sought to make both these defenses as well as showing the inappropriateness of the identification. If the jury had been permitted to hear and consider the evidence of good character and good reputation they could not have failed to be influenced in their verdict. Thus for this reason itself, independent of all the other errors committed below, justice requires that this court reverse the conviction and remand the case for a new trial.

POINT III

THE KEY PROSECUTION EVIDENCE, THE IDENTIFICATION OF THE DEFENDANTS BY THE VICTIM, GAYDRA JACKMAN, WAS HIGHLY UNRELIABLE IN ITSELF AND BY REASON OF THE IMPROPER IDENTIFICATION PROCEDURES WHICH OCCURRED PRIOR TO TRIAL.

As a matter of legal science it is now generally recognized that eye-witness identification by a single witness is extremely weak and unreliable evidence. Many commentators and Judges have noted that eye-witness identification, however certain the witness may be, tends to be extremely unreliable. A recent and ex-

haustive work, Wall, *Eye-Witness Identification in Criminal Cases*, (1965), notes that the likelihood of error is greater when the identification is made by a single witness, at page 11; and where the witness is identifying persons of a different race, at page 122. Justice Frankfurter, while a professor at Harvard, wrote that:

“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.”

Frankfurter, *The case of Sacco and Vanzetti* 30 (1927).

Judge Jerome Frank stated that:

“ . . . perhaps erroneous identification of the accused constitutes the major cause of the known wrongful convictions.”

Frank & Frank, *Not Guilty*, 61 (1957)

Professor Borchard in his classic work, *Convicting the Innocent*, (1932) stated at page 111:

“Perhaps the major source of these tragic errors is an identification of the accused by the victim of a crime of violence.”

A similar statement was made by a leading American prosecutor, Richard Kuh, formerly Chief Assistant Prosecutor in the New York County District Attorney's Office. According to Mr. Kuh:

“Proof that relies wholly on identifications made by eye-witness (is) inherently weak, persons who merely saw a thief or attacker briefly, and under conditions of stress may *despite the best of intentions*—too readily be mistaken.”

Kuh, *Careers in Prosecution Offices*, 14 Journal of Legal Education 175, 187 (1961). (Emphasis added.)

Similarly, the Lord Chief Justice of England in a 1961 case, *Regina v. Parks*, [1961] 1 W.L.R. 1484, 1485, felt called upon to say:

“It is well known that these questions of identification are difficult. They can lead to a miscarriage of Justice and the court though with great hesitation has come to the conclusion that it would be unsafe to allow this conviction to stand.”

Indeed, this honorable Court has only recently had occasion to consider the unreliability of eye-witness identifications. In *State v. Reeves*, Utah 2d, P. 2d, filed March 25, 1968, Justice Henriod noted for a unanimous court that two witnesses to the crime identified some one other than the defendant at a lineup. Yet the court ruled that “the faulty inconsistent evidence of identification by two witnesses,” did not create a reasonable doubt as a matter of law when contrasted with other direct and circumstantial evidence. Fortunately for the innocent man so identified in the Reeves lineup, there were other evidence and other witnesses and the lineup was not the basis upon which the prosecution built its case. Unfortunately for the defendants in the present case, there is only one real witness who

observed the criminals and physical and scientific evidence is entirely lacking. Instead, the case against defendants turns upon the eye-witness identification by the victim, Gaydra Jackman.

Yet this identification suffers not only from the inherent difficulty of all eye-witness identifications of unfamiliar persons but is further weakened by the following facts, (1) The suggestiveness of the lineup, (2) The fact that Gaydra has difficulty seeing objects further than four feet away without her glasses and was not wearing her glasses during the crime, (3) The witness was naturally very upset and alarmed during the crime, (4) The witness admittedly had difficulty identifying defendant Ervin at the lineup, and (5) the witness' tentative identification at the lineup was improperly and suggestively reinforced by the unilateral deposition taken under oath in the courtroom by the district attorney without notice to defendants or their attorney on the afternoon in which defendants were arraigned.

POINT IV

THE IMPROPER AND SUGGESTIVE MANNER IN WHICH THE LINEUP WAS CONDUCTED PREJUDICED THE RIGHTS OF DEFENDANTS TO A FAIR TRIAL BY TAINTING THE IN-COURT IDENTIFICATION OF THE DEFENDANTS BY THE VIC-

TIM AND RENDERING THAT IDENTIFICATION UNRELIABLE.

In dealing with the problem of identification in the courtroom, two eminent British legal scholars have made the point that the question at trial asking a witness if he can identify the defendant is "of such trifling probative force that it ought not to be asked, except in the context of three other questions." These questions they urge are:

"When and in what circumstances did the witness first recognize the defendant as the man? Did he have any difficulty in recognizing him? And by what marks did he recognize him?"
Williams and Hammelmann, *Identification Parades*, 1963 Criminal Law Review, 479, 480.

We submit that the positive in-court identification of the defendants by the victim is indeed of little probative value apart from the answers about prior identification. We submit further that though there are gaps and inadequacies in the record resulting from the denial of counsel at the lineup in violation of the requirement of *United States v. Wade*, 388 U.S. 218, 87 Sup. Ct. 1926, 18 L.Ed. 2d 149 (1967), there is enough in the record to show that the courtroom identification was the result of an improper lineup and improper and suggestive practices which followed thereafter. We ask this court to rule, as the California Supreme Court has rule in *People v. Carusoe*, 65 Cal. Rep. 336, 339, 436 P.2d 336, 339 (Sup. Ct. Cal. 1968):

“That the lineup was unnecessarily suggestive and conducive to irreparable mistaken identification, and that its grossly unfair makeup deprived defendant to due process of law.”

Indeed what the California Supreme Court ruled in *Carusoe* applies even more strongly to this case. There the court noted that the other participants in the lineup did not physically resemble defendant. “They were not his size, not one had his dark complexion, and none had dark wavy hair.” 65 Cal. Rep. 339. In the present case only two participants in the lineup other than defendants, were even of the same race as the defendants. One of these Negroes was completely, even startlingly, bald and the other, though about the same height as defendant Ervin, was considerably more heavily built and had a distinctively flattened nose that the witness could remember several months after the lineup. Given these facts it is easy to conclude that defendants could well have been selected by the process of elimination as the only persons in the lineup who could be said by the witness as possibly resembling the men who committed the crimes. As the Supreme Court of the United States made clear in *United States v. Wade*, supra, *Gilbert v. California*, 388 U.S. 263, 87 Sup. Ct. 1951, 18 L.Ed.2d 1178 (1967) and *Stovall v. Deno*, 388 U.S. 293, 87 Sup. Ct. 1967, 18 L.Ed.2d 1199 (1967), supra, unfair suggestive and improper lineups are inseparably related to the later identification of defendants in the course of trial. Here, as in the *Carusoe* case, “The defendants’ counsel could not

free the defense from the taint of the improper lineup, and his client's destiny was in a real sense, sealed by the time the trial commenced." *People v. Carusoe*, supra at 65 Cal. Rep. 341.

POINT V

IT WAS A PREJUDICIALLY IMPROPER AND UNFAIR TACTIC FOR THE DISTRICT ATTORNEY TO TAKE A SWORN UNILATERAL DEPOSITION OF THE VICTIM IN THE COURTROOM WITHOUT NOTICE TO DEFENDANTS OR THEIR ATTORNEY AND WITHOUT THE DEFENDANTS, THEIR ATTORNEY, OR THE JUDGE BEING PRESENT, WHERE THE DISTRICT ATTORNEY USED THE DEPOSITION PROCEDURE TO SHAPE, INFLUENCE, AND SUGGEST THE WITNESS' TESTIMONY BY LEADING AND REPETITIVE QUESTIONS.

Despite the fact that the witness admitted to having some difficulty in picking defendant Ervin out of the lineup; despite the fact that the affidavit of the County Attorney who was present at the lineup shows that the witness was not prepared to identify Ervin as her assailant immediately following the lineup, the witness at the trial testified that she was certain defendant Ervin was the assailant and that she would never forget him. The positiveness of the witness' testimony at trial resulted in large measure from the prosecution's

improper and suggestive use of deposition procedures to shape and influence the witness' testimony. Specifically, on the very afternoon on which defendants were arraigned, the district attorney caused the witness Gaydra Jackman to attend and submit to a deposition taken under oath in the courtroom in which the case was to be tried, without the presence of a judge and without notice to or presence of defendants or their attorney. This unilateral deposition procedure is not authorized or sanctioned by the Utah Code of Criminal Procedure and is completely novel and improper. Indeed express provision is made for the taking of a witness' testimony by U.C.A. 77-15-31, but this section expressly requires notice to the defendant and further requires that the testimony be taken before the magistrate having jurisdiction of the charge.

At the unilateral deposition the district attorney repeated and repeated leading and suggestive questions which could have had no purpose and no effect other than to shape and suggest the testimony of the witness. Again and again, the district attorney hammered home by leading and suggestive questions that the witness could identify and would never forget the defendants as the men who committed the crimes. The transcript of the deposition shows that no less than a dozen times, on page 8, twice on page 15, on page 20, on page 32, twice on page 44, three times on page 45, on page 48 and on page 49, the district attorney kept hammering home the point through his leading questions that the witness was sure she could identify defendants. While

there is certainly nothing wrong with an attorney discussing the case with a witness and going over the witness' testimony in preparation for trial, there are and must be reasonable limits on how far an attorney may fairly go. In this case those limits were exceeded. They were exceeded because the questions took place in a formal proceeding, under oath and in the courtroom, conducted as if it were part of the official proceedings except for the absence of the judge, the defendants and their attorney and except for the leading and suggestive nature of the questions. The very formality with which the deposition was conducted had a tendency to fix and shape the witness' testimony at trial. Given the nature of the deposition and the manner in which it was conducted, it is not surprising at all that despite her initial difficulty in identifying defendant Ervin at the lineup shortly after the crime was committed, she was definite in her identification at trial and testified at page 60 of the trial transcript and at page 89 of the trial transcript, the answer to the question so carefully suggested and so repeatedly hammered home by the prosecutor in the course of the unilateral deposition, that she would never forget the defendants. Given the effect of this novel and unauthorized procedure on the witness' testimony, defendants were denied their right to a meaningful and effective cross-examination and confrontation of the key prosecution witness. Thus, in and of itself, the improper deposition procedure was prejudicial error.

POINT VI

THE DEFENDANTS WERE PREJUDICED BY THE ERRONEOUS AND IMPROPER DENIAL OF COUNSEL AT THE LINEUP, A CRITICAL STAGE OF THE PROCEEDINGS AGAINST DEFENDANTS. BY REASON OF THE DENIAL OF COUNSEL AT THE LINEUP, TRIAL DEFENSE COUNSEL WAS HAMPERED AND PRECLUDED FROM SHOWING THE VICTIM'S FAILURE TO MAKE A POSITIVE IDENTIFICATION AT OR IMMEDIATELY FOLLOWING THE LINEUP.

In *United States v. Wade*, 388 U.S. 218, 87 Sup. Ct. 1926, 18 L. Ed. 2d 149 (1967), and *Gilbert v. California*, 388 U.S. 263, 87 Sup. Ct. 1951, 18 L. Ed. 2d 1178 (1967), the United States Supreme Court recognized that a lineup at which a defendant is presented for identification to witnesses of a crime is a critical stage of the proceedings at which a defendant is entitled to the presence of counsel. The court expressly ruled in *Stovall v. Denno*, 388 U.S. 293, 87 Sup. Ct. 1967, 18 L. Ed. 2d 1199 (1967), decided the same day as *United States v. Wade*, supra, that all lineups conducted after June 12, 1967, the date of the *Wade*, *Gilbert* and *Stovall* decisions must comply with the requirements of *Wade* and *Gilbert*. These requirements are stated in *United States v. Wade*:

“(B)oth Wade and his counsel should have been notified of the impending lineup and counsel’s presence should have been a requisite to conduct of the lineup, absent an intelligent waiver. See *Carnley v. Cochran*, 369 U.S. 506.”

The record in this case makes clear that the standards of *Wade* were not met. Indeed, at the hearing on defendants’ motion for a new trial, it was established by defense counsel that defendants were not informed of their right to the presence of counsel at the lineup and, not having been so informed, could not intelligently waive that right. While there was testimony that a lawyer may have been informed that a lineup would be held in the future, that lawyer testified that he did not regard himself as representing the defendants and thus did not take any action in relation to such advice. Indeed, it is clear that the trial judge’s decision denying the motion for new trial was erroneously based upon a misreading of the requirements of the *Wade* rule. As the trial judge stated at the hearing in the motion, at page 42:

“What your cases say, if I understand them correctly is that such viewing or lineup must be conducted properly, and that’s the purpose for having an attorney there.”

As the *Wade* case makes clear, the major purpose for requiring an attorney at the lineup is not just to assure that the lineup is fairly conducted but to permit effective confrontation and cross examination at the trial as to how the lineup was conducted and whether and how the witness was able to identify the suspects.

Indeed, the instant case is a clear example of the prejudicial results of denying counsel at the lineup. Though defense counsel sought to challenge the lineup identification by questioning the witness about it, he was unable to develop the facts or show more than the fact that the witness had trouble in identifying the defendant Ervin until he put on his glasses.

The error resulting from the failure to comply with the rule of *United States v. Wade* was not waived either by defendant's failure to demand the presence of counsel at the lineup or by the defense failure to object to the in-court identification at trial.

It is clear that there can be no waiver of important constitutional rights by mere default, in the absence of knowledge of those rights for a waiver is "an intentional relinquishment or abandonment of a known right or privilege," *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 Sup. Ct. 1019, 1023, 82 L. Ed. 1461 (1938); *Carnley v. Cochran*, 369 U.S. 506, 82 Sup. Ct. 884, 8 L. Ed. 2d 70 (1962). Since defendants were not informed of their rights to have counsel present at the lineup they cannot intelligently have waived such right.

The Miranda warning adverted to by the trial judge in stating his denial of the motion for new trial is merely a warning relating to interrogations and questioning. Even an astute lawyer could not be expected to know from the Miranda warning that a defendant is entitled to the presence of counsel during a lineup. Certainly laymen would have no such knowledge.

As to the failure to object during the trial itself, certainly it is clear that defense counsel sought to raise the issue of the appropriateness of the lineup. Indeed, it must be noticed that in the *Wade* case itself, the issue was raised by a motion for a judgment of acquittal or alternatively to strike the courtroom identification at the close of the testimony of the case. In any event since the violation of the *Wade* rule was so prejudicial and so significant in the light of the total evidence and posture in this case, this court should not permit this conviction to stand despite the error, merely because of defense counsel's failure to make a motion to strike the in-court identification testimony. C.f. *Henry v. Mississippi*, 379 U.S. 443, 85 Sup. Ct. 564, 13 L. Ed. 2d 408 (1965).

While in *Simmons v. United States*, U.S., 89 Sup. Ct. 967, L. Ed. 2d, (1968), the Court ruled that when tested by the totality of the surrounding circumstances test of *Stovall v. Denno*, supra, a pre-*Wade* identification from photographs was not so improper under the circumstances as to require reversal, it is clear that the Court was limiting its ruling to extrajudicial identifications by photograph. So too, *Biggers v. Tennessee*, U.S., 89 Sup. Ct. 979, L. Ed. 2d, (1968), in which the Court sustained a pre-*Wade* identification by an equally divided court, does not affect the rule of *Wade* as applied to lineups and other viewings of defendants occurring after the date of the *Wade* decision.

It should be noted that the present case which turns upon the applicability of the rule of *United States v. Wade*, supra, to lineups conducted after June 12, 1967, is distinguishable from the situations presented to this court in *State v. Workman*, Utah 2d, 435 P. 2d 919 (1968); *Nielsen v. Turner*, Utah 2d, 435 P. 2d 921 (1968); and *Dyett v. Turner*, Utah 2d, P. 2d, (1968). In those cases this court ruled that newly fashioned federal constitutional rulings did not apply retroactively to practices and procedures which had occurred before the date of the rulings. In *Stovall v. Denno*, supra, at 388 U.S.:

“We hold that *Wade* and *Gilbert* affect only those cases *and all future cases which involve confrontations for identification purposes conducted in the absence of counsel after this date.*” (Emphasis added.)

In numerous cases decided since *Wade* and *Stovall* state and federal courts have recognized and stated that lineups conducted after June 12, 1967, must be conducted in accordance with the *Wade* rule.

The present case is a striking example of the reason for the Supreme Court's ruling in *United States v. Wade*, supra. For here there is a clear and striking example of just the kind of unfairness the Supreme Court was seeking to prevent. Not only was the lineup unduly suggestive and unfair but, unknown to trial defense counsel until after the trial the chief prosecution witness failed to make a positive identification of

the defendant Ervin. Yet when cross examined about her identification at the lineup the witness unwittingly gave the impression that she had made a positive identification of Ervin at the lineup after he put on dark glasses (Tr. 74). In fact she did not make a positive identification at the lineup and the time when she saw him in dark glasses was long after the lineup. Yet this erroneous impression was not corrected by the district attorney and the defense counsel was not aware at the time that the impression was erroneous.

POINT VII

IT WAS PREJUDICIAL ERROR TO ADMIT THE IN-COURT IDENTIFICATION OF THE DEFENDANT ANDREW BY THE WITNESS DAN HATCH WARNER SINCE HIS TESTIMONY AT TRIAL WAS OBTAINED BY A SHOCKING AND FLAGRANT VIOLATION OF THE CONSTITUTIONAL RIGHTS OF THE DEFENDANTS IN CIRCUMSTANCES TENDING TO MAKE SUCH TESTIMONY INHERENTLY UNRELIABLE.

We have urged above that the identification testimony of the victim, Gaydra Jackman, was tainted by the failure to comply with the requirements of *United States v. Wade*, supra, applicable to all lineups conducted after June 12, 1967. What we have urged above applied with even greater force to the testimony of the witness Dan Hatch Warner. While the testimony of

this witness tended to be merely corroborative, the violation of the *Wade* rule was even more flagrant and improper.

Dan Hatch Warner testified at trial that he observed the defendant Carl Archie Andrew walking around outside the Jackman home, the scene of the crime, at about the time the crime was alleged to have occurred. This testimony tended to corroborate the testimony of the victim and was certainly prejudicial to defendants. While the witness testified that he wasn't positive in his identification, he did answer yes to the question, "With respect to the man you saw at . . . the Jackman residence on or about the 26th day of June, 1967, do you recognize one of these men as being that man?"

This testimony by witness Warner was obtained by a direct, blatant, and grossly improper violation of the rule of *United States v. Wade*, supra, reinforced by an improper and suggestive unilateral deposition obtained by the district attorney on August 15, 1967.

On August 15, 1967, the date of arraignment on the information, the district attorney had the witness, Mr. Warner, attend the court and observe defendants under circumstances extremely suggestive that they were the ones who had committed the crime. Later on the same day, without notice to defendants or their counsel, the district attorney conducted a unilateral deposition in the district courtroom with the witness under oath in the presence of the sheriff, the county

attorney, and a court reporter — in the presence of everyone but those persons whom common decency and the basic standards of American law would suggest ought to be present—the defendants and their attorney.

The witness was sworn and then by leading and suggestive questions, led to state that he could identify one of the defendants.

Given the fact that the witness' testimony itself shows he had only a momentary observation of the man he identified as defendant Andrew and did not even see the man's face, and did not identify him until after he saw him in court as a defendant at the arraignment, the manner in which this identification was made and the suggestive deposition in which it was reinforced made the admission of Warner's testimony at trial a violation of due process of law, under the rule of *United States v. Wade*, *Gilbert v. California*, and *Stovall v. Denno*. Since the testimony of the witness, Warner was the only significant corroboration of the identification by the victim, its admission was prejudicial error as well as a violation of due process of law. For as the Court of Appeals for the Fourth Circuit stated in *Palmer v. Peyton*, 359 F. 2d 199, 202 (1966) :

“A state may not rely in a criminal prosecution . . . on an identification secured by a process in which the search for truth is made secondary to the question for conviction.”

The present case demonstrates that, when the search for truth is subordinated to the quest for conviction, injustice may result.

POINT VIII

THERE WAS NO EVIDENCE WHATSOEVER, UPON WHICH THE JURY COULD HAVE FOUND DEFENDANT ANDREW TO BE GUILTY AS AN ACCESSORY.

While we urge that the record demonstrates that the conviction of both defendants was clearly erroneous, our duty to the Court and to defendants compels us to urge as well, a particular ground of error on behalf of defendant Andrew. Specifically, even assuming, contrary to the evidence, that defendant Ervin was guilty, there is no evidence to support the conviction of Andrew as an accessory. U.C.A. 76-1-46 defines as accessories:

All persons who, after full knowledge that a felony has been committed, conceal it from a magistrate, or harbor and protect the person who committed it . . .

Since defendant Andrew was originally charged as a principal, it is obvious that the accessory charge cannot be based upon his failure to reveal any knowledge he may have had to the magistrate before whom he himself was charged. Thus, the only basis for the accessory charge would be that he "harbored and protected" defendant Ervin. But there is not a shred of evidence to show this. The record shows that Andrew was a guest in the car of Ervin's mother. Can it be said that by riding in another's car back to his own home, he harbored and protected another guest, the son of the car's owner?

Would he have had to have refused to ride in the car and have left himself stranded far from home in a State where he was a stranger to avoid being an accessory? Certainly, there is nothing in the record besides the fact that Andrew accompanied the Ervin family back to Wyoming, which would indicate harboring and protecting. Clearly, one who merely fails to make a citizen's arrest or report the crime to the police is not guilty as an accessory. 22 Corpus Juris Secundum, § 99 (d), (e)

CONCLUSION

Your Amicus respectfully urges that by reason of the numerous and significant errors, each of which was prejudicial, the conviction in this case was a miscarriage of justice. Accordingly, we urge this Court to reverse the conviction and remand the case for a new trial.

Respectfully submitted,

I. DANIEL STEWART

LIONEL H. FRANKEL