No. _____

In the
Supreme Court of the United States

DARRILL M. HENRY,
Petitioner,
v.
STATE OF LOUISIANA,
Respondent.

On Petition for Writ of Certiorari
to the Louisiana Court of Appeal, Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

SHERRY WATTERS
Counsel of Record
LA. APPELLATE PROJECT
P.O. Box 58769
New Orleans, LA 70158
sherrywatters@yahoo.com
(504) 723-0284

JAMES L. BROCHIN
JAREN JANGHORBANI
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019
(212) 373-3000

BARRY C. SCHECK
KAREN NEWIRTH
INNOCENCE PROJECT, INC.
40 Worth Street, Suite 701
New York, NY 10013
(212) 364-5340

Counsel for Petitioner

July 9, 2015

QUESTION PRESENTED

Whether Louisiana's per se ban on the introduction of eyewitness identification expert testimony violates the Due Process, Confrontation, and Compulsory Process Clauses of the U.S. Constitution.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

Darrill M. Henry respectfully petitions for a writ of certiorari to review the judgment of the Louisiana Court of Appeal, Fourth Circuit, in this case.

OPINIONS BELOW[1]

The opinion of the Supreme Court of Louisiana denying the defendant's application for a Writ of Certiorari to the Court of Appeal, Fourth Circuit, *State* v. *Henry*, No. 2014-K-1869, 2014 WL 1758094, __ So. 3d __ (La. Apr. 10, 2015), is attached as Appendix "A." The opinion of the State of Louisiana Court of Appeal, Fourth Circuit, in this matter, *State* v. *Henry*, No. 2013-KA-0059, 147 So. 3d 1143 (La. Ct. App. Aug. 6, 2014), is attached as Appendix "B." The transcript of the District Court of the Parish of Orleans' ruling denying Petitioner's motion *in limine* to admit expert testimony is attached as Appendix "C." The transcript of the District Court of the Parish of Orleans' denying Petitioner's motion for a new trial and renewed request to admit expert testimony is attached as Appendix "D."

JURISDICTION

The denial of defendant's Application for Writ of Certiorari to the Louisiana Supreme Court to the Court of Appeal, Fourth Circuit, was entered on April 10, 2015. This Court has jurisdiction under the

---

[1] Hereafter, citations to the appendices will be cited as "Pet. App. __." Citations to the record below will be cited as "R-__" according to the designations set for the appellate record filed with the Louisiana, Fourth Circuit Court of Appeal on January 14, 2013. Unless otherwise specified, "Tr." refers to the trial transcript in this case.

United States Constitution, Article II, Section 2, and 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const., amend. VI.

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part that:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., amend. XIV.

STATEMENT OF THE CASE

Petitioner Darrill Henry was convicted of first-degree murder and sentenced to life in prison without the possibility of parole based exclusively on eyewitness identification testimony. That evidence was the product of police procedures that decades of social science research, courts across the country, and this Court have identified as likely to generate unreliable identifications. Yet, bound by a rule that differs from the law in 48 states and all but one federal circuit, the trial court precluded Mr. Henry from calling an expert to point out the flaws in the identification procedures used by law enforcement and to rebut the conclusory testimony of the officer who administered the procedures that he deemed "suitable." Pet. App. at 31a. Despite the fact that this testimony was contrary to findings of established social science research in areas outside the ken of the average juror, the trial court categorically refused to permit Mr. Henry to introduce qualified expert opinion evidence to rebut this testimony.

The trial court denied Mr. Henry's motion for an expert, citing the Louisiana Supreme Court's decision in *State* v. *Young*, 35 So. 3d 1042 (La. 2010), which prohibits expert testimony on eyewitness identification issues in all cases on the grounds that such testimony is highly prejudicial to the jury.[2] Pet. App. at 36a. This per se ban on eyewitness experts stands in stark contrast to the law in the overwhelming majority of state and federal courts to have considered the issue. These courts recognize

[2] The *Young* court did not hold that expert identification testimony is unreliable.

the importance of this type of expert evidence, which recently received a ringing endorsement from the National Academy of Science, and trust trial courts to exercise discretion in determining its admissibility. Louisiana's per se rule denying Mr. Henry the right to offer eyewitness expert testimony, regardless of its scientific merit, helpfulness to the jury, or relevance to the facts of the case, violates Mr. Henry's right to present a complete defense under the Fourteenth Amendment's Due Process Clause and the Sixth Amendment's Compulsory Process and Confrontation Clauses.

I. The State's Evidence

Darrill Henry was convicted of the June 15, 2004 murders of Durelli Watts and her daughter Ina Gex at Ms. Watts' home in New Orleans, Louisiana. R-131. The only evidence the State introduced against Mr. Henry was the testimony of Ms. Watts' neighbors Mr. Steven Dominick, Ms. Cecilia Garcia, and Ms. Linda Davis, who claimed to have seen the perpetrator at or leaving the Watts residence at the time of the murders. *See* Pet. App. at 10a. Each of these witnesses participated in police-orchestrated out-of-court identification procedures that were suggestive in material respects and that research has shown is not commonly understood by lay persons.

A. The Police Investigation and Police-Orchestrated Identification Procedures

Immediately following the crime, Mr. Dominick, Ms. Garcia, and Ms. Davis provided descriptions of the perpetrator to police. The only facts on which all three could agree were that the perpetrator was an African American male wearing a

red shirt and blue pants. Tr. 117:27–32; 248:16–250:14; 427:5–13. New Orleans Police Department Detective Winston Harbin administered the identification procedures to all three witnesses. On the day of the murders, he met with Mr. Dominick and assisted in the creation of a composite sketch of the perpetrator.[3] Tr. 248:4–26, 250:17–26. Although Mr. Dominick reported that the composite did not look like the perpetrator, it was released to the news media together with a request for information about the crime. Tr. 250:27–251:14. Approximately thirty Crimestopper tips were reported to the police, including several tips claiming that the composite looked like Mr. Henry. *See* R-986–90.

Detective Harbin then obtained a recent photograph of Mr. Henry[4] in which he wore a white shirt with blue stripes and placed it in a six-person photo array that he showed to Mr. Dominick on June 24, 2004.[5] *See* Tr. 771:25–773:8; *see also* Pet. App. at

---

[3] *State* v. *Lawson*, 291 P.3d 673, 703 (Or. 2012) (en banc) (citing research) ("Indeed, some studies show a negative effect on identification accuracy after witnesses have attempted to produce a composite of a suspect or provide detailed verbal descriptions of facial features, a development that might result from the different cognitive mechanisms employed to verbally describe faces as opposed to recognizing them.")

[4] At about 11pm on the night of the murders, Mr. Henry was arrested and charged with a municipal misdemeanor. Tr. 735:25–736:23. As revealed in his booking photograph, at the time of his arrest he was wearing a white shirt with blue stripes and had no visible injuries. Tr. 738:6–739:10.

[5] National Academy of Sciences, *Identifying the Culprit: Assessing Eyewitness Identification* at 92 (2014) ("NAS Report") ("use of 'blinded' or 'double-blind' lineup identification procedures is an effective strategy for reducing the likelihood that a witness will be exposed to cues from interactions with

32a; R-3730. Mr. Dominick could not identify anyone in the array as the perpetrator. Pet. App. at 13a.

Detective Harbin next obtained another photograph of Mr. Henry that was approximately a year old. In that photograph, Mr. Henry wore a red t-shirt—the same color and type of shirt that witnesses described the perpetrator wearing. Tr. 445:29–446:31. This same photograph was released to the media and was broadcast as part of a news report on the Watts/Gex murders. Pet. App. at 12a. Both Ms. Garcia and Ms. Davis viewed this report prior to being asked by police to make an identification.[6]

On July 7, 2004, Detective Harbin composed a six-person photographic array using Mr. Henry's year-old booking photo and five filler photographs. *Id.* at 13a. Mr. Henry was the only person in the array with braided hair (the others had close cropped hair) and the only person in the array wearing a red t-shirt. Tr. 752:14–21. Ms. Garcia identified Mr. Henry from this array as the person she saw exiting the Watts residence on the day of the murders. Pet. App. at 12a. On September 2, 2004,[7] Detective Harbin reordered the photographs in the array

---

law enforcement (such as feedback) that could influence identifications and/or confidence in those identifications"); NAS Report at 106 (recommending double-blind lineup and photo array procedures).

[6] *Lawson*, 291 P.3d at 708–09 ("Viewing a suspect multiple times throughout the course of an investigation adversely affects the reliability of any identification that follows those viewings. . . .").

[7] Memories fade over time. *See* NAS Report at 98.

shown to Ms. Garcia and presented them to Ms. Davis. *Id.* at 30a, 32a. Ms. Davis also identified Mr. Henry as the person she saw leaving the Watts residence on the day of the murders. *Id.* at 12a.

On July 17, 2010, six years after the crime, Mr. Dominick was in jail on multiple serious felony charges when he was allegedly placed in the same holding cell as Mr. Henry. *Id.* at 13a. Mr. Dominick informed corrections officers that he recognized Mr. Henry as the man who shot Ms. Gex.

B. The Trial Evidence

Mr. Henry's trial began on August 23, 2011. Mr. Dominick, Ms. Garcia, and Ms. Davis all made in-court identifications of Mr. Henry.[8] Pet. App. at 25a. Detective Harbin testified as a prosecution witness regarding his investigation and described the identification procedures used. He testified that he chose "neutral" filler photos so that no one photo would stand out. Tr. 747–53. He also testified that although he could have selected filler photographs with any hair style or shirt color, Mr. Henry was the only member of the photo array with braided hair and a red t-shirt. Pet. App. at 19a; *see also* Tr. 747:11–756:11. Detective Harbin further explained that although "hair and shirt color could be an issue" in this case, he had reviewed the photographic arrays for suggestiveness and found them "suitable" for use. Tr. 756:24–757:2. He further opined that he had "no specific intent" to put Mr. Henry in the array in the "hopes he would be identified." Pet. App. at 31a.

---

[8] NAS Report at 36 n.28 ("[I]n-court identifications do not reliably test an eyewitness' memory."); NAS Report at 110–11.

The State objected to any other questions about the detective's selection of the fillers, the nature of the filler photographs or the suggestiveness of the identification procedures. The trial court sustained the objections, holding that suggestiveness was an issue for the jury. *E.g.*, Tr. 774:6–775:12

Mr. Henry was precluded from calling an expert witness in police identification procedures and eyewitness memory and perception. *See* Pet. App. at 74a. As a result, he was unable to effectively challenge the eyewitness identification evidence—the only evidence against him—by demonstrating that the police procedures used were suggestive and that the witnesses, although certain, were mistaken.[9] Mr. Henry was convicted based on the identification testimony despite significant exculpatory evidence, *see id.* at 10a, including his *exclusion* as the donor of male DNA contained in blood collected at the scene containing an unknown male's DNA, *see id.* at 18a, 22a–23a; Tr. 1071:23–24, 1078:14–20, and testimony and documents that supported his alibi that he spent the day of the crime applying for work at locations throughout New Orleans, at a considerable distance from Ms. Watts' home, *see* Pet. App. at 18a.[10] In

---

[9] NAS Report at 29 ("[I]t is now well established that confidence judgments may vary over time and can be powerfully swayed by many factors.")

[10] Studies have shown that jurors routinely "over-believe" eyewitness testimony. *See* Jennifer N. Sigler & James V. Couch, *Eyewitness Testimony and the Jury Verdict*, 4 N. Am. J. Psychol. 143, 146 (2002) (noting that the conviction rate by mock juries increased from 49% to 68% with the addition of a single, vague eyewitness account). Jurors also tend to overestimate "the likely accuracy of eyewitness evidence." John C. Brigham & Robert K. Bothwell, *The Ability of Prospective*

addition, jurors heard testimony from law enforcement witnesses that despite the bloody nature of the crime scene, no forensic evidence connected Mr. Henry to the Watts home or to either victim. Pet. App. at 10a. The investigators were unable to find any evidence of blood, injury, or arson on Mr. Henry's body, clothes, or any of his belongings. Tr. 854:18–31; Pet. App. at 10a.

II. Trial and Appeal

Immediately prior to trial, Mr. Henry filed a Motion *in Limine* to Admit Expert Testimony on the Effect of Proper Police Procedures on Perception, Memory and Eyewitness Reliability.[11] R-429–68. In his motion, Mr. Henry argued that the "[f]ailure to allow this testimony will deny [him] due process, the right to present a defense, his right of confrontation and a fair trial under the Louisiana and United States constitutions." R-434. The trial judge, Judge Waldron, denied Mr. Henry's motion to admit eyewitness expert testimony, relying on the Supreme Court of Louisiana's holding in *State* v. *Young*. Pet. App. at 74a.

The jury found Mr. Henry guilty of both counts of murder. R-131. The following day, the jury returned and recommended that Mr. Henry serve life in prison. R-130. Judge Waldron later heard

---

Jurors to Estimate the Accuracy of Eyewitness Identifications, 7 Law & Hum. Behav. 19, 28 (1983).

[11] Indeed, the defense limited the scope of the expert's testimony to address only system variables—*i.e.*, flaws in the identification procedure introduced by suggestive procedures—and not estimator variables in an attempt to comply with its reading of *State* v. *Young*. R-429.

arguments on a motion for a new trial. Mr. Henry again argued that he should have been allowed to present eyewitness expert testimony. Pet. App. at 187a–190a. The court denied his motion. *Id.* at 209a–210a. Judge Waldron sentenced Mr. Henry to life in prison without the benefit of probation, parole, or suspension on May 24, 2012. R-294.

On appeal, Mr. Henry argued that the court's refusal to admit eyewitness expert testimony deprived him of his right to present a complete defense in violation of the guarantees embodied in the Sixth and Fourteenth Amendments to the United States Constitution. Br. for Def.-Appellant at 30, *State* v. *Henry*, 147 So. 2d 1143 (La. Ct. App. Aug. 6, 2014) (No. 2013-KA-0059). The Court of Appeal of Louisiana, Fourth Circuit, rejected all of Mr. Henry's assignments of error in his appeal, and affirmed his conviction. Pet. App. at 43a. The Court of Appeal did not specifically address Mr. Henry's constitutional arguments, simply holding, based on *State* v. *Young* that it was proper for the trial court to exclude Mr. Henry's eyewitness expert. *Id.* at 36a–37a. Mr. Henry then filed an Application for Writ of Certiorari to the Supreme Court of the State of Louisiana specifically arguing that the exclusion of his expert's testimony prevented the exercise of his constitutional right to present a defense. Appl. for Writ of Cert. with Mem. in Supp. of Relator-Def. ("Def's La. Cert. Pet.") at 30, *State* v. *Henry*, 147 So. 2d 1143 (La. Apr. 10, 2015) (No. 2013-KA-0059). The Supreme Court of the State of Louisiana denied this application on April 10, 2015. Pet. App. at 1a.

REASONS FOR GRANTING THE PETITION

I. The Jurisdictions that Ban All Eyewitness Expert Testimony Are Unconstitutionally Depriving Criminal Defendants of Significant Protections

Forty-eight states, the District of Columbia, and eleven federal circuits have considered the admissibility of eyewitness expert testimony.[12] Of these, only Louisiana, Nebraska, and the Eleventh Circuit have imposed per se bans on the use of eyewitness expert testimony.

As a result of the minority rule, however, a defendant's ability to exercise his right to present a complete defense, one recognized repeatedly by this Court, depends on where a defendant is being tried.

A. Nearly All Federal and State Courts Leave to the Discretion of the Trial Court the Admission of Eyewitness Expert Testimony

Three jurisdictions—the Eleventh Circuit, Louisiana, and Nebraska—do not allow the admission of expert testimony concerning the

---

[12] Two states—Hawaii and New Mexico—and the D.C. Circuit—have not addressed this issue in their appellate courts. The D.C. district courts allow eyewitness expert testimony under a regular *Daubert* analysis. *See Robertson* v. *McCloskley*, 676 F. Supp. 351, 354 (D.D.C. 1988) ("There is therefore no magic formula for determining whether [the expert's] testimony is admissible. An independent decision must be made to determine whether that testimony would be helpful to the jury."); *see also United States* v. *Libby*, 461 F. Supp. 2d 3, 9 (D.D.C. 2006).

reliability of eyewitness testimony regardless of the circumstances of the case or the evidence offered by the prosecution. *See United States* v. *Smith*, 122 F.3d 1355, 1358 (11th Cir. 1997) (acknowledging that circuit precedent imposed a per se ban on eyewitness expert testimony); *Young*, 35 So. 3d at 1050; *State* v. *George*, 645 N.W.2d 777, 790 (Neb. 2002). The remaining states and federal courts afford trial courts the discretion to determine whether or not eyewitness expert testimony should be admitted in a particular case. *E.g.*, *State* v. *Guilbert*, 49 A.3d 705, 731–32, 734 (Conn. 2012) ("[W]hether to permit expert testimony concerning the reliability of eyewitness identification evidence in any individual case ultimately is a matter within the sound discretion of the trial court."). Trial courts within these jurisdictions exercise this discretion using the standard rules of evidence and procedure that the jurisdiction applies to any form of expert testimony.[13]

---

[13] *See United States* v. *Rodriguez-Berrios*, 573 F.3d 55, 71 (1st Cir. 2009), cert. denied, 559 U.S. 905 (2010); *United States* v. *Lumpkin*, 192 F.3d 280, 289 (2d Cir. 1999); *United States* v. *Brownlee*, 454 F.3d 131, 144 (3d Cir. 2006); *United States* v. *Harris*, 995 F.2d 532, 534 (4th Cir. 1993); *United States* v. *Moore*, 786 F.2d 1308, 1312 (5th Cir. 1986); *United States* v. *Smithers*, 212 F.3d 306, 314 (6th Cir. 2000); *United States* v. *Bartlett*, 567 F.3d 901, 906 (7th Cir. 2009); *United States* v. *Martin*, 391 F.3d 949, 954 (8th Cir. 2004); *United States* v. *Rincon*, 28 F.3d 921, 926 (9th Cir. 1994), cert. denied, 513 U.S. 1029 (1994); *United States* v. *Rodriguez-Felix*, 450 F.3d 1117, 1126 (10th Cir. 2006); *Ex parte Williams*, 594 So. 2d 1225, 1226 (Ala. 1992); *Skamarocius* v. *State*, 731 P.2d 63, 66 (Alaska Ct. App. 1987); *State* v. *Nordstrom*, 25 P.3d 717, 731 (Ariz. 2001) (abrogated on other grounds); *Parker* v. *State*, 968 S.W.2d 592, 596 (Ark. 1998); *People* v. *McDonald*, 690 P.2d 709, 727 (Ca. 1984) (en banc), *overruled on other grounds by People* v. *Mendoza*, 4 P.3d 265 (Ca. 2000); *People* v. *Campbell*, 847 P.2d

Many of the courts that have allowed trial judges the discretion to admit eyewitness expert testimony in appropriate cases have recognized the important role such testimony can play, as well as the important due process and fair trial rights

---

228, 230 (Colo. App. 1992); *Guilbert*, 49 A.3d at 722; *Garden* v. *State*, 815 A.2d 327, 338 (Del. 2003), *superseded by statute on other grounds*; *Benn* v. *United States*, 978 A.2d 1257, 1273 (D.C. 2009); *McMullen* v. *State*, 714 So. 2d 368, 371 (Fla. 1998); *Howard* v. *State*, 686 S.E.2d 764, 769 (Ga. 2009); *State* v. *Pacheco*, 2 P.3d 752, 756 (Idaho Ct. App. 2000); *People* v. *Allen*, 875 N.E.2d 1221, 1231 (Ill. App. Ct. 2007); *Cook* v. *State*, 734 N.E.2d 563, 570 (Ind. 2000); *State* v. *Schutz*, 579 N.W.2d 317, 320 (Iowa 1998); *State* v. *Carr*, 331 P.3d 544, 690 (Kan. 2014); *Commonwealth* v. *Christie*, 98 S.W.3d 485, 489 (Ky. 2002); *State* v. *Kelly*, 752 A.2d 188, 191 (Me. 2000); *Bomas* v. *State*, 987 A.2d 98, 112 (Md. 2010); *Commonwealth* v. *Santoli*, 680 N.E.2d 1116, 1119 (Mass. 1997); *People* v. *Kowalski*, 821 N.W.2d 14, 35 (Mich. 2012); *State* v. *Miles*, 585 N.W.2d 368, 371 (Minn. 1998); *Flowers* v. *State*, 158 So. 3d 1009, 1029 (Miss. 2014); *State* v. *Hill*, 839 S.W.2d 605, 607 (Mo. 1992); *State* v. *DuBray*, 77 P.3d 247, 255 (Mont. 2003); *White* v. *State*, 926 P.2d 291, 292 (Nev. 1996); *State* v. *Hungerford*, 697 A.2d 916, 924 (N.H. 1997); *State* v. *Gunter*, 554 A.2d 1356, 1360 (N.J. Super. Ct. App. Div. 1989); *People* v. *Santiago*, 958 N.E.2d 874, 883 (N.Y. 2011); *State* v. *Lee*, 572 S.E.2d 170, 176 (N.C. 2002); *State* v. *Fontaine*, 382 N.W.2d 374, 377 (N.D. 1986); *State* v. *Buell*, 489 N.E.2d 795, 801 (Ohio 1986); *Torres* v. *State*, 962 P.2d 3, 20 (Okla. Crim. App. 1998); *Lawson*, 291 P.3d at 697; *Commonwealth* v. *Walker*, 92 A.3d 766, 772 (Pa. 2014); *State* v. *Martinez*, 774 A.2d 15, 19 (R.I. 2001); *State* v. *Whaley*, 406 S.E.2d 369, 372 (S.C. 1991); *State* v. *McCord*, 505 N.W.2d 388, 392 (S.D. 1993); *State* v. *Copeland*, 226 S.W.3d 287, 298 (Tenn. 2007); *Weatherred* v. *State*, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000); *State* v. *Clopten*, 223 P.3d 1103, 1107 (Utah 2009); *State* v. *Percy*, 595 A.2d 248, 252 (Vt. 1990); *Currie* v. *Commonwealth*, 515 S.E.2d 335, 338 (Va. Ct. App. 1999); *State* v. *Cheatam*, 81 P.3d 830, 841 (Wash. 2003) (en banc); *State* v. *Taylor*, 490 S.E. 2d 748, 753 (W. Va. 1997); *State* v. *Shomberg*,709 N.W.2d 370, 374 (Wis. 2006); *Engberg* v. *Meyer*, 820 P.2d 70, 80 (Wyo. 1991).

inherent in a criminal defendant's right to present a complete defense. *E.g.*, *Copeland*, 226 S.W.3d at 298 n.6, 300–01 (overruling per se ban on eyewitness expert testimony; noting that the court had previously "held that the exclusion of such expert testimony could violate the due process right to a fair trial if the excluded evidence was critical to the defense and was reliable"); *see also infra* pp. 26–35. Indeed, in this case, a concurring judge wrote,"[I]t seems reasonable in a death penalty case that, out of fairness, the defendant should be allowed to call an expert witness to discuss 'how suggestive police procedures can lead good people to pick a photo . . . as a result of poor police investigative procedures.'" Pet. App. at 62a–63a (Tobias, J., concurring).

The most recent cases to have addressed this issue also emphasized the need for expert testimony to shed light on the shortcomings of eyewitness evidence. *See, e.g.*, *Walker*, 92 A.3d at 780 ("Because eyewitnesses can offer inaccurate, but honestly held, recollections in their attempt to identify the perpetrator of a crime, eyewitness identifications are widely considered to be one of the least reliable forms of evidence."). As the *Walker* court wrote:

> [T]here is no doubt that wrongful conviction due to erroneous eyewitness identification continues to be a pressing concern for the legal system and society. One way in which fact finders may be assisted in making more accurate and just determinations regarding guilt or innocence at trial is through the admission of expert testimony.

Id.

Other courts have echoed the importance of expert testimony in assisting juries in understanding what scientists have come to recognize as a complex topic, one that is not necessarily within common knowledge or experience. *E.g.*, *Brownlee*, 454 F.3d at 142 ("Thus, while science has firmly established the 'inherent unreliability of human perception and memory,' this reality is outside the 'jury's common knowledge,' and often contradicts jurors' 'commonsense' understandings." (citations omitted)); *Moore*, 786 F.2d at 1312 ("Indeed, the conclusions of the psychological studies are largely *counter-intuitive*, and serve to 'explode common myths about an individual's capacity for perception . . . ." (citation omitted) (emphasis in original)); *Carr,* 331 P.3d at 690; *Santiago,* 958 N.E.2d at 883.

Other state courts have analyzed and discussed the science underlying the critiques of eyewitness testimony. *E.g.*, *Guilbert*, 49 A.3d at 729–30 ("We depart from [precedent] mindful of recent studies confirming what courts have long suspected, namely, that mistaken eyewitness identification testimony is by far the leading cause of wrongful convictions."); *Copeland*, 226 S.W.3d at 299–300 (noting that "[s]cientifically tested studies, subject to peer review, have identified legitimate areas of concern," including juror's sensitivity to eyewitness identifications). Louisiana simply ignores—and shields entirely from consideration by trial judges and juries—this body of established scientific evidence.

Yet Louisiana offers no valid—let alone constitutionally permissible—reason for its categorical ban on the use of experts in this field, because there simply is none. Indeed, the trial court in *Young* found the eyewitness expert testimony in that case admissible after a *Daubert* hearing, and the *Young* court never found the proffered testimony unreliable. *Young*, 35 So. 3d at 1045–46. The Louisiana Supreme Court banned eyewitness expert testimony based on a "fear of the expert invading what is considered the exclusive province of the jury," namely, determining the credibility of witnesses. *Id.* at 1050.[14] That fear is misplaced. As many jurisdictions have recognized, eyewitness expert testimony offers opinions not on the credibility of witnesses, but rather, on the reliability of eyewitness testimony generally. *See Walker*, 92 A.3d at 780. Eyewitness expert testimony is based on an analysis of specific factors and variables—such as the type, number, and nature of identification procedures used—which social science has shown can affect the accuracy and reliability of eyewitness testimony. *See State* v. *Henderson*, 27 A.3d 872,

---

[14] Moreover, the rationale behind the per se ban, as described by the Louisiana Supreme Court in *State* v. *Stucke*, 419 So. 2d 939, 944–45 (La. 1982), has been undercut significantly by subsequent authority. The Louisiana Supreme Court based its conclusion in *Stucke* "that the prejudicial effect of the testimony outweighed its probative value," on cases from other jurisdictions, including Nebraska, Nevada, the Tenth Circuit, and the Ninth Circuit. *Id.* Yet, Nevada, the Tenth Circuit, and the Ninth Circuit now all permit testimony from eyewitness identification experts. *See, e.g.*, *White*, 926 P.2d 291; *United States* v. *Jernigan*, 44 F. App'x 127 (9th Cir. 2002); *Rincon*, 28 F.3d 921; *Rodriguez-Felix*, 450 F.3d 1117. *But see George*, 645 N.W.2d 777.

894–909 (N.J. 2011). Such testimony provides the jury with important information that allows it to assess eyewitness identification testimony on an informed basis.

B. Louisiana's Deviation from the Nearly Uniform Consensus Among Other Jurisdictions Is Evidence of the Constitutional Infirmity of Louisiana's Position

In *Cooper* v. *Oklahoma*, the Court found that Oklahoma was one of only four states that required a defendant to prove by "clear and convincing" evidence that he was incompetent to stand trial. 517 U.S. 348, 360 (1996). Every other state to have considered the issue applied the lower, preponderance of the evidence standard. *Id.* The Court held the standard in Oklahoma was unconstitutional, informed in part by the "near-uniform application of a standard that is more protective of the defendant's rights," which "supports [the] conclusion that the [practice] offends a principle of justice that is deeply 'rooted in the traditions and conscience of our people.'" *Id.* at 362 (citation omitted); *see also Ake* v. *Oklahoma*, 470 U.S. 68, 79 (1985) (finding persuasive that more "than 40 States, as well as the Federal Government, have decided . . . that indigent defendants are entitled" to a psychiatric expert in certain circumstances).

Nearly all other jurisdictions place the admission of eyewitness expert testimony in the discretion of trial judges. *See supra* n.13. Louisiana, on the other hand, refuses to consider the opinions of its sister states and federal courts, as well as the

growing body of scientific evidence. Pet. App. at 52a (Tobias, J., concurring) ("As I read *Young*, the Court directed that no expert witness may address at trial the issue of the unreliability of eyewitness identification.").[15] And the Louisiana Supreme Court has suggested that it has no intention of reversing course. *Id.* at 3a (Clark, J., concurring) ("Until the Louisiana legislature enacts legislation that overrules *Stucke* and *Young*, expert testimony on eyewitness identification is not admissible . . . ."). The only way to resolve this conflict is for the Court to hear this case.

II. Eyewitness Expert Testimony Is Profoundly Important to the Fair Administration of Justice in Criminal Cases

A. This Court Has Repeatedly Acknowledged the Problems Inherent in Eyewitness Testimony

This Court has long recognized the "dangers and unfairness" that are inherent in eyewitness identifications. *Stovall* v. *Denno*, 388 U.S. 293, 298 (1967). The "vagaries of eyewitness identification are well-known," and the "annals of criminal law are rife with instances of mistaken identification." *United States* v. *Wade*, 388 U.S. 218, 228 (1967). The risks of wrongful conviction based on misidentification are

---

[15] The Louisiana Supreme Court also recently denied an application for certiorari in *State* v. *Lee*, No. 2015-KK-0899, 2015 WL 3832463 (La. June 19, 2015). The concurring opinion by Justice Clark noted that under the rule established in *Stucke* and endorsed in *Young*, "[e]xpert testimony regarding eyewitness identification is inadmissible in Louisiana courts." *Id.* at *1 (Clark, J., concurring).

so substantial that this Court has held that the Due Process Clause compels certain protections against convictions based on unreliable eyewitness testimony. *See, e.g.*, *Manson* v. *Brathwaite*, 432 U.S. 98, 120 (1977); *Neil* v. *Biggers*, 409 U.S. 188, 198–99 (1972); *Foster* v. *California*, 394 U.S. 440, 442 (1969); *Simmons* v. *United States*, 390 U.S. 377, 384 (1968); *Wade*, 388 U.S. at 235; *Gilbert* v. *California*, 388 U.S. 263, 272 (1967). More than thirty years of social science research findings affirm the Court's concerns on this score.[16] In addition, DNA exonerations established that eyewitness misidentifications were a factor in more than 70% of 329 post-conviction DNA exonerations nationwide. Innocence Project, *DNA Exonerations Nationwide* (June 15, 2015), http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/dna-exonerations-nationwide; *accord* Brandon Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong 8–9 (2011).

Social science research shows that eyewitness identification testimony is problematic because eyewitnesses—including mistaken eyewitnesses—are *too* believable.[17] *See Perry* v. *New Hampshire*, 132 S.

---

[16] This Court has recognized the guidance that social science research can provide in reaching decisions of constitutional dimensions. *See, e.g.*, *Miller* v. *Alabama*, 132 S. Ct. 2455, 2464 (2012) ("Our decisions rested not only on common sense . . . but on science and social science as well."); *Graham* v. *Florida*, 560 U.S. 48, 68 (2010) (relying on "developments in psychology and brain science").

[17] Hon. Alex Kozinski, *Criminal Law 2.0*, 44 Geo. L.J. Ann. Rev. Crim. Proc. iii, iii–iv, vi–vii (2015) (discussing myth, which has been undermined by "experience, legal scholarship and common sense," that eyewitnesses are highly reliable).

Ct. 716, 739 (2012) (Sotomayor, J., dissenting) ("Study after study demonstrates that . . . jurors routinely overestimate the accuracy of eyewitness identifications . . . ." (citing John C. Brigham & Robert K. Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 L. & Hum. Behav. 19, 22–24, 28 (1983); Jennifer N. Sigler & James V. Couch, *Eyewitness Testimony and the Jury Verdict*, 4 N. Am. J. Psychol. 143, 146 (2002))). Researchers have shown that identifications are comparable to, or more influential than, "physical evidence, character evidence, alibis, polygraph evidence, and even sometimes confession evidence." Melissa Boyce et al., *Belief of Eyewitness Identification Evidence*, *in* Handbook of Eyewitness Psychology: Volume 2, Memory for People 501, 505 (Rod C.L. Lindsay et al. eds., 2007) (citations omitted). As a result of its effect on jurors, eyewitness identification testimony can be particularly prejudicial. *See id.* ("[L]aboratory research strongly supports the conclusion that eyewitnesses are frequently believed even in the absence of other evidence.").

To be sure, cross-examination is important for testing the fallibilities of eyewitness testimony. But many courts have recognized social science research showing that cross-examination is ineffective at exposing inaccurate witnesses. *See, e.g.*, *Clopten*, 223 P.3d at 1110 (because "eyewitnesses may express almost absolute certainty about identifications that are inaccurate, research shows the effectiveness of cross-examination is badly hampered"). Cross-examination of eyewitnesses is ineffective, in part, because it works best as a tool to expose witnesses who are lying; but misidentification evidence is often

offered by witnesses who are genuinely and honestly mistaken, not lying. *See Flowers*, 158 So. 3d at 1078 (Dickinson, J., dissenting) ("A skillful attorney may utilize cross-examination to expose contradictions in a witness's testimony. But no attorney—of even the greatest skill—can cross-examine a witness in such a way to expose that the witness did not see what the witness actually believes he saw. And that is exactly the purpose of expert eyewitness-identification testimony.").

Cross-examination is also ineffective because neither the witness nor the lineup or photographic array administrator may be aware of the factors that decrease reliability. *See, e.g.*, Report of the Special Master at 20, *Henderson*, 27 A.3d 872 (in cases involving unintentional or unconscious suggestion, "neither the administrator nor the witness is ordinarily aware of either the unintentional suggestions or their impact; accordingly, neither is in position to report or dissipate the taint"). Compounding this problem is the fact that the information the jury needs to assign weight to the eyewitness testimony is likely to be outside the scope of cross-examination. As the Pennsylvania Supreme Court held,

> If permitting expert testimony on relevant factors impacting eyewitness identification does not go to credibility, but to educating the jury, and if such factors are possibly not known or understood, or even misunderstood, by jurors, then the more effective way of educating the jury is not through the eyewitness him or herself, but through

> the presentation of such testimony by an expert when appropriate.

Walker, 92 A.3d at 786.[18]

As state and federal courts have recognized, many principles of social science research relating to perception, memory, and recall are counterintuitive, and not within the average juror's knowledge. *See, e.g.*, *Young* v. *Conway*, 715 F.3d 79, 81 (2d Cir. 2013) ("Many of these factors are counterintuitive and therefore cannot be deduced by the application of the 'common sense' that juries are customarily instructed to employ."); *Guilbert*, 49 A.3d at 723 ("Although these findings are widely accepted by scientists, they are largely unfamiliar to the average person, and, in fact, many of the findings are counterintuitive."). Thus, expert testimony may be the sole mechanism for providing the jury with the information it needs to assess the relevant evidence and reach fair and well-informed conclusions.

---

[18] *See also Lawson*, 291 P.3d at 695 ("[F]ederal and state courts around the country have recognized that traditional methods of informing factfinders of the pitfalls of eyewitness identification—cross-examination, closing argument, and generalized jury instructions—frequently are not adequate to inform factfinders of the factors affecting the reliability of such identifications.").

B. Louisiana Law Precluded the Defendant from Invoking Due Process Protections that this Court Has Held Essential to Ameliorate the Problems of Eyewitness Testimony

This Court has held that the "Constitution protects a defendant against a conviction based on evidence of questionable reliability . . . by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit." *Perry*, 132 S. Ct. at 723. And this Court specifically recognized the kind of expert testimony offered by Petitioner as one of the principal means afforded to defendants for discrediting questionable eyewitness testimony. *Id.* at 729 (quoting *Clopten*, 223 P.3d at 1113) ("'We expect . . . that in cases involving eyewitness identification of strangers or near-strangers, trial courts will routinely admit expert testimony [on the dangers of such evidence].'")). This protection is even more important in light of the ineffectiveness of cross-examination of mistaken eyewitnesses.

The majority in *Perry* relied on expert testimony as a backstop to protect defendants against the fallibilities of eyewitness identifications, and lower federal and state courts have incorporated this tenet into their analyses of eyewitness testimony. Other courts have similarly found the availability of expert testimony to be a central feature of due process protection against the fallibilities of eyewitness identification testimony. *See, e.g.*, *State* v. *Johnson*, 94 A.3d 1173, 1187 (Conn. 2014) (Rogers, J., concurring).

Eyewitness experts can assist the factfinder by explaining the relevant research without testifying to the credibility or accuracy of a specific eyewitness. For example, in this case, Dr. John C. Brigham would have testified concerning the "suggestibility of [identifications] that are improperly composed," but "would not give opinion testimony regarding any ultimate issue." Def's La. Cert. Pet. at 7. Social scientists draw a distinction between "framework evidence," which presents scientific propositions, and "diagnostic" evidence, which applies the propositions to individual cases.[19] In cases such as this one, where the expert merely presents framework evidence, but does not opine on an ultimate issue, the expert testimony is "crucial." *See Clark* v. *Arizona*, 548 U.S. 735, 795 (2006) (Kennedy, J., dissenting); *Walker*, 92 A.3d at 784 (Testimony on "relevant psychological factors" "teaches—it provides jurors with education by which they assess for themselves the witness's credibility.").[20] This distinction disposes of the Louisiana Supreme Court's concern in *Young* that it was "reluctant to allow experts to offer

---

[19] *See generally* David L. Faigman et al., *Group to Individual (G2i) Inference in Scientific Expert Testimony*, 81 U. Chi. L. Rev. 417 (2014). In *Wal-Mart Stores, Inc.* v. *Dukes*, the plaintiffs' expert Dr. William Bielby was criticized for "claim[ing] to present a social framework, but [testifying] about social facts specific to Wal-Mart." 131 S. Ct. 2541, 2553 & n.8 (2011). Testimony that is limited to general scientific propositions is helpful to factfinders, because it provides factfinders with the "framework" under which to analyze the facts of the case—and ultimately, reach their own factual conclusions.

[20] NAS Report at 111–12 (acknowledging that expert testimony that does not reach an ultimate issue can nonetheless be informative).

opinions on the credibility of another witness for fear of the expert invading what is considered the exclusive province of the jury." 35 So. 3d at 1050.

The Louisiana courts have also raised the unwarranted concern that there is a "substantial risk that the potential persuasive appearance of the expert witness will have a greater influence on the jury than the other evidence presented during the trial." Pet. App. at 56a–57a (Tobias, J., concurring). This view gives the jury too little credit. As this Court has recognized, jurors are quite capable of hearing all relevant evidence, and making credibility findings. *See Daubert* v. *Merrell Dow Pharm.*, *Inc.*, 509 U.S. 579, 595–96 (1993) (rejecting "overly pessimistic" view of the "capabilities of the jury" that assumed jurors would be "befuddled" and "confounded by absurd and irrational pseudoscientific assertions"); *United States* v. *Scheffer*, 523 U.S. 303, 318–19 (1998) (Kennedy, J., concurring) (argument for per se ban "demeans and mistakes the role and competence of jurors in deciding the factual question of guilt or innocence"); *see also Clark*, 548 U.S at 794–95 (Kennedy, J., dissenting).

By following a rule that excludes all eyewitness expert testimony, Louisiana ignores this Court's recognition of the inherent dangers of eyewitness identifications. In a string of decisions limiting, and finally banning, eyewitness expert testimony, the Louisiana courts have displayed a fundamental misunderstanding of witness perception, memory, and recall; the reliability and relevance of social science research in this area; and the impact of eyewitness testimony on jurors. The

ban on eyewitness expert testimony in Louisiana courts creates a serious and unacceptable risk of wrongful conviction based on eyewitness misidentification. As this Court has held, "[a] conviction which rests on a mistaken identification is a gross miscarriage of justice." *Stovall*, 388 U.S. at 297.

III. The Louisiana Supreme Court's Per Se Ban Violates the Defendant's Right to Present a Complete Defense

This Court has long recognized that, whether rooted in the Fourteenth Amendment's Due Process Clause or in the Sixth Amendment's Compulsory Process or Confrontation Clauses, the U.S. Constitution guarantees every criminal defendant "'a meaningful opportunity to present a complete defense.'" *Crane* v. *Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California* v. *Trombetta*, 467 U.S. 479, 485 (1984)). Although "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials," *Scheffer*, 523 U.S. at 308, "[t]his latitude . . . has limits," *Holmes* v. *South Carolina*, 547 U.S. 319, 324–25 (2006). The right to present a complete defense is abridged by evidentiary rules that "infring[e] upon a weighty interest of the accused" and are "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Scheffer*, 523 U.S. at 308 (quoting *Rock* v. *Arkansas*, 483 U.S. 44, 56, 58 (1987)). Rules that categorically bar "potentially exculpatory evidence" and that lack "any *rational* justification for the wholesale exclusion" violate the accused's right to present a complete defense. *Crane*, 476 U.S. at 691.

A. Louisiana's Per Se Ban Infringes upon a Weighty Interest of the Accused

The right to present a complete defense encompasses several interrelated guarantees. These include (1) the right to compel the attendance of witnesses at trial and to present those witnesses in defense of the charges brought, *see, e.g.*, *Rock*, 483 U.S. at 61–62; *Crane*, 476 U.S. at 691; *Washington* v. *Texas*, 388 U.S. 14, 22 (1967); (2) the right to subject the prosecution's case to "the crucible of meaningful adversarial testing" by confronting and cross-examining the prosecution's witnesses at trial, *Crane*, 476 U.S. at 690–91; and (3) the right to have a jury find the facts of guilt or innocence by evaluating the credibility of witnesses, weighing the evidence, and resolving conflicting inferences that may be drawn from that evidence, *see, e.g.*, *Scheffer*, 523 U.S. at 313. Each of these guarantees was infringed by the exclusion of Dr. Brigham's testimony at Mr. Henry's capital murder trial.

1. The Per Se Ban Infringes the Right to Compel the Attendance of Witnesses at Trial and to Present Those Witnesses in Defense of the Charges Brought

The right of a criminal defendant to compulsory process for obtaining witnesses in his favor "stands on no lesser footing than the other Sixth Amendment rights." *Washington*, 388 U.S. at 18. Indeed, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers* v. *Mississippi*, 410 U.S. 284, 302 (1973); *see also Washington*, 388 U.S. at 19; *United*

States v. *Valenzuela-Bernal*, 458 U.S. 858, 875 (1982) (O'Connor, J., concurring); *accord State* v. *Bias*, 393 So. 2d 677, 679 (La. 1981).

Where the theory of the defense is misidentification—whether as a result of intentionally or unintentionally suggestive police procedures, or the error of an honest but mistaken eyewitness—expert identification testimony is vital to the defense, particularly where, as here, the state offers no other evidence of guilt. The right to present such evidence is guaranteed by the Compulsory Process Clause. *Washington*, 388 U.S. at 23. Often the expert is the only source of information that is critical to the defense of misidentification, because of, among other things, the inherent limitations of cross-examination to the scope of the direct. *See supra* pp. 20–22. In finding unconstitutional per se evidentiary bars, the Court has found it significant that the barred evidence was the only source of information critical to the defense. *See Rock*, 483 U.S. at 46–49 (without hypnotically refreshed testimony, defendant was unable to testify about certain relevant facts); *Washington*, 388 U.S. at 16–17 (finding Sixth Amendment violated where defendant was denied the right to offer accomplice's testimony that he had actually committed the crime); *Chambers*, 410 U.S. at 302 (combination of rules precluded defendant from offering testimony of witnesses to establish third party guilty); *Holmes*, 547 U.S. at 331 (overturning bar on introduction of evidence of third-party guilt).

The right to present expert testimony takes on an added constitutional dimension when the accused seeks to challenge the identification by

establishing that the procedures used were suggestive, *Manson*, 432 U.S. at 114; *Neil*, 409 U.S. at 199–200, or that the police investigation was otherwise infirm, *see, e.g.*, *Kyles* v. *Whitley*, 514 U.S. 419, 446 n.15 (1995) ("When, for example, the probative force of evidence depends on the circumstances in which it was obtained and those circumstances raise a possibility of fraud, indications of conscientious police work will enhance probative force and slovenly work will diminish it.").

Louisiana's per se ban on eyewitness expert testimony violates the Compulsory Process Clause because it bars all criminal defendants confronted with identification testimony from calling an entire category of defense witnesses—expert witnesses—from testifying.

2. The Per Se Ban Infringes the Right to Subject the Prosecution's Case to "the Crucible of Meaningful Adversarial Testing" by Confronting and Cross-Examining the Prosecution's Witnesses at Trial

The right to confrontation "is a trial right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination." *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 53 (1987). But there are instances where "simple questioning will not be able to undermine a witness' credibility and in fact may do actual injury to a defendant's position." *See id.* at 63 (Blackmun, J., concurring) (citing *Davis* v. *Alaska*, 415 U.S. 308 (1974)).

For example, in *Davis* v. *Alaska*, defense counsel was prevented from using the juvenile record of a key prosecution witness during cross-examination to show potential bias because of an Alaska state rule prohibiting the admission of such a record. *Davis*, 415 U.S. at 310–11. Limiting defense counsel only to cross-examination, without the opportunity to offer additional evidence, was not only useless to Davis but actively harmful to his case. Indeed, this Court observed, "[o]n the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness or, as the prosecutor's objection put it, a 'rehash' of prior cross-examination." *Id*. at 318. The Court concluded that, without being able to refer to the witness's juvenile record, "[p]etitioner was thus denied the right of effective cross-examination." *Id*.

Here, because of Louisiana's per se ban, Petitioner's confrontation was limited to cross-examination of Detective Harbin and the eyewitnesses. This limit was particularly problematic because Detective Harbin testified that he reviewed the photograph arrays for suggestiveness and found them "suitable" to use. Tr. 756:24–757:2. Detective Harbin also was permitted to discount the issues concerning his decision to choose an older photo of petitioner that showed him in a red t-shirt, the only person so dressed in the entire array, and the use of improper filler photographs. *See supra* pp. 7–8. Petitioner was not

offered the opportunity to rebut this testimony.[21] In effect, Detective Harbin was permitted to testify as an unqualified expert and, thus, bolster the credibility of the eyewitnesses, while Petitioner was given no opportunity to adequately rebut this testimony.

3. The Per Se Ban Infringes the Right to Have a Jury Find the Facts of Guilt or Innocence by Evaluating the Credibility of Witnesses, Weighing the Evidence, and Resolving Conflicting Inferences that May Be Drawn from that Evidence

Expert identification can be "crucial" to the presentation of a complete defense where jurors make a "determination about issues that inevitably are complex and foreign." *Ake*, 470 U.S. at 80–81. As courts have recognized, many principles of social science research relating to perception, memory, and recall are counterintuitive, and outside the average juror's knowledge. *See supra* pp. 14–15. Thus, expert testimony may be the sole mechanism for

---

[21] This inability to offer a rebuttal expert is also unconstitutional because it unfairly disadvantages the defense. *See, e.g.*, *Holmes*, 547 U.S. at 331; *Washington*, 388 U.S. at 22–23; *see also Scheffer*, 523 U.S. at 316 n.12 (noting that, in *Washington*, "the State of Texas could advance no legitimate interests in support of the evidentiary rules at issue, and those rules burdened only the defense and not the prosecution"). In fact, the Louisiana Supreme Court has acknowledged the need to avoid such an imbalance. *See State* v. *Johnson*, 333 So. 2d 223, 225 (La. 1976) (holding that "[d]ue process and fundamental fairness" required that a defendant be given the right to choose his own ballistics expert).

providing the jury with the information needed to assess the relevant evidence and reach fair and well-informed conclusions.

In *Crane*, the Court found that Kentucky's ban on admitting testimony about the circumstances of petitioner's confession (for purposes other than determining voluntariness) deprived appellant of "a fair trial." *Id.* at 687.[22] Without "signal[ing] any diminution in the respect traditionally accorded to the States," this Court ultimately concluded that the opportunity to be heard "would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence." *Id.* at 690; *see also id.* at 691. In the present case, as in *Crane*, "evidence about the manner in which" the identification was obtained "is often highly relevant to its reliability and credibility," particularly where the "there was no physical evidence to link [Petitioner] to the crime." *Id.* at 691.

So too, here, Louisiana should not be permitted to exclude essential exculpatory evidence from Petitioner's defense.

---

[22] The Court granted certiorari in *Crane* because the reasoning of the Kentucky Supreme Court was directly at odds with language in several of this Court's opinions, and because it conflicted with the decisions of every other state court that confronted the issue. 476 U.S. at 687. We respectfully request that the Court grant the present petition for the same reasons.

B. Louisiana's Per Se Ban Is Arbitrary and Disproportionate to the Purposes it Is Designed to Serve

The Sixth Amendment was designed "to make the testimony of a defendant's witnesses admissible on his behalf in court." *See Washington*, 388 U.S. at 22. This protection is violated "by arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of a priori categories that presume them unworthy of belief." *Id.*

The Louisiana Supreme Court's per se ban on eyewitness expert testimony is arbitrary because it treats eyewitness expert testimony differently from other types of evidence, including evidence that is widely accepted as less reliable.[23] *See, e.g.*, *State* v. *Catanese*, 368 So. 2d 975, 982–83 (La. 1979) (permitting use of polygraph evidence in post-trial proceedings); *State* v. *Monroe*, 329 So. 2d 193, 203 (La. 1975) (permitting expert testimony regarding fingerprint evidence); *State* v. *Jacobs*, 67 So. 3d 535, 586–87 (La. Ct. App. 2011) (permitting testimony of

[23] *See* National Academy of Sciences, *The Polygraph and Lie Detection* 2 (2003) ("Almost a century of research in scientific psychology and physiology provides little basis for the expectation that a polygraph test could have extremely high accuracy."); Press Release, Federal Bureau of Investigation, FBI Testimony on Microscopic Hair Analysis Contained Errors in at Least 90 Percent of Cases in Ongoing Review (Apr. 20, 2015), *available at* https://www.fbi.gov/news/pressrel/press-releases/fbi-testimony-on-microscopic-hair-analysis-contained-errors-in-at-least-90-percent-of-cases-in-ongoing-review (confirming that "FBI microscopic hair analysts committed widespread, systematic error, grossly exaggerating the significance of their data under oath with the consequence of unfairly bolstering the prosecutions' case").

ballistics expert); *In re Succession of Calhoun*, 674 So. 2d 989, 990 (La. Ct. App. 1996) (permitting testimony of handwriting expert); *State in Interest of Thrash*, 497 So. 2d 414, 417–18 (La. Ct. App. 1986) (permitting expert testimony concerning microscopic hair analysis). Treating eyewitness expert testimony differently from other areas of expert analysis, without offering a legitimate basis for doing so, renders the per se ban unconstitutional.

Courts unquestionably have a legitimate interest in ensuring that reliable evidence is presented to the fact-finder in a criminal trial. *See Scheffer*, 523 U.S. at 309; *Manson*, 432 U.S. at 114. Yet even a "state's legitimate interest in barring *unreliable* evidence does not extend to per se exclusions that may be reliable in an individual case." *See Rock*, 483 U.S. at 61 (emphasis added).

Notably, the Louisiana Supreme Court has never called expert eyewitness identification evidence "unreliable," nor justified its ban on such evidence in any valid way. *See Crane*, 476 U.S. at 690–91 ("In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'"); *see also Clark*, 548 U.S. at 770–72 (noting that, to comport with due process, the State must have "good reason" for "curtail[ing]" relevant evidence); *Rock*, 483 U.S. at 57–62.

The Louisiana Supreme Court, while "cognizant of the ongoing legal debate over the admissibility of expert psychological testimony on

the validity of eyewitness identification," has expressed "a compelling concern that a potentially persuasive expert testifying as to the generalities of the inaccuracies and unreliability of eyewitness observations, that are already within a juror's common knowledge and experience, will greatly influence the jury more than the evidence presented at trial." *Young*, 35 So. 3d at 1049–50.

In addition to being unfounded, *see supra* pp. 14–15 this concern has been dismissed by this Court, *see supra* p. 25. Even if the State's concern were legitimate, it still does not provide a constitutionally valid reason for excluding wholesale an entire category of evidence. *See, e.g.*, *Rock*, 483 U.S. at 61; *Crane*, 476 U.S. at 686–87; *Chambers*, 410 U.S. at 302; *Washington*, 388 U.S. at 22; *Holmes*, 523 U.S. at 315; *see also Clark*, 548 U.S. at 791 (Kennedy, J., dissenting) (describing as "severe" a rule that "barred from consideration on the issue of mens rea all this evidence, from any source").

Simply put, the Louisiana rule serves no valid purpose: it fails to "ensur[e] that only reliable evidence is introduced at trial, preserv[e] the court members' role in determining credibility, [or] avoid[ ] litigation that is collateral to the primary purpose of the trial." *Scheffer*, 523 U.S. at 309.

CONCLUSION

For the reasons listed herein, the petition for a writ of certiorari should be granted.

Respectfully submitted.

SHERRY WATTERS
Counsel of Record
LA. APPELLATE PROJECT
P.O. Box 58769
New Orleans, LA 58769
sherrywatters@yahoo.com
(504) 723-0284

JAMES L. BROCHIN
JAREN JANGHORBANI
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019
(212) 373-3000

BARRY C. SCHECK
KAREN NEWIRTH
INNOCENCE PROJECT, INC.
40 Worth Street, Suite 701
New York, NY 10013
(212) 364-5340

July 9, 2015

APPENDIX

APPENDIX A — DENIAL OF PETITION OF THE SUPREME COURT OF THE STATE OF LOUISIANA, DATED APRIL 10, 2015

THE SUPREME COURT OF
THE STATE OF LOUISIANA

NO. 2014-K-1869

STATE OF LOUISIANA

VS.

DARRILL M. HENRY

IN RE: Henry, Darrill M.; - Defendant; Applying for Writ of Certiorari and/or Review, Parish of Orleans, Criminal District Court Div. L, No. 451-696; to the Court of Appeal, Fourth Circuit, No. 2013-KA 0059;

April 10, 2015

Denied.

GGG

JTK

JLW

SJC

Appendix A

CLARK, J., concurs with reasons.

HUGHES, J., concurs in the denial and assigns reasons.

Supreme Court of Louisiana
April 10, 2015

/s/_____
Deputy Clerk of Court
For the Court

Appendix A

SUPREME COURT OF LOUISIANA

NO. 2014-K-1869

STATE OF LOUISIANA

VERSUS

DARRILL M. HENRY

ON WRIT OF CERTIORARI TO THE COURT
OF APPEAL, FOURTH CIRCUIT,
PARISH OF ORLEANS

Clark, J., concurring with reasons.

I respectfully concur in the denial of the writ application. I writ separately to address the question pondered by Judge Tobias in his concurrence to the court of appeal opinion - why does Louisiana not allow expert testimony relating to eye witness identification in a capital murder case? In *State v. Young*, 09-1177, p. 13 (La. 4/5/10), 35 So. 3d 1042, 1050, this Court expressly declined to overrule the decision in *Stucke*[1] barring the admissibility of expert testimony on eyewitness identification. Until the Louisiana legislature enacts legislation that overrules *Stucke* and *Young*, expert testimony on eye witness identification is not admissible, even in a capital murder case, for the same reasons expressed by this Court in *Young*. Those reasons include: (1) Such expert testimony

1. *State v. Stucke*, 49 So. 2d 939, 945 (La. 1982).

can be more prejudicial than probative because it focuses on the things that produce error without reference to the factors which support the validity of identification, thus, fostering a disbelief of eyewitnesses by jurors; (2) allowing experts to offer opinions on the credibility of another witness invades what is considered the exclusive province of the jurors; (3) the concept of promoting battles of experts over whether the testimony of every witness is truthful and reliable is not desirable; and (4) such expert testimony does not satisfy the standard articulated under La. C.E. art. 702. *Young*, 09-1177, pp. 13-14, 35 So.3d at 1050.

Appendix A

SUPREME COURT OF LOUISIANA

No. 2014-K-1869

STATE OF LOUISIANA

VS.

DARRILL M. HENRY

ON WRIT OF CERTIORARI TO THE COURT
OF APPEAL, FOURTH CIRCUIT,
PARISH OF ORLEANS

Hughes, J., concurs in the denial of the writ.

I concur with the writ denial for the reasons assigned by Judge Tobias. I do not consider the issue closed.

APPENDIX B — OPINION OF THE COURT OF APPEAL OF LOUISIANA, FOURTH CIRCUIT, DECIDED AUGUST 6, 2014

COURT OF APPEAL OF LOUISIANA
FOURTH CIRCUIT

NO. 2013-KA-0059

STATE OF LOUISIANA

VERSUS

DARRILL M. HENRY

2013-0059 (La.App. 4 Cir. 08/06/14)
August 6, 2014, Decided

APPEAL FROM
CR1MINAL DISTRICT COURT ORLEANS PARISH
NO. 451-696, SECTION "L"
Honorable Dennis J. Waldron, Judge Pro Tempore

Judge Edwin A. Lombard

JUDGES: (Court composed of Judge Max N. Tobias, Jr., Judge Edwin A. Lombard, Judge Madeleine M. Landrieu). TOBIAS, J., CONCURS.

LANDRIEU, J., CONCURS FOR THE REASONS ASSIGNED BY JUDGE TOBIAS.

OPINION BY: Edwin A. Lombard

Appendix B

OPINION

The defendant, Darrill M. Henry, challenges his convictions on two counts of first degree murder, arguing that he is factually innocent, that the suggestive and unreliable witness identifications should have been suppressed, and that *Brady [v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)] violations occurred. After review of the record in light of the applicable law and arguments of the parties, his conviction is affirmed.

RELEVANT PROCEDURAL AND FACTUAL HISTORY

On June 15, 2004, at approximately 1:30 p.m., eighty-nine year old Durelli Watts and her sixty-seven year old daughter, Ina Gex, were brutally murdered in Ms. Watts' Gentilly home at 1930 Duels Street. After stabbing Ms. Watts fourteen times, the perpetrator set her body and the house on fire. Before he could leave the house, Ms. Gex arrived to check on her mother. The perpetrator shot Ms. Gex three times as she stood on the porch and, after rummaging through her purse, shot her a fourth time in the head. He then walked away from the house and down the street. Three of Ms. Watts' neighbors witnessed the shooting. They removed Ms. Gex from the porch but were unable to assist Ms. Watts because the residence was engulfed in flames.

The defendant was indicted on September 2, 2004, charged with two counts of murder in violation of La. Rev. Stat. 14:30. At his arraignment on September 9, 2004, he

pleaded not guilty. The defendant's motions to suppress the statements and identifications were denied and his trial commenced on August 23, 2011. On August 31, 2011, the jury unanimously found him guilty on both counts. During the penalty phase, the jury recommended a life sentence and on May 24, 2012, the trial judge sentenced the defendant to life imprisonment without benefit of parole, probation or suspension of sentence on both counts. This appeal follows.

ERRORS PATENT

A review of the record for errors patent reveals none.

ASSIGNMENT OF ERROR 1

Appellate counsel argues that the defendant is innocent and that the charges against him were based upon neighborhood gossip without supporting evidence or forensics. In addition, appellate counsel asserts that the State failed to prove the defendant was correctly identified as the perpetrator.

Applicable Law

Counsel's argument misapprehends appellate jurisdiction. It is axiomatic that the factfinder determines factual guilt or innocence; an appellate court determines whether the evidence is constitutionally sufficient in accordance with *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). Accordingly, we can only view the evidence in the light most favorable to the

prosecution to determine whether any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. Although we consider the record as a whole, *State v. Mussall*, 523 So.2d 1305 (La.1988), this court cannot be "called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence." *State v. Smith*, 600 So.2d 1319, 1324 (La.1992); *see also State v. Spears*, 05-0964, p. 3 (La. 4/4/06), 929 So.2d 1219, 1222 (constitutional law does not require the reviewing court to determine whether it believes the witnesses or whether it believes that the evidence establishes guilt beyond a reasonable doubt; the factfinder is given much discretion in determinations of credibility and evidence, and the reviewing court will only impinge on this discretion to the extent necessary to guarantee the fundamental protection of due process of law); *State v. Hearold*, 603 So.2d 731, 734 (La.1992) (the entirety of the evidence, whether properly or improperly admitted, is to be considered by the reviewing court when assessing a conviction for sufficiency of the evidence).

La. Rev. Stat. 14:30 defines first degree murder as the killing of a human being:

> (1) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated arson . . . or the perpetration or attempted perpetration of armed robbery . . . .

* * *

(3) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person.

* * *

(5) When the offender has the specific intent to kill or to inflict great bodily harm upon a victim who is . . . sixty-five years of age or older.

The State bears of the burden of proving those elements, along with the burden to prove the identity of the defendant as the perpetrator. *State v. Draughn*, 2005-1825, p. 7 (La.1/17/07), 950 So.2d 583. "Specific criminal intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act." La. Rev. Stat. 14:10(1). It "may be inferred from the circumstances surrounding the offense and the conduct of the defendant." *Draughn*, 05-1825 at pp. 7-8, 950 So.2d at 592-93. Additionally, specific intent "may be formed in an instant." *State v. Wright*, 01-0322, p. 11 (La. 12/4/02), 834 So.2d 974, 984.

In this case, no forensic evidence links the defendant to the victims or to the crimes, only eyewitness testimony and the defendant disputes the trustworthiness of that evidence. When identity is disputed, the State must negate any reasonable probability of misidentification. *State v. Everett*, 11-0714, p. 15 (La. App. 4 Cir. 6/13/12), 96 So. 3d 605, 619, *writs denied*, 12-1593, 12-1610 (La. 2/8/13), 108 So.3d 77.

Appendix B

The following evidence was adduced at trial.

Communications Supervisor Giselle Roussel of the New Orleans Police Department (NOPD) identified the incident recall number F-25354-04 and the recording of the 911 calls relative to this case. The calls were played for the jury and Officer Roussel noted that the first 911 call was received at l:54 p.m. on June 15, 2004. The callers stated that the perpetrator was wearing a red t-shirt and blue pants.

Ms. Cecilia Garcia testified that at the time of the murder she lived at 1933 Duels Street and often saw Ms. Watts sitting on her front porch across the street. On June 15, 2004, Ms. Garcia was talking on the telephone in her kitchen at about 1:30 p.m. when she heard what sounded like a pebble hitting her house. She went to the front of her house and saw a man standing on Ms. Watts' front porch. She noticed a woman in a prone position on the porch and, after retrieving her cell phone, went outside. She did not recognize the man who walked away from the porch towards the Dominick house (her neighbors to the right) as she walked towards Ms. Watts' porch. They passed each other on the street and, according to Ms. Garcia, the man walked in a leisurely manner, as if "taking a Sunday stroll or something," and was wearing a floppy "Gilligan" hat that "shadowed his face some," blue pants, and a red t-shirt. Ms. Garcia unequivocally identified the defendant in court as the man she saw walking away from Ms. Watts' residence. She stated that he was about 5'8" with medium build but appeared heavier in court than he had on the day of the murders.

Other neighbors came out of their houses and several carried the body from the porch as the police and fire department sirens drew close. When the firemen arrived, Ms. Garcia and her neighbors alerted them to the fact that Ms. Watts was still in the house and they pulled her out, her pants singed from the fire. Ms. Garcia stayed at her mother's house that evening and, after seeing a sketch of the perpetrator on television which she thought was incorrect, directed her husband in drawing a more accurate sketch. She subsequently gave that sketch to the police. On July 7, 2004, Ms. Garcia identified the defendant in a six-person photo lineup as the man she saw walking from Ms. Watts' porch on June 15, 2004.

Steven Dominick testified that he grew up in his parents' home at 1937-39 Duels Street (directly across the street from Ms. Watts' residence) and, accordingly, had known Ms. Watts his entire life. He was at his parents' house on June 15, 2004, when, at approximately 1:00 p.m., he heard gunshots emanating from across the street. Accordingly, Mr. Dominick walked to the picture window in the front of the house and witnessed Ms. Gex fall on the porch of Ms. Watts' house. As he stepped out of the house, he witnessed a man put a gun to Ms. Gex's head and fire another shot. The shooter casually walked from the scene toward the corner of Annette and Duels Streets and Mr. Dominick, monitoring the shooter's movements from inside the house, called 911. Then he went outside and, as he walked towards Ms. Watts' house, he realized that it was on fire. Ms. Gex's head moved and, as the police and firemen arrived, he and two neighbors carried her away from the burning house. He and his neighbors then turned

their attention Ms. Watts but the police would not let them enter the burning house. Instead, the police transported him and one other neighbor, who also witnessed the event, to the Fifth District Station for questioning.

Mr. Dominick described the shooter as having a medium brown complexion, small twists in his hair and clean shaven. He said the perpetrator wore a red shirt, blue jeans/pants and a canvas hat. The day after the incident, a police artist drew a sketch of the shooter with Mr. Dominick's direction. Although the police showed him with at least two photographic lineups, Mr. Dominick was unable to make a positive identification from either lineup. On July 17, 2010, however, Mr. Dominick was in jail on pending charges and placed in the same holding cell as the defendant who was also awaiting a court hearing. He recognized the defendant as the man who shot Ms. Gex and, after alerting deputies that he feared for his safety, Mr. Dominick was placed in a tier separate from the defendant.

On cross-examination, Mr. Dominick confirmed that he made a 911 call, gave a taped statement to the police, met with a sketch artist, viewed two photographic lineups, and testified before the Orleans Parish Grand Jury. In addition, he stated that he noticed the defendant carrying a gun as he left Ms. Watts' residence. On further cross-examination, Mr. Dominick conceded that he had been charged with 139 counts of pornography involving children[1] and also that he had pleaded guilty to five counts

1. Mr. Dominick pleaded guilty to the 139 counts. On appeal from the trial court's denial of his motion to withdraw his guilty

of forcible rape, six counts of stalking, three counts of extortion and one count of second-degree kidnapping.[2]

Ms. Linda Gex Davis testified that she lived on Duels Street from 1965 to 2005 and had known Ms. Watts for many years. On June 15, 2004, she walked outside her house to her car to retrieve something from the trunk of her car and heard Ms. Watts say: "You better get out of here." Ms. Davis said there did not appear to be any trouble. Ms. Watts was standing in the front doorway speaking with a man wearing a red shirt and blue pants with deep set eyes and his hair styled in jerri-curls. Ms. Davis went back into her house and almost immediately heard a gunshot. She walked to her front door and saw a woman lying on Ms. Watts' porch. Ms. Davis witnessed the man she had seen speaking with Ms. Watts shoot the woman on the porch two times, rummage through her handbag and then shoot her a third time. Ms. Davis called 911, and all the while, she continued to watch the shooter as he walked from the porch and exited the neighborhood via Annette Street. Ms. Davis stated that she had a good opportunity to view the shooter's face as he stood on the porch speaking with Ms. Watts.

According to Ms. Davis, as soon as the shooter walked from the area, other neighbors gathered to see what had happened. Ms. Davis spoke with Mr. Dominick who told

---

plea, the court upheld the trial court ruling. *See State v. Dominick*, 2013-0270 (La. App. 4 Cir. 1/30/14), 133 So.3d 250.

2. Those convictions were affirmed by this court. *See State v. Dominick*, 2013-0121 (La. App. 4 Cir. 11/20/13), 129 So.3d 782.

her that the woman who had been shot was Ms. Gex, not Ms. Watts. At that point, there was smoke pouring from Ms. Watts' house. The neighbors feared Ms. Watts was inside the house, so someone went into the house and removed Ms. Watts' body. Ms. Davis identified a picture of Ms. Watts' body lying in the grass.

Ms. Davis recalled that the shooter walked away calmly and slowly after the shooting, as if nothing had happened. As the shooter walked, he turned several times to see if anyone was behind him, thus providing her with an opportunity to get a good look at him. Although the first responders arrived quickly, Ms. Davis was so traumatized by the shooting that she was hesitant to speak with the police. On September 2, 2004, however, she gave a taped statement to the police positively identifying the defendant as the shooter from a six-person photo lineup. She also testified before the grand jury. Ms. Davis identified the defendant in court as the man that shot Ms. Gex.

On cross-examination, Ms. Gex stated that she had not seen the defendant in the neighborhood prior to the shooting.

Captain Herman Franklin of the New Orleans Fire Department testified that he responded to the fire at 1930 Duels Street on June 15, 2004, after his unit was notified by the first responders from Fire Engine 27, who had responded to a call for medical assistance. Upon arriving on the scene, Captain Franklin and another fireman made a preliminary search of the residence for anyone in the house. The smoke in the house was extremely thick but

they located Ms. Watts on the kitchen floor next to the stove and removed her to the EMS unit waiting on the scene. Captain Franklin, after identifying photos of Ms. Watts' house that showed the fire and the crime scene, stated that the fire was investigated as arson.

Ms. Anna Duggar, director of the NOPD Crime Lab, testified that in June 2004 she was a criminalist assigned to the forensic light unit and that her specializations were blood spatter pattern analysis, latent fingerprint analysis and comparison, serology, DNA preparation and analysis of hair and fiber evidence. Ms. Duggar processed the crime scene at 1930 Duels Street on June 18, 2004, and she noted her findings in a report. She also identified photographs she took of the crime scene. Ms. Duggar noted that two knives, one with a serrated edge and the other with a rounded blade, were retrieved from the kitchen sink at 1930 Duels Street. Although she tested the knives for fingerprints and the presence of blood, they were negative for blood and latent prints. Ms. Duggar explained that, although she collected blood samples from the kitchen, no fingerprint testing was performed at the crime scene because the fire and suppression efforts rendered testing impossible.

Detective Winston Harbin of the NOPD testified that he was the lead investigator of the murders of Ms. Watts and Ms. Gex. He and Detective Claude Nixon met with Mr. Dominick on June 16, 2004, and he assisted in the compilation of a sketch of the perpetrator that was released to the news media. After the sketch was released, thirty to thirty-two Crimestopper tips were reported

to police but were systematically eliminated as possible leads.

On June 17, 2004, Detectives Harbin and Nixon viewed the crime scene, noting the presence of blood droplets on the kitchen cabinets and refrigerator. Accordingly, Detective Harbin directed Ms. Duggar to collect blood evidence from the kitchen. That same day, Ms. Garcia's husband gave Detective Harbin the sketch he had drawn from his wife's description of the shooter. While in the neighborhood on June 17, 2004, Detective Harbin received information from a resident[3] that directed him to an address in the 2100 block of Law Street, the residence of Ladrika Davis.[4] Detective Harbin's investigation developed a description of the defendant as a light skinned black male, standing 5'9", weighing 180 pounds, and wearing a red shirt with blue pants, tan fishing hat and sunglasses. After learning that the defendant had been arrested on two previous domestic violence charges involving Ms. Ladrika Davis, Detective Harbin obtained a copy of the defendant's booking photo and placed it in the six-person photo lineups that he presented to Mr. Dominick. Mr. Dominick told Detective Harbin that one suspect's picture "jumped out at him," and another "looked like the guy who hung out

3. The person who gave Detective Harbin the information did not want to be involved in the case but told Detective Harbin that a person from the neighborhood followed the defendant from the scene of the crime to a residence on Law Street.

4. Ms. Ladrika Davis was the defendant's ex-girlfriend. The defendant lived with Ms. Davis at that address, which was two blocks from the crime scene, until shortly before the murders.

with Ms. Dot's grandson," but he was unable to identify the perpetrator from the lineup. Detective Harbin also showed the lineup to Ms. Cecilia Garcia and Ms. Linda Davis, who both identified the defendant as the man they had seen at Ms. Watts' house at the time of the shooting. Detective Harbin also discovered that the defendant had been arrested on municipal charges approximately eight hours after the murders of Ms. Watts and Ms. Gex.

From further investigation, Defendant Harbin obtained a search warrant for the defendant's mother's residence on Erato Street. During the search, several items of clothing and several pairs of shoes, including a pair of tennis shoes that appeared to have blood on them, were seized and submitted for forensic testing. Detective Harbin learned that the defendant went by the nickname "Short Story."

On July 7, 2004, the defendant waived his rights and gave Detective Harbin a videotaped statement denying involvement in the murders. The defendant offered the alibi of having filed job applications with several restaurants/hotels and fast food businesses in the CBD.[5]

During cross-examination, Detective Harbin admitted that no forensic evidence collected or tested linked the defendant to the murders.

---

5. Detective Harbin verified that the defendant had filed job applications with the businesses he claimed, but none of the applications could be verified as to the time of the day on June 15, 2004, that they were filed.

Appendix B

Dr. Paul McGarry, formerly a forensic pathologist with the Orleans Parish Coroner's Office, testified that he performed the victim's autopsies on June 16, 2004. Dr. McGarry noted that Ms. Gex suffered four gunshot wounds -- one each to the head, the chest, the left upper back, and the left arm. The trajectory of the first two wounds indicated that the victim was standing when the shots were fired, while the third and fourth wounds were sustained as the victim was turning away from and/or falling as a result of the first two shots. Ms. Gex died of internal hemorrhaging and massive brain damage. Ms. Watts' autopsy revealed that she died from fourteen stab wounds to her face, forehead, neck, and central chest. The wounds to her chest went through her breast bone, ribs, heart and both lungs, causing massive internal hemorrhaging within the heart chamber and major blood vessels to the heart. Dr. McGarry determined that Ms. Watts' body sustained extensive burning. Soot deposits around the victim's nostrils indicated that the victim was alive when she was set on fire. The pathologist opined that the victim was stabbed with a knife having a three to four inch blade, similar to a boning knife.

Captain Rose Duryea testified that in June 2004 she was the commander of the NOPD Crime Lab. Her job involved overseeing all testing performed and authenticating reports generated by lab employees. The captain verified that testing of fingernail scrapings from the victim and search for fingerprints from the crime scene were negative.

The defense called Mr. James McCullough of the Louisiana Department of Public Safety, Office of Motor Vehicles. In his capacity as custodian of records, Mr. McCullough produced the DMV's records pertaining to a Mr. Terrence Roche, which referenced the license plate number MKF 690.[6]

Ms. Monique Louque, the Human Resource director for the Monteleone Hotel, also testified for the defense. In the course of her employment, Ms. Louque accepted job applications on behalf of the hotel on Tuesdays from 9:00 a.m. to 11:00 a.m. and then again from 2:00 p.m. to 4:00 p.m. on those days. She produced a list of job applicants dated June 15, 2004, indicating that the defendant applied for the for the position of room attendant/dishwasher on that date. Copies of those exhibits were published to the jury. Ms. Louque testified, however, that she had no particular memory of the person who signed the application as "Darrill Henry" and noted that the application did not indicate the time of day the defendant signed the application.

On cross examination, Ms. Louque explained that when someone signs an employment application, they are not asked to produce identification. Only after an applicant advances to the interview stage in the hiring process does the hotel require proof of identification. Ms. Louque

6. The reference to Mr. Roche and the license plate number MKF 690 came to Detective Harbin's attention during the investigation. It was supplied by a Crimestopper's tip, but the information did not prove to be of any evidentiary value to the murder investigations.

said that according to her records, the defendant did not proceed past the application stage to the interview portion.

In addition, two other Hotel Monteleone employment recruiters, Ms. Kerri Colombo and Mr. Prescott Kerutis, testified that they had no memory of anyone who filled out employment applications on June 15, 2004.

Private Investigator, Frank Mistretta, explained that he was engaged by the defense to obtain measurements from the scene of the crime[7] to the three houses, 1933, 1935 and 1937 Duels Street, the vantage points from which the three eyewitnesses observed the shooting. He identified Defense Exhibit 59 as the diagram of his measurements and Defense Exhibit 60 as an aerial photograph of the 1900 block of Duels Street. During cross-examination, Mr. Mistretta explained that the purpose of the diagram was to allow the jury to determine whether the eyewitnesses could see what they claimed to see from their respective vantage points.

Mr. Raynold Antonio testified on behalf of the defendant, stating that on the day of the murder he lived at 1916 Duels Street and heard Ms. Watts' tell someone that she did not have anything. However, he could not see the person to whom Ms. Watts was speaking. Shortly thereafter, at about 1:40 p.m., Mr. Antonio was sitting

7. Mr. Mistretta noted that the Watts' residence was destroyed by Hurricane Katrina, so he established a point on the sidewalk where the house used to be and used that as the reference point to measure the distance from the Watts' residence to the three houses across the street.

on his mother's porch at 1929 Duels Street and heard a popping noise, similar to the sound of glass cracking or a firecracker, then heard a female voice say: "Why are you doing this?" He heard another pop and he realized it was a gunshot. Mr. Antonio walked to the front gate and observed a man wearing a red shirt, blue jeans and a brown hat walking away from Ms. Watts' house down Annette Street toward Florida Avenue. Mr. Antonio did not see the man's face. He heard Ms. Garcia screaming for help and walked over to Ms. Watts' porch where he observed a woman lying on the porch. Mr. Dominick came over and the two of them carried the woman (Ms. Gex) from the porch. Mr. Antonio noted that the Watts' residence was on fire.

Ms. Anne Montgomery was also called by the defense and testified by stipulation as an expert in DNA analysis. At the time of the murders of Ms. Watts and Ms. Gex, Ms. Montgomery was the DNA technical leader of the NOPD Crime Lab. After an explanatory discussion of the history of DNA testing and procedures and local and national storage bases for DNA information for use in crime fighting, Ms. Montgomery identified reports from the NOPD's Scientific Criminal Investigation Division of DNA testing done in this case by Ms. Montgomery and her staff. The reports indicate that a total of eleven blood samples were submitted for testing and those samples produced DNA profiles belonging to one or the other of the victims. A blood sample taken from a tennis shoe seized from the defendant's mother's residence on Erato Street

produced the DNA profile of the defendant.[8] In short, Ms. Montgomery stated that the DNA in this case proved to be nothing of evidentiary value -- nothing implicated or exculpated anyone in the murders.

Next, on behalf of the defense, Mr. Ruben Watts, the grandson of Ms. Watts and the nephew of Ms. Gex, testified that the night before the murders, he offered to cut Ms. Watts' grass. She refused his offer, stating that she had someone else to do it but without identifying the person.

Ms. Jainey Young, who was employed by First Evangelist Housing Community Development Corporation, explained that her job involved finding employment for people who sought the corporation's assistance. Toward that objective, the corporation maintained daily and weekly sign-in sheets of the names of people who appeared at the corporate office seeking food and/or employment assistance. Ms. Young identified the daily and weekly sign-in sheets kept by the corporation for the period of June 14 to June 18, 2004. The weekly sign-in reflected that the defendant sought employment assistance during that period but the daily sheet for June 15, 2004, did not reflect that the defendant signed up for job assistance on that date.

---

8. The testing division had earlier obtained a sample of the defendant's blood which it compared with the blood from the tennis shoe to identify the donor.

At this point in the trial, the judge read Detective Eduardo Colmenaro's cross-examination testimony given during the hearing on the motion to suppress the identification on February 19, 2009.[9] The detective explained that he assisted Detective Harbin in the murder investigations. He accompanied Detective Harbin when Harbin displayed a six-person photo lineup to Ms. Garcia at her home.

The defense called Mr. Dominick. He denied receiving an immunity agreement from perjury charges from the State. Mr. Dominick recalled that approximately one to two months prior to trial, he and his attorney attended a meeting arranged by prosecutors. His parents, Ms. Cecilia Garcia, and Ms. Linda Davis and her husband were also present at the meeting. Mr. Dominick had a subsequent meeting with the prosecutors, also attended by Ms. Garcia and Ms. Davis. Mr. Dominick denied being offered consideration for his trial testimony or believing he would obtain any benefit. He identified his voice on the CD containing telephone calls he made to his family from jail requesting information about the proceedings and the possibility of "leverage" because of his testimony.

In rebuttal, the State called John Butler, the attorney representing Mr. Dominick in criminal matters pending against him at the time of this trial. Mr. Butler testified that he asked the prosecutors on several occasions if Mr. Dominick would receive any consideration in his criminal case from the State in exchange for his testimony in this case, but that the prosecutors refused and, against his advice, Mr. Dominick testified at this trial.

---

9. Detective Colmenaro did not testify at trial.

Mr. Butler confirmed that he was present at a July 28, 2011, meeting with prosecutors in this case with Mr. Dominick and his parents. After Mr. Dominick was escorted from the meeting, the District Attorney arrived and thanked everyone for attending the meeting. After that meeting, Mr. Butler spoke with Mr. Dominick's parents about his pending criminal charges, specifically plea bargaining as to non-violent rather than violent offenses. Mr. Butler emphasized that all overtures he made to the prosecutors as to consideration for Mr. Dominick's testimony in this case were flatly refused.

The evidence in this case is constitutionally sufficient to support the defendant's conviction. In summary, there is no dispute that the victims were over the age of sixty-five and that the house was set on fire by the perpetrator. Moreover, two eyewitnesses (Ms. Garcia and Ms. Davis) identified the defendant in photographic lineups after the incident and three eyewitnesses (Ms. Garcia, Ms. Davis and Mr. Dominick) identified the defendant in court as the man they witnessed shoot Ms. Gex on the porch of her mother's house. Thus, for the defendant to have been misidentified, the jury would have to have concluded that all three eyewitnesses were mistaken as to the same individual. In addition, although the defendant offered witness testimony and documentation of work applications, none of the testimony or the documentation was specifically linked to the time of the murders. Therefore, the jury could have reasonably concluded that the defendant killed the victims before or after filling out the applications.

This assignment of error is without merit.

Appendix B

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant contends that the photographic line-ups conducted by Detective Harbin were unconstitutionally suggestive and, therefore, the trial court erred in denying his motion to suppress the identifications made by Ms. Garcia and Ms. Davis. He also argues that the trial court erred in refusing to allow the defense to call an expert witness on identification procedures.

Applicable Law

The Fifth and Fourteenth Amendments to the United States Constitution protect defendants from unreliable evidence in criminal proceedings through the provision of rights and resources that function to persuade juries that such evidence is untrustworthy. The defendant bears the burden of proof in his motion to suppress an out-of-court identification. La. Code Crim. Proc. art. 703; *State v. Thibodeaux*, 98-1673, p. 20 (La. 9/8/99), 750 So.2d 916, 932. To prevail on such a motion, a defendant must show that the identification procedure in question was suggestive, *Manson v. Brathwaite*, 432 U.S. 98, 106, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977), and that the procedure created a substantial likelihood of misidentification such that defendant was denied due process of law. *Neil v. Biggers*, 409 U.S. 188, 196, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972); *State v. Prudholm*, 446 So.2d 729, 738 (La. 1984). To prove suggestiveness, a defendant must show that the police conduct in organizing and administering the identification was improper. *Perry v. New Hampshire*, __ U.S. __, 132

S. Ct. 716, 724, 181 L. Ed. 2d 694 (2012). An identification is suggestive if the witness' attention is "unduly focused" on the defendant. *State v. Brown*, 09-0884, p. 5 (La. App. 4 Cir. 3/31/10), 36 So.3d 974, 979.

We review a trial court's determination on the admissibility of an out-of-court identification and its subsequent denial of a motion to suppress for abuse of discretion. *Brown*, 09-0884 at p. 3, 36 So.3d at 978. This review is not limited in scope to the evidence introduced at the hearing on the motion to suppress; rather, consideration extends to all pertinent evidence adduced at trial. *State v. Chopin*, 372 So.2d 1222, 1224 n.2 (La. 1979).

In this case, four separate hearings were held (on February, 11, 2005; September 25, 2008; January 22, 2009; and February 19, 2009) in relation to the defendant's motion to suppress these identifications:

First Hearing:

Detective Harbin testified that Ms. Garcia informed him that on the day of the murders, she heard "popping" noises and exited her house to investigate. She noticed a man, who was wearing a red shirt, blue pants, sunglasses and a hat, standing in front of Ms. Watts' residence. Two days after the shootings, Ms. Garcia's husband gave Detective Harbin a sketch of the perpetrator as drawn to Ms. Garcia's specifications. Ms. Garcia was reluctant to speak with him but on July 7, 2004, when the detective showed Ms. Garcia a six-person photo lineup that included the defendant's picture, she identified his photo and wrote

on the back "This is the man I saw walking away from Mrs. Watts' porch on 6-15-04."

Detective Harbin learned from Ms. Linda Davis that as she exited her car in her driveway, she heard loud taking between Ms. Watts and a man in a red shirt standing on Ms. Watts' porch. Ms. Davis entered her house, but returned to her vehicle about ten minutes later. While standing at her car, she heard gunshots. She observed the suspect standing on the Watts' porch firing a weapon at Ms. Gex, who had fallen onto the porch. On September 2, 2004, Ms. Davis identified the defendant's photo from the same lineup viewed by Ms. Garcia. Detective Harbin testified that he inserted a different, unsigned copy of the defendant's photo into the lineup and rearranged the filler photos prior to Ms. Davis' viewing. Detective Harbin asserted that Ms. Davis was not shown any other photographs prior to viewing the September 2, 2004, lineup.

Detective Harbin testified that he presented a photo lineup to Mr. Dominick who indicated that one of the people depicted in the lineup "jumped out at [him]." He then focused on the defendant's picture and said: "This guy looks familiar. I know him from the neighborhood." However, Mr. Dominick did not make a positive identification from the lineup. Detective Harbin related that Mr. Dominick told him that he normally wore glasses, but was not wearing them at the time of the murders. In addition, Mr. Dominick worked with a police artist to compile a sketch of the suspect.

Detective Harbin explained that he was led to the defendant as a possible suspect by Ms. Gex's family members who learned from a neighbor (who did not want to get involved) that he (the neighbor) had followed the suspect to a house on Law Street. Detective Harbin ran the address through the motion system and obtained the name of Ladrika Davis, the defendant's ex-girlfriend. Further investigation revealed that Ladrika Davis brought charges against the defendant for domestic abuse. Detective Harbin obtained the defendant's booking photograph and placed it in the lineups he presented to Ms. Garcia, Ms. Davis, and Steven Dominick.

Ms. Garcia testified that she lived across the street from the Watts' residence and had known Ms. Watts for years. Ms. Garcia was in her house when she heard gunshots. She walked outside to investigate, and she observed the suspect standing on Ms. Watts' front porch next to a woman's body. Ms. Garcia walked toward the Watts' house, passing within twenty to twenty-five feet of the suspect as he walked away. As she approached the house, she realized that Ms. Gex, not Ms. Watts, was lying on the porch. Shortly after the shooting, she saw a sketch of the suspect on the news. She did not think it looked like the perpetrator, so she had her husband draw a composite from her memory and gave it to the police. From the photo lineup presented by Detective Harbin, Ms. Garcia identified the defendant as the man she saw walking from the Watts residence on the day of the murders.

Ms. Garcia recalled that the suspect wore a hat pulled very low on his head, causing a shadow to cover his

eyes, which looked as though he may have been wearing sunglasses. The hat covered the suspect's braids, and she did not notice any facial hair. She said the person she saw "looked like somebody that might be familiar but [she] didn't know him personally." She also said that as she viewed the lineup, she covered the faces from the eyes up.

Ms. Davis testified that she was looking for her telephone book in her car when she heard Ms. Watts tell a man standing on her porch that he better leave. Ms. Davis found the telephone book and went into her house. Moments later, she hear heard a gunshot. She went to the door in time to see the suspect standing over a woman's prone body firing two more shots. Initially, she mistakenly thought that the suspect had shot Ms. Watts, but he actually shot Ms. Gex. The suspect was wearing a red shirt and blue jeans. As the suspect walked away, he repeatedly turned around to look at the victim's body on the porch, thereby providing Ms. Davis with ample opportunity to see his face. She looked at him directly in the face, noticing that he had deep set eyes. On September 2, 2004, she identified the defendant from a photo lineup as the man that shot Ms. Gex.

Second Hearing

The defense recalled Detective Harbin, who recalled that on June 23, 2004, he compiled two photo lineups which he showed to Ms. Garcia and Ms. Davis. In both of those lineups, the defendant is wearing a red T-shirt. However, the randomizations of the filler photos were different in each lineup. Harbin explained that in compiling a lineup,

he sought individuals with physical traits similar to a suspect. When questioned about the criteria he used to show Ms. Davis and Ms. Garcia a lineup in which only the defendant was wearing a red T-shirt, Harbin responded:

> There was no criteria. There was no specific intent on my part, which is what I'm gathering from your question, that I specifically put him in the lineup - - and him being the only one in the red shirt - - in the hopes that he would be identified. I don't work like that.
>
> I put this lineup together. If anything, I didn't show the same lineup to anyone. I manipulate the photographs so the person is not in the same position so if in the event the witnesses talk amongst themselves for any reason, one won't tell the other, I picked him out of number three.
>
> As far as the color of the shirt, those were the only booking photographs that I had at my disposal at the time. There was no - - I mean, I guess if he had horizontal shirts we'd be here arguing horizontal in lieu of [sic] vertical stripes shirts, multi colors.
>
> I don't know what else to say to you, but I don't operate like that. I put the lineups together with what I had, the best I had. The witnesses either saw the perpetrator or they didn't see the perpetrator. I present them with the lineup; they either say yes or they say he's not in there. And that's the extent of what I do when I show lineups.

Appendix B

* * *

> The fact that he's wearing a red shirt and [sic] his previous two booking photographs does nothing more for me other than explain he wears red shirts. The fact that he is in the lineup in a red shirt was all I had to work with at the time. I did not, and I know - - this is what I'm getting from you - - I did not specifically put him in the lineup wearing a red shirt.
>
> I searched for any other photographs I could with a red shirt. Put him in the lineup with horizontal stripes, blue shirt, green shirt, a multitude of different color shirt with different individuals.

The defense counsel showed Detective Harbin a booking photo of the defendant taken on May 15, 2004, stemming from the municipal charges for which the defendant was arrested on the day of the murders. In that photo, the defendant is wearing a white shirt. Detective Harbin informed counsel that the photograph from the municipal charges was not contained within the State's identification system used to compile the lineup and, therefore, not available for his use in the photo lineups he compiled for the witnesses.

Detective Harbin testified that when he interviewed Ms. Davis prior to her grand jury testimony on September 2, 2004, she indicated that she saw a sketch or picture of the defendant on the news but neither looked like the

perpetrator. Detective Harbin had no knowledge of Ms. Davis' viewing any photographs prior to viewing the lineup, but he acknowledged she had some interaction with the district attorney's investigator.

Detective Harbin recalled that Ms. Garcia viewed the photographic lineup at her home but did not remember that she covered portions of the photographs as she examined the lineup. He further recalled that he did not present a photographic lineup to Ms. Garcia prior to July 7, 2004, either because the lineup was not available or because he preferred to wait until he determined what she would say prior to allowing her to view a lineup.

Third Hearing

The defense called Aaron Walker, its private investigator, who explained that he was retained to measure distances from the residence of Ms. Watts to the street, as well as to vantage points from which the eyewitnesses allegedly observed the defendant on the day of the murders. Mr. Walker testified that his calculations and measurements revealed that the distance from the residence of Ms. Watts to the residences at 1933, 1935, and 1937 Duels Street was 97.4', 75' and 70', respectively.

Ms. Davis recalled meeting with a black detective at the District Attorney's Office and viewing a photographic lineup. She identified the defendant from the lineup and signed the back of the defendant's picture to denote her identification. The color of the shirt and the deep circles around the defendant's eyes led to her identification of

the defendant's picture. She said: "I remember the dark circles underneath his eyes. I looked right in his face . . . ." She gave a statement to a white detective on September 2, 2004. Ms. Davis acknowledged that the defense counsel sent her a copy of her statement. When she saw a sketch of the perpetrator on television, she told her husband that the sketch did not look like the perpetrator. Ms. Davis was emphatic that she did not just consider the red shirt when she identified the defendant. She looked at his face. No one told her whom to pick out of the lineup and no one told her she had picked the correct person or that the police had a suspect in custody at the time she viewed the lineup.

Fourth Hearing

Detective Colmenaro testified that he accompanied Detective Harbin to present a photo lineup to Ms. Garcia at her residence on July 7, 2004. Ms. Garcia immediately picked the defendant's picture from the lineup. She wrote on the back of the photo: "This man is the man I saw walking away from Ms. Watts' porch on 6-15-04."

Ms. Garcia testified that Detective Harbin and another detective presented her with a photo lineup at her home on July 7, 2004, from which she identified the defendant in less than one minute. She signed the picture: "This is the man I saw walking away from Ms. [Watts'] porch." She had not been shown any photographs of suspects prior to the lineup. The police did not tell her that they had a suspect in custody at the time of the lineup or that a suspect had been identified.

Appendix B

Analysis

Detective Harbin conceded that the two photographs of the defendant he used to compile the lineups presented to Ms. Garcia and Ms. Davis depicted the defendant wearing a red shirt -- the same color shirt the witnesses said the shooter wore the day of the murders. Although this is problematic, the detective explanation that those pictures were the only ones at his disposal at the time he compiled the lineup appears undisputed. The detective denied any attempt to single out the defendant or to unduly focus the witnesses' attention on the defendant and the defendant has offered no proof to discredit Detective Harbin's testimony.

Moreover, Ms. Garcia and Ms. Davis both testified that they had ample opportunity to view the perpetrator on the day of the shooting. Both Ms. Garcia and Ms. Davis said they could see the defendant's face in the broad daylight and, in fact, Ms. Garcia's view of the defendant's face was so clear that her husband sketched the shooter according to her directions. Both women described the shooter as a black male wearing a red shirt and blue pants. When confronted several weeks after the murder with the photographic lineup compiled by Detective Harbin, both witnesses positively and immediately identified the defendant and neither ever waivered from her identification of the defendant. Moreover, Ms. Garcia and Ms. Davis also positively identified the defendant at trial.

The defendant argues that Ms. Davis' identification is tainted because she saw his picture on the news prior

to identifying him in the photo lineup. The jurisprudence does not support this argument. *See State v. Gilmore*, 2011-1606, (La. App. 4 Cir. 2/8/13), __ So. 3d __, 2013 La. App. LEXIS 206, 2013 WL 476008, (eyewitness viewing pictures of the defendant on the internet prior to viewing a photographic lineup assembled by the police did not render the procedure used by police unconstitutionally suggestive or taint the eyewitness' identification of the defendant prior to and during trial, especially where the jury was aware that the eyewitness had seen defendant's photograph prior to identifying him in a lineup and the eyewitness identified only the defendant in the police lineup); *see also State v. Daughtery*, 563 So.2d 1171, 1174 (La. App. 1st Cir. 1990) (the viewing of television news coverage of a defendant's arrest or seeing his picture in a newspaper is not an element of an identification procedure). Accordingly, the defendant has failed to carry his burden of proving the photo lineup in this case was suggestive and there is no merit in this argument.

Notably, the defendant also argues that the trial court erred in refusing to allow expert testimony concerning the causes of misidentification. Under current jurisprudence, however, this argument is problematic. *See State v. Young*, 2009-1177, pp. 13-14 (La. 4/5/10), 35 So.3d 1042, 1049-1050 (expert testimony on eyewitness identifications can be more prejudicial than probative because it focuses on the things that produce error without reference to those factors that improve the accuracy of identifications; expert testimony presumes a misidentification, in the absence of presenting factors which support the validity of the identification). Although the defendant maintains in his

appellate brief that the purpose of the expert testimony was not to "refute the eyewitness's credibility" at trial, but "to address the defense's burden in regard to the photographic lineup procedure, *i.e.* to show that the procedure was suggestive, and also that the procedure created a substantial likelihood of misidentification," in his motion *in limine* before the trial court the defendant asserted that "the issue for the expert is to *educate* the jury about how Ms. Garcia's memory was affected by the suggested lineup." Thus, the defense's stated purpose for the expert testimony would violate the prohibition against "invad[ing] the field of . . . [the] education of men." *State v. Stucke*, 419 So.2d 939, 945 (La.1982). Therefore, in accordance with the current controlling jurisprudence of the Louisiana Supreme Court, we do not find that the trial court abused its discretion in refusing to allow the defense expert to testify.

ASSIGNMENT OF ERROR NO. 3

By a third assignment of error, the defendant charges three instances of prosecutorial misconduct.

First, the defendant alleges his *Brady* rights were violated by the State's failure to disclose exculpatory evidence of the plea deal the State made with Mr. Dominick in exchange for his trial testimony. Under *Brady*, the prosecution has a duty to disclose evidence favorable to a defendant, whether the evidence is exculpatory or impeachment, prior to trial. In this case, Mr. Dominick testified at trial that he was not offered nor did he believe he would be offered a deal in exchange for his testimony.

The defense presented a scathing cross-examination of Mr. Dominick reviewing details of his pending prosecutions, his understanding of the State's authority to reduce or dismiss charges and every interaction Mr. Dominick had with prosecutors since the inception of his criminal prosecutions.

The prosecutor informed the court that the District Attorney's Office never offered Mr. Dominick any deals. Even Mr. Butler, the attorney representing Mr. Dominick in the criminal matters pending against him at the time of this trial, testified that he asked the prosecutors on several occasions if Mr. Dominick would receive any consideration in his criminal prosecution in exchange for his testimony in this case. Mr. Butler maintained that the prosecutors flatly refused his requests on every occasion and that Mr. Dominick testified at this trial against his advice.

Next, the defendant claims the prosecution violated *Brady* by unlawfully withholding phone calls made by Mr. Dominick to family members. The defendant argues that the calls contained impeachment information. The record indicates, however, that the State was never in possession of the recordings of the phone calls. Following the first day of trial, defense counsel requested that the Criminal Sheriff's Office be subpoenaed to produce the defendant's telephone and medical records. The following day, the Sheriff produced the items requested and the court released the phone recordings to the defense.

Thus, even if the State could be held accountable for failing to provide the information, the calls were available

to, and obtained by, the defense. Mr. Dominick was subjected to lengthy and withering cross-examination on the calls. The defense thoroughly explored any possible impeachment value. The defendant's argument is without merit.

Next, the defendant complains the State failed to produce the grand jury transcript of the State's three key witnesses. The record shows that the first judge handling this matter reviewed a portion of the grand jury testimony and provided the defense with those portions of Detective Harbin's testimony that the court determined was inconsistent with the detective's testimony at the motion hearing. The issue remained contentious with the defense pushing for disclosure of the grand jury testimony of the three eyewitnesses in order to highlight alleged inconsistencies between their statements, grand jury testimony and trial testimony.[10]

During trial, the defense obtained a copy of the grand jury transcript.[11] The defense counsel argued that the transcript contained impeachment evidence vital to the

10. During trial, the trial judge ordered the State to turn over to the defense the entire grand jury testimony relating to the defendant. On application for supervisory review filed by the State, this court granted writ, reversed the trial court ruling, and ordered "that the entirety of the grand jury proceedings transcript, save the testimony of Detective Harbin, be returned to the court and that the defendant be prohibited from referring to any other grand jury testimony whatsoever at trial." *See State v. Henry, unpub.*, 11-1187 (La. App. 4 Cir. 8/29/11), *writ denied*, 11-1887 (La. 8/30/11), 68 So. 3d 517.

11. Defense counsel explained:

case. The trial judge informed the defense that it would be allowed to recall any of the State's witnesses it chose for impeachment purposes with the portions of the grand jury transcript previously ordered disclosed by the prior judge. Later in the defendant's case, the trial judge ordered the State to provide the defense with the entire grand jury transcript, which the State did. Of the three eyewitnesses to the crimes, the defense chose to call only Mr. Dominick. The defense highlighted some differences between Mr. Dominick's grand jury testimony, previous statements and trial testimony concerning the perpetrator's identity. However, Mr. Dominick was able to explain his responses, blunting the defendant's argument that the responses were effective impeachment information which the prosecution had a duty to relay to the defense. Moreover, the defendant has not identified any impeachment information contained

---

> Your Honor, yesterday we are at counsel table. Counsel for the prosecution was laying out its evidence. They were moving documents, asked me, get your stuff off the table so we can lay out our stuff. I began piling. Do you see how neat I am out there?
>
> * * *
>
> I began grabbing stuff. I went to dinner. At 9:30, 10:00 I opened my brief case and found the grand jury transcript in my brief case.
>
> Inside this transcript is impeachment material to their entire case, particularly supporting our central theory. I got to page - - I got to page - - I didn't read everything. I was flipping through [Detective] Harbin's testimony]. I get to page 39. I read - - or 36. I read what Detective Harbin has to say. I called co-counsel. I have not even read the whole thing.

in the grand jury transcript that was unlawfully withheld from the defense prior to the trial judge's mid-trial order turning the transcript over to the defense. This issue is meritless.

Finally, the defendant argues that during closing argument, the prosecutor improperly and prejudicially argued that the "Ms. Dot" notation on the defendant's Rally's job application[12] was a reference to Ms. Watts. The defendant maintains that the State manufactured this connection between the defendant and victim because it had no evidence to link him to the victim or the crimes.

Pursuant to La. Code Crim. Proc. art. 774, the scope of closing argument should be confined to the evidence admitted, the lack of evidence, conclusions of fact that the State or defendant may draw therefrom, and the law applicable to the case. The State's rebuttal shall be confined to answering the argument of the defendant. *Id*. While prosecutors have wide latitude with regard to tactics used during closing arguments, they should not appeal to prejudice and should refrain from making personal attacks on defense strategy and counsel. *State v. Manning*, 2003-1982, p. 75 (La.10/19/04), 885 So.2d 1044, 1108. Nevertheless, even where a prosecutor exceeds that wide latitude, the reviewing court will not reverse a conviction unless thoroughly convinced that the argument influenced the jury and contributed to the guilty verdict. *State v. Taylor*, 93-2201, p. 19 (La.2/28/96), 669 So.2d 364, 375.

12. The defendant listed "Ms. Dot" as a reference.

Appendix B

A trial court has broad discretion in controlling the scope of closing arguments, and Louisiana courts have consistently held that great consideration should be accorded to the good sense and fair-mindedness of jurors who have seen the evidence, heard the arguments, and repeatedly been instructed by the trial judge that arguments of counsel are not evidence. *State v. Casey*, 99-0023, p. 17 (La.1/26/00) 775 So.2d 1022, 1036.

At trial, Detective Harbin testified that Mr. Dominick pointed to the defendant's photograph and said: "This guy looks familiar; I know him from the neighborhood; I think he hangs out with Ms. Dot's grandson." During closing argument, the prosecution reviewed Detective Harbin's trial testimony:

> PROSECUTOR:
>
> Detective Harbin testified that when he showed Steven Dominick the line-up that Steven Dominick said this guy look [sic] familiar, from the neighborhood. I am thinking this is the guy that looks familiar. He hangs out with Ms. Dot's grandson.
>
> DEFENSE:
>
> Objection, your Honor, facts not in evidence.
>
> COURT:
>
> I overrule that. That is for the jury to decide. I am not saying the lady is correct or not. Let the jury decide that, sir. I note your objection, sir.

Appendix B

STATE:

Rely on each other's memories. Ask each other what you remember from Detective Harbin. I think that's the guy. It looks like Ms. Dot's grandson -- the guy who hangs out with Ms. Dot's --

DEFENSE:

Objection, your Honor, facts not in evidence.

COURT:

I overrule that. I am not saying the lady is correct or not. Let the jury make that decision. I note the objection for the defense.

Thus, the defendant is incorrect in his assessment that the prosecution argued that "Ms. Dot" was Ms. Watts.' The prosecution merely commented on evidence admitted at trial.

This assignment of error is without merit.

CONCLUSION

After review of the record in light of the applicable law and arguments of the parties, the defendant's conviction is affirmed.

AFFIRMED.

TOBIAS, J., CONCURS.

For all intents and purposes, Mr. Henry's conviction is based exclusively on eyewitness identification. My reading of the record satisfies me that the jury could rationally find on the evidence presented that the defendant was guilty beyond a reasonable doubt of the crimes of which he was accused and stands convicted. I respectfully concur to address further one issue discussed by the majority.

In his written motion *in limine*, the defendant sought to present John C. Brigham, Ph.D., whose testimony would address the suggestibility of lineups that are improperly composed.[1] As orally argued on 1 August 2011, the defense counsel stated:

> We just have a couple of comments on the Motion in Limina [sic] regarding expert, Mr. Brigham [,] regarding memory. Our only point and it was set out in the Motion was that he is not going to give opinion testimony regarding any ultimate issue. What he is doing is talking about how memories are formed. He is there as an educational witness and we have a kind of unique situation here in that it is how did the line-up procedures affect memory. Expert Brigham is not going to talk about any of the issues that were set forth by the Supreme Court about witnesses ability under the

1. The issue was raised by the defendant again in a slightly different context on an application for new trial.

> circumstances, the timing, the lighting, the distance, the stress, weapon focus, etcetera [sic]. It simply is not going to be any of his testimony. He is going to address the lineup procedures.
>
> * * *
>
> He is not going to be offering opinion testimony... about the witnesses reliability.

The court refused to allow Dr. Brigham to be called. However, in his motion for new trial, the defendant argued that the trial court improperly prevented the testimony of Richard Ernest. Mr. Ernest is an expert in the field of eyewitness identification, to testify "about how suggestive police procedures can lead good people to pick a photo [out of a photographic line-up] not based on their perceptions and memory but as a result of poor police investigative procedures." The trial court also refused to allow Mr. Ernest to be called. Although the defendant attempts to limit the purposes for which he wanted to call Mr. Ernest, the issue relates to the unreliability of eyewitness identification where the eyewitness identifies an individual previously unknown to him or her.

At the time of trial, Louisiana law relating to eyewitness identification was controlled by the then latest jurisprudential expression by the Louisiana Supreme Court in *State v. Young*, 09-1177 (La. 4/5/10), 35 So.3d 1042, a first degree murder case in which corroborating evidence supported the eyewitness identification. I quote the Court's reasoning:

The State argues the district court misapplied the tests articulated under *Daubert* and *Foret*. Specifically, it contends the court erred in qualifying Dr. Malpass as an expert in a field before determining whether the discipline itself satisfied the standards for reliability. The State argues that the "field of eyewitness identification psychology" has no known error rate, its findings are insufficiently quantifiable, and its theories are not falsifiable. It contends there has been no new jurisprudence or compelling scientific advances, since this Court's seminal decision in *[State v.] Stucke*, [419 So.2d 939 (La. 1982)] to warrant reconsideration of this Court's ban on expert testimony regarding the validity of eyewitness identification. The State also contests the district court's findings as to Dr. Malpass' qualifications as an expert and the relevancy of his testimony.

Conversely, the defense urges the district court properly performed its gatekeeping function articulated under *Daubert* and *Foret*. It claims emerging social science research in the field of eyewitness identification validates the reliability of the proposed testimony and, as such, warrants this Court revisiting the vitality of *Stucke*. As evidence of the recognized field of study, the defense relies on the fact several jurisdictions that previously barred the admission of such testimony have changed their position on the issue. It also contends

Dr. Malpass is well-qualified to testify as an expert based on his professional background, which includes publicly-funded research and his participation in developing law enforcement guidelines, and his extensive history of testifying as an expert in numerous other court proceedings.

This Court is cognizant of the ongoing legal debate over the admissibility of expert psychological testimony on the validity of eyewitness identification. Generally, criminal defendants suggest jurors are ignorant of the alleged inadequacies of eyewitness testimony. Their proposed remedy is to allow qualified cognitive and memory experts to essentially educate jurors on the factors allegedly outside of the common experience that contribute to unreliability and inaccuracies in eyewitness testimony. These factors would include observations involving significant stress, weapon focus, cross-race identification, identification based on time delays, and psychological phenomena, such as the feedback factor and unconscious transference, among others. *See United States v. Langan*, 263 F.3d 613, 621 (6th Cir.2001).

Unquestionably, eyewitness identifications can be imperfect. However, upon review, the touted advances in the social sciences regarding the validity of eyewitness identifications do not

render obsolete the underlying premise for which such evidence was held to be inadmissible in *Stucke*. There is still a compelling concern that a potentially persuasive expert testifying as to the generalities of the inaccuracies and unreliability of eyewitness observations, that are already within a juror's common knowledge and experience, will greatly influence the jury more than the evidence presented at trial. *Higgins*, 03-1980 at 33-34, 898 So.2d at 1240; *Stucke*, 419 So.2d at 945. By merely being labeled as a specialist in eyewitness identifications, an expert has the broad ability to mislead a jury through the "education" process into believing a certain factor in an eyewitness identification makes that identification less reliable than it truly is. *See United States v. Angleton*, 269 F.Supp.2d 868, 873-874 (S.D.Tx.2003); *United States v. Lester*, 254 F.Supp.2d 602, 608-609 (E.D.Va.2003). Moreover, expert testimony on eyewitness identifications can be more prejudicial than probative because it focuses on the things that produce error without reference to those factors that improve the accuracy of identifications. The expert testimony presumes a misidentification, in the absence of presenting factors which support the validity of the identification. This fosters a disbelief of eyewitnesses by jurors.

This Court has long been reluctant to allow experts to offer opinions on the credibility of

another witness for fear of the expert invading what is considered the exclusive province of the jury. Moreover, the concept of promoting battles of experts over whether the testimony of every witness is truthful and reliable is not desirable. These considerations are especially compelling in cases involving eyewitness identifications where any alleged deficiencies could easily be highlighted through effective cross-examination and artfully crafted jury instructions. *United States v. Rincon*, 28 F.3d 921, 921 (9th Cir.1994); *United States v. Harris*, 995 F.2d 532, 535 (4th Cir.1993).

With this in mind, we decline to overrule our decision in *Stucke* barring the admissibility of eyewitness identification testimony. We conclude the district court erred in finding the proposed testimony satisfied the standard for admission of expert testimony under Louisiana Code of Evidence article 702. The testimony will not assist the jury in its deliberations.

* * *

There is no reason for us to disturb our earlier ruling in *Stucke* barring the admission of the expert testimony at issue. The proposed testimony on the general factors potentially contributing to a misidentification does not satisfy the standard articulated under Louisiana Code of Evidence article 702. While

> being aware of the vast discretion to be afforded to trial courts in their determinations of the admissibility of expert evidence, we find the district court abused its discretion in allowing Dr. Malpass to testify at trial.

In a concurring opinion, Justice Johnson stated:

> I concur with the majority opinion vacating the district court's ruling permitting the admission of testimony by defendant's expert on the validity of eyewitness identification. However, I disagree with the majority's finding that *State v. Stucke*, 419 So.2d 939, 945 (La.1982) serves as a complete bar to the admission of expert testimony regarding eyewitness identification. In *Stucke*, this Court held that the trial court did not abuse its discretion in excluding expert witness regarding the quality of an identification.
>
> * * *
>
> Rather than establishing a brightline rule, our jurisprudence has determined that the admissibility of expert witness testimony should be made on a case by case basis. In *State v. Chapman*, 436 So.2d 451, 453 (La.1983), the trial court allowed expert testimony concerning studies which generally reflected the fallibility of eyewitness identification in certain circumstances. Although the question

of admissibility was not an issue on appeal in *Chapman*, this Court, in a footnote, cited the *Stucke* decision, and discussed the concurring opinion in *Stucke* which emphasized the trial court's discretion in admitting such evidence, in the interest of justice, when the court determines that the proffered evidence would assist the jury in deciding the question of identity.

The United States Supreme Court noted the inherent problems in eyewitness identification testimony decades ago in its first attempt to establish constitutional safeguards governing the admission of eyewitness evidence of identification in criminal trials.[FN2] The Court, in a trilogy of cases, stated: "The vagaries of eye-witness identification are well known; the annals of criminal law are rife with instances of mistaken identification...." Although the majority concludes that the expert testimony on eyewitness identification somehow invades the province of the jury, Federal Rules of Evidence have eliminated this rationale, providing that: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Fed.R.Evid. 704(a). Additionally, this reasoning has been explicitly rejected by the federal courts.

> In the case at bar, I agree, that based on the facts presented, the majority is correct in vacating the trial court's ruling admitting the expert testimony because there were multiple eyewitnesses, and ample corroborating evidence to support defendant's conviction. The fallibility of human perception and memory, in general, is consideration in those cases where the lone witness' identification is not supported by other testimony or evidence. It is my view, that expert witness testimony regarding the reliability of eyewitness identification is not *per se* inadmissible in every case.

Young, 09-1177, pp. 11-13 (La. 5/7/10), 35 So.3d 1042, 1049-50 [footnotes omitted].

As I read *Young*, the Court directed that no expert witness may address at trial the issue of the unreliability of eyewitness identification.

In *State v. Stucke*, 419 So.2d 939 (La. 1982), a pre-*Daubert/Foret* aggravated battery case in which the Court did not address what corroborating evidence, if any, was present, the Supreme Court established the standard for admission of expert testimony addressing the reliability of eyewitness identification:[2]

---

2. The case was decided before *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) and *State v. Foret*, 628 So.2d 1116 (La.1993).

> The rationale expressed in the foregoing cases [from other jurisdictions] is equally applicable to the instant case. We conclude that the prejudicial effect of such testimony outweighs its probative value because of the substantial risk that the potential persuasive appearance of the expert witness will have a greater influence on the jury than the other evidence presented during the trial. Such testimony invades the province of the jury and usurps its function.
>
> We therefore conclude that the *trial court did not abuse his discretion* in failing to allow the expert witness to testify. The testimony sought to be elicited from him would not have been an aid to the jury. We further conclude for the reasons contained herein that the trial court did not err in denying defendant's motion for a proffer of the evidence.

Id. at 945 [emphasis supplied].

In a concurring opinion, Justice Lemmon noted:

> Although I agree that the trial judge, under the circumstances of this case, did not abuse his discretion in refusing to permit defendant to offer the testimony of the "identification expert", it is not necessary to decide whether the trial court must, under *all circumstances*, exclude such testimony as unhelpful to the trier of fact. Trial courts should not view this decision

> as imposing a "rule of inadmissibility" with regard to expert testimony of the nature offered here. Rather, trial courts should cautiously approach the question of admissibility of such evidence in each instance and decide whether, under the peculiar facts of the particular case, the "specialized knowledge" of an expert in the form of opinion evidence would assist the jury in deciding the question of identity. See Fed.R.Evid. art. 702.

Id. at 951 [emphasis in original].

Thus, my reading of *Stucke* is that it stands for the proposition that a trial court has the discretion in certain undisclosed circumstances on a case-by-case basis to allow an expert to testify about the reliability of eyewitness identifications. The case does not prohibit such evidence.

In 1983, following close on the heels of *Stucke*, the Supreme Court was again called upon to address the issue of eyewitness identification in *State v. Chapman*, 436 So.2d 451, 453 (La. 1983), a non-capital aggravated rape case where physical evidence was present to support the conviction. The Court stated:

> At the trial, defendant presented the testimony of an expert concerning studies which tended to discredit eyewitness identification generally. [FN6] In addition, several alibi witnesses testified that defendant was in a local barroom at the approximate time of the rape. Defendant also

testified, flatly denying that he was the rapist and directly contradicting the testimony of some of the investigating officers. Despite his firm denials and a vigorously presented defense, the jury obviously credited the victim's positive identification, *as corroborated by some circumstantial evidence* (which by itself was by no means conclusive).

> FN6. The trial court permitted Dr. Robert Buckhout, a psychologist, to testify concerning his research which substantially tended to discredit the accuracy of much eyewitness testimony, especially when the victim's observations were made under certain circumstances (such as those present in defendant's situation).
>
> This court held in *State v. Stucke*, 419 So.2d 939 (La.1982), that defendant was not entitled to offer such evidence, on the theory that the potential persuasiveness of this type of testimony might have a greater influence on the jury than the other evidence and might thus invade the province of the jury. A concurring opinion emphasized that the trial judge may (as was done here) exercise his discretion in favor of admitting such evidence, in the interest of

> justice, when the judge determines that the proffered evidence would assist the jury in deciding the question of identity.

Id. at 951 [emphasis supplied].

In my view, *Chapman* stands for the proposition that a conviction may be upheld when a trial judge, utilizing his discretion, permits evidence relating to eyewitness identification where corroborative evidence, circumstantial in nature, has been introduced to support a finding of guilt. That is, a trial judge has the discretion to permit expert evidence on the reliability of eyewitness identification.

Approximately three years after *Chapman*, the Second Circuit was called upon to address the same issue in *State v. Coleman*, 486 So.2d 995, 1000 (La. App. 2d Cir. 1986), *writ denied*, 493 So.2d 634 (La. 1986), a case involving an armed robbery, aggravated rape, and aggravated crimes against nature. Absent in *Coleman* is any discussion of corroborative evidence. In sustaining the trial court's decision to exclude an expert witness to testify concerning the reliability of eyewitness identification, the court stated:

> In *State v. Stucke*, 419 So.2d 939 (La.1982), refusal to allow an experimental psychologist to testify concerning the quality of an identification was held not an abuse of discretion, in view of the substantial risk that the potential

> persuasive appearance of an expert witness would have greater influence on the jury than the other evidence presented during the trial.
>
> Competence of an expert witness is a question of fact to be determined within the sound discretion of the trial judge; his rulings on the qualification of expert witnesses will not be disturbed in the absence of manifest error. *State v. Trosclair*, 443 So.2d 1098 (La. 1983); *State v. Williams*, 431 So.2d 885 (La. App. 2d Cir.1983).
>
> The trial judge did not abuse his discretion in refusing to allow this expert witness to testify. The prejudicial effect of such testimony outweighs its probative value because of the substantial risk that the potential persuasive appearance of the expert witness will have a greater influence on the jury than the other evidence presented during the trial. Such testimony invades the province of the jury and usurps its function.

This court addressed the issue in *State v. Gurley*, 565 So.2d 1055 (La. App. 4th Cir. 1990), *writ denied*, 575 So.2d 386 (La. 1991). The defendant therein was charged with second degree murder. Absent was physical evidence tying the accused to the crime; three eyewitnesses gave testimony identifying the accused as the perpetrator. We said:

Appendix B

The defendant's second assignment of error asserts that the trial court erred in refusing to allow expert testimony on the psychological factors affecting reliability of eyewitness identifications.

The Louisiana Supreme Court in *State v. Stucke*, 419 So.2d 939 (La. 1982), ruled against the admission of expert testimony relative to eyewitness identifications. The Court held as follows:

> We conclude that the prejudicial effect of such testimony outweighs its probative value because of the substantial risk that the potential persuasive appearance of the expert witness will have a greater influence on the jury than the other evidence presented during the trial. Such testimony invades the province of the jury and usurps its function.

We therefore conclude that the trial court *did not abuse his discretion* in failing to allow the expert witness to testify. The testimony sought to be elicited from him would not have been an aid to the jury.

Other Louisiana decisions which have addressed this issue have relied upon the *Stucke* decision and found that the trial court *did not abuse its discretion* in refusing to allow expert testimony

> on the reliability of eyewitness identification. *State v. Mims*, 501 So.2d 962 (La. App. 2d Cir.1987); *State v. Coleman*, 486 So.2d 995 (La. App. 2nd Cir.1986), *writ denied*, 493 So.2d 634 (La.1986).

Id. at 1057-58 [emphasis supplied].

> This court impliedly agreed that the standard of review for admissibility of an expert on the unreliable nature of eyewitness identification was abuse of discretion.

The Louisiana Supreme Court again visited the issue in *State v. Higgins*, 03-1980 (La. 4/1/05), 898 So.2d 1219. The case was a first degree murder reduced to second degree murder; substantial physical evidence to support multiple eyewitness identifications and other corroborating evidence was adduced. The Court stated:

> In his third assignment of error, the defendant claims the trial court erred in refusing to allow expert testimony concerning the causes of misidentification. Specifically, this testimony was to be offered in order to diminish the credibility of eyewitness Wanda Brown.

As a general matter, under La.C.E. art. 702, "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify ... in the form of an opinion or otherwise." In reviewing an expert's qualifications, the "trial judge is vested with wide discretion in determining the competence of an expert witness. Competence of an expert witness is a question of fact to be determined within the sound discretion of the trial judge; h[er] rulings on the qualifications of expert witnesses will not be disturbed in the absence of manifest error." *State v. Stucke*, 419 So.2d 939, 944 (La.1982)(citing *State v. Drew*, 360 So.2d 500 (La.1978)).

Under *Stucke* and its progeny, a trial court may exclude expert testimony regarding the reliability of eyewitness identification. *Stucke*, 419 So.2d at 945; *see also State v. Ford*, 608 So.2d 1058, 1060-1061 (La. App. 1st Cir.1992); *State v. Velez*, 588 So.2d 116, 134 (La. App. 3 Cir.1991). Because of the risk that expert testimony on eyewitness identification "will have a greater influence on the jury than other evidence presented at trial," and because such evidence presents the danger of "'invad[ing] the field of common knowledge, experience, and education of men [ ]'" this Court has held that

the prejudicial impact of such evidence would substantially outweigh its probative value. *Stucke*, 419 So.2d at 945 (quoting 3 Am.Jur.2d, Expert and Opinion Evidence, § 21; 227 Cal. App. 2d 87, 38 Cal. Rptr. 431, 356 Ill. 144, 190 N.E. 301).

In the instant case, the defendant wished to call Dr. John C. Brigham, an expert in eyewitness identification, who would have testified regarding his findings after years of studying the reliability of eyewitness testimony. Specifically, Brigham sought to explain to the jury his findings that, *inter alia*, intoxication greatly increases the likelihood of false identification, that little correlation exists between the confidence expressed by an eyewitness and the actual reliability of that witness's identification, that the chance of misidentification increases with the length of time between incident and identification, and that facts gathered from secondary sources after observing the event in question tend to skew a witness's perception of that event. While the defendant claims that the particular facts of this case present the rare instance in which the "'specialized knowledge' of an expert in the form of opinion evidence would assist the jury in deciding the question of identity," *Stucke*, 419 So.2d at 951 (Lemmon, J., concurring), with the possible exception of the effect of alcohol on Brown's ability to process the world around

> her, the proposed expert testimony likely presented an invasion into a reasonable juror's common knowledge. *See State v. Ammons*, 208 Neb. 797, 305 N.W.2d 808, 812 (1981) (the prejudicial effect of a psychologist's testimony on a witness's identification outweighs its probative value); *see also Ford*, 608 So.2d at 1061 (expert testimony regarding the fallibility of human perception and memory generally is unnecessary to resolve the issues regarding the reliability of an identification); *see generally* Elizabeth Loftus, Eyewitness Testimony Civil and Criminal (1997). The trial court thus properly excluded this expert testimony, and defendant's third assignment of error fails to have merit.

Id. at pp. 33-35, 898 So.2d at 1239-40 [footnote omitted].

The Court again stated that the standard of review is abuse of discretion and a trial court does not err in excluding an eyewitness identification expert.

In the case at bar, I cannot say that the trial court ruled incorrectly on the issue by following Louisiana Supreme Court jurisprudence, and more specifically *Young*, which excludes an expert's testimony relating to eyewitness identifications. Nevertheless, here the only evidence against the accused is eyewitness identifications by individuals who were not familiar with the accused and no corroborative or other circumstantial evidence links the accused to the crime. Thus, it seems reasonable in

a death penalty case that, out of fairness, the defendant should be allowed to call an expert witness to discuss "how suggestive police procedures can lead good people to pick a photo not based on their perceptions and memory but as a result of poor police investigative procedures."

Because many jurisdictions allow such expert witnesses to testify, I ponder why this state does not allow such testimony in cases such as the present one where the defendant was charged with murder (La. R.S. 14:30) and the death penalty was on the line. If an accused cannot call such a witness in a death penalty case, even one where the crimes are as horrific as the present ones, under what circumstances will an accused be allowed to do so, given that many studies exist that call into question the validity of eyewitness identification.[3]

A recent decision of New Jersey's Supreme Court, *State v. Henderson*, 208 N.J. 208, 27 A.3d 872 (2011), in significant detail addresses the reliability of eyewitness identifications[4] and the use of expert witnesses to address the issue. I do not think, as some writers have averred in opposing the admissibility of such expert evidence, that the expert will have a greater influence on the jury than the eyewitnesses. An ordinary jury charge in a case where

---

3. In an *amicus* brief filed in this case by The Innocence Project and Innocence Project New Orleans, a substantial listing of studies is disclosed that demonstrate that the potential unreliability of eyewitness identification is not junk science.

4. Concededly, the Court was addressing cross-racial identifications, which does not appear applicable in the case at bar.

an expert has testified explains to the jury the difference between an expert witness and an ordinary witness. That difference is merely that a person qualified as an expert by the court in some professional, art, or science is permitted to express an opinion in the field in which he has been qualified as an expert; just because the witness has been qualified as an expert does not make him a "super" witness whose testimony is entitled to greater weight than any other witness, expert or lay. That is, I trust jurors to apply the law to the facts. And I do not find that jurors are so naïve as to believe an expert simply because he has been qualified as such; jurors, by their own life experiences, possess common sense and know when they are hearing bunkum. The methodology of the expert can be reliably tested in a *Daubert/ Foret* hearing.

Thus, I am required to concur with the affirmation of the conviction and sentence of Mr. Henry, relying upon the latest expression of the Supreme Court in *Young*.

LANDRIEU, J., CONCURS FOR THE REASONS ASSIGNED BY J. TOBIAS.

APPENDIX C — TRANSCRIPT OF THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS, STATE OF LOUISIANA, DATED AUGUST 1, 2011

[1] CRIMINAL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

CASE NO. 451-696
SECTION "L"

STATE OF LOUISIANA

VERSUS

DARRILL HENRY

Transcript of the DISCOVERY HEARING before the Honorable Ad Hoc Judge Dennis Waldron, Judge Presiding, Section "L" Criminal District Court, Parish of Orleans, State of Louisiana, on Monday, August 1, 2011, in New Orleans, Louisiana.

REPORTED BY:

Dawn Plaisance,
Official Court Reporter, Section "L"
Criminal District Court

[2] THE COURT:

Good morning. We hope this is our final pre-trial conference. If it is not we will re-group again, but what

we hope to be our final pre-trial conference. The trial we anticipate will begin two weeks from the today on the 15th day of August, 2011.

How do you lad6y and gentlemen wish to proceed? Whatever you like to do is what we shall do.

MR. TRENTACOSTA:

Your Honor, if I could just confer for a moment.

THE COURT:

Take your time, please. If you need to confer and step outside for a moment with your client, please do so. Same for the State, if you need to confer for a moment, please do so.

All parties are present. The attorneys for both sides along with Mr. Henry are here.

MS. RODRIGUE:

Your Honor, Laura Rodrigue on behalf of the State.

MR. ROCKS:

Your Honor, Michael Rocks and Nicholas Trentacosta on behalf of Darrill Henry.

MS. RODRIGUE:

Your Honor, I believe there are [3] several motions outstanding in this matter. The defense filed on the State a packet titled "Omnibus Motions In Limina." At this time the State has prepared a response to the defendants Omnibus Motions In Limina. I am serving a copy on the defense at this time. I am also serving a copy on the Court.

THE COURT:

I will allow you Mr. Rocks to take some time to review that privately with co-counsel and with Mr. Henry. Whenever you are ready to proceed, we will.

Is there anything that you need to respond to formally for the State so that they might have a moment to examine anything that you have filed.

MR. ROCKS:

Your Honor, we have the second updated notice of alibi pursuant to the alleged time frames. So we are going to be filing that and providing a copy of that to the State this morning.

THE COURT:

And I can take a copy if you have one, sir.

MR. ROCKS:

Sure.

MS. RODRIGUE:

Your Honor, I would like to review that as well.

THE COURT:

[4] Both of you shall take a few moments.

MS. RODRIGUE:

There are a couple of other motions by the State that I need to file at this time.

Your Honor, the State was asked to file an updated Notice of Victim Impact statement. I am filing a copy with the defense now as well as the Court.

I also have a response to the defendants Motion In Limina to admit expert testimony. I am serving a copy on the defense as well as on the Court.

Two motions, your Honor, this is not a response to any defense motions. These are motions being filed by the State today.

THE COURT:

Please go ahead and file those now and allow the defense a moment to examine them and then we will go back on the record in a few minutes.

MS. RODRIGUE:

The first one is a Notice of the Intent of the State to compel the defendant to display physical characteristics to the jury. I am filing a copy with the defense as well as the Court at this time.

The final motion today is the State's Motion In Limina to Exclude [5] Argument Questioning and/or Extringent Evidence pertaining to witnesses acts, vices or courses of conduct which have not resulted in criminal convictions. I am serving a copy on the defense as well on the Court at this time.

THE COURT:

I will give each side to review these and whenever you lady and gentlemen are ready just let me know. I will be in the conference room. Please take your time.

(A BRIEF RECESS IS TAKEN)

THE COURT:

Thank everyone for their indulgence. The attorneys for both sides have advised the Court that they are ready to resume. You lady and gentlemen shall proceed as you wish, please.

Appendix C

MR. ROCKS:

Your Honor, Michael Rocks on behalf of Darrill Henry. Co-counsel, Mr. Henry and I have gone over the Motions In Limina and Opposition to our Motions In Limina. We would for the bulk of them rest on what we have already filed.

We just have a couple of comments on the Motion In Limina regarding expert, Mr. Brigham regarding on memory. Our only point and it was set out in the Motion was that he is not going to give opinion testimony regarding any ultimate [6] issue. What he is doing is talking about how memories are formed. He is there as an educational witness and we have a kind of unique situation here in that it is how did the line-up procedures affect their memory. Expert Brigham is not going to talk about any of the issues that were set forth by the Supreme Court about witnesses ability under the circumstances, the timing, the lighting, the distance, the stress, weapon focus, etcetera. It simply is not going to be any of his testimony. He is going to address the lineup procedures. So we would simply note that as what we believe is the distinction that we could make.

Regarding the Motion In Limina that the State —

MS. RODRIGUE:

Your Honor, if we might address them one at a time if that is okay with the Court.

Appendix C

THE COURT:

Sure.

MS. RODRIGUE:

Your Honor, I believe there —

THE COURT:

But are you finished on your comments?

MR. ROCKS:

Yes.

THE COURT:

[7] The State has filed an objection to the request in fact to allow such testimony citing the very recent case. I noted it in the Motion In Limina. I noted it in the Motion In Limina just — I know it is an inadvertent oversight there but the defense has cited *STATE VERSUS YOUNG* as 35 So. 2nd and it is obviously So. 3rd. We all got to get use to the idea that we are in the third series now, but nonetheless at 35 So. 3rd, page 10 according to the relatively recent opinion from last year from the Louisiana Supreme Court on a somewhat similar issue. Not exactly the same, obviously.

Appendix C

MS. RODRIGUE:

Your Honor, the State has filed in writing the State's reply to defendant's Motion In Limina to admit such expert testimony. Specifically the State wants to address the two as they call "psychological phenomenon, the feedback factor and unconscious transference" which I believe the Court has held are specifically not admissible.

The defenses motion is that why would Cecilia, the witness, pick out the photo of a man whose lower facial features do not match the photo that she selected? With the strong implication that it is because the photographic [8] line-up included a person with a red shirt, that is exactly what is called the feedback factor. This is the genre of testimony that the Louisiana Supreme Court in *YOUNG* held was inadmissible.

With regards to the unconscious transference, again, the idea that the witnesses initial memory can be replaced at a later date is essentially what the definition of unconscious transference is.

The defense is essentially trying to bring in an expert to testify to that exact thing. Would she see a new picture of the defendant and then replace that image with the image that she had previously seen? This is exactly what the Court in *STATE V. YOUNG* held was not admissible.

The reasoning behind it or the theory as to why this type of testimony is not admissible is because the Court held the fear of the expert invading what is considered

to be the exclusive province of the jury. The jury is to decide what is the reliability of the witnesses identification. Essentially the Court has held that this expert can not interrupt what is the job of the jury with these exact two factors that the defense seeks to introduce, the feedback factor and the unconscious transference.

[9] THE COURT:

Anything further on that?

MR. ROCKS:

I apologize to the Court and to the State. I advanced our opposition argument before the State hence their argument in support.

Briefly, Judge, its not opinion. He is not going to be offering opinion testimony opinion about the witnesses reliability. He is not going to.

THE COURT:

I appreciate that.

Anything further on that issue?

MS. RODRIGUE:

Just, your Honor, on that general assumption, one of the reasons to qualify a person as an expert is for that person to be able to give their opinion testimony. It would

only be evident or we would only assume that that expert would then give their opinion testimony as to the reliability of the witnesses identification.

THE COURT:

I appreciate that.

MR. ROCKS:

Of course, your Honor, we would rely on you to craft whatever qualifications of this fellow and limit his testimony accordingly. We would abide by that.

THE COURT:

[10] I appreciate that as well.

The Court would sustain the objection of the State and note an objection on this issue. I believe that *STATE VERSUS YOUNG* is controlling and of all the cases that have proceeded it in regards to these types of issues. I have read the initial motion by the defense and I have obviously this morning had the opportunity to review a response by the State. The Court is familiar with the *YOUNG* decision and the cases that proceeded it in this regard.

At the same time I will note the objection for the defense and extend as I am hoping I always do to both sides but more particularly on this issue to the defense the right to challenge and argue to the jury what you perceive

to be any suggestion unduly in nature or otherwise as it relates to the procedures that are allegedly were attended to this alleged identification process.

I will note the objection for the defense.

MR. ROCKS:

Thank you.

THE COURT:

Are there any other issues that you gentlemen and lady have not agreed on regarding any of the other motions that are before the Court in terms of [11] responses that are unsatisfactory or anything of this sort that you wish to place on the record? Please do so at your convenience.

MS. RODRIGUE:

Your Honor, are we going to address the — is the Court prepared to rule on the Omnibus Motions In Limina today?

THE COURT:

I am allowing you to do as you see fit in terms of if you want to take these one by one or however you want to note anything that there is a disagreement on. I don't know how else to approach it. I leave it to you to take them in the order you wish.

MS. RODRIGUE:

Yes, sir. The State will request that we just proceed on the Omnibus Motions In Limina one at a time beginning with the Motion In Limina to preclude reference by the State to double hearsay made on June 29, 2004.

MR. ROCKS:

Your Honor, just one second. We are looking for our copy of the motion.

THE COURT:

If you all could aid me with any background information you might have. With all respect to the Court, I am personally obviously at a somewhat of a disadvantage as I did not conduct any of [12] the earlier pre-trial conferences or hearings nor heard testimony as it relates to many of these issues as these matters were held over the last few years prior to my appointment in the case. So any background that you can give me I will appreciate. I realize that you all spelled out to some degree the basis for your requests and/or your objections in each of these documents.

MR. ROCKS:

Yes, your Honor, on Motion In Limina number 1, as counsel just noted that double hearsay statements of June 29, 2004, it is in fact two double hearsay statements. Simply rumors related to Winston Harbin on June 29,

two separate rumors. Rumor on the street, boy on Law Street did it.

Rumor number 2, subject expressed he heard that someone on Law Street committed the murders. Subjects nickname was "Short Story."

THE COURT:

Does the State intend to offer such evidence?

MS. RODRIGUE:

Your Honor, the reason that this becomes an issue for more background information is that it is the hearsay statement of a subject on Law Street that takes Detective Winston Harbin to Law [13] Street where he runs a check on arrests in the Law Street area. This specific area which the witness indicated was where the person Short Story resided. Based on that running of the names of possible arrests on Law Street does Detective Harbin find Darrill Henry.

THE COURT:

I will allow the State to offer evidence if you wish that the Officer was called or went to that particular area based on information he received during the course of his investigation. I will not allow reference to the some called rumor on the street that the boy on Law Street did it or that the nickname was Short Story.

I will note the objection for the State in that regard.

MS. RODRIGUE:

Yes, your Honor —

THE COURT:

As always I know that people are prompted to ask well suppose something else develops or there is a door that is opened. We deal with those issues as they unfold. I think at the outset that that restriction is appropriate and I note the objection for the State.

MS. RODRIGUE:

Thank you, your Honor.

The second Motion In Limina is the [14] motion to preclude reference by the State to ballistics results. In particular, this motion filed by the defense indicates that the State should be prevented from having Officer Kenneth Leary testify that a 357 Colt Python that was recovered is not consistent with the .38 caliber projectiles that were removed from the scene. The State is essentially asking this Court to preclude the witness from eliminating that weapon as the potential murder weapon because the defense was not provided any report showing the testing comparison of the 357 Colt Python to the .38 caliber projectiles that were removed from the scene. The State does not have the actual murder weapon that was used in this case and the defense again is seeking to eliminate or order the State to be prevented from eliminating the 357 Colt Python as a possible murder weapon.

THE COURT:

And your position is that you will argue that it is possibly the weapon that may have been involved or one of the weapons? I am not familiar with your allegation.

MS. RODRIGUE:

Your Honor, I believe that the defense would argue or maybe they are implying that — I will let them state [15] their position. Our position is that though there was no testing done or none in our possession at this time comparing the 357 Colt Python to the .38 caliber projectiles recovered from the scene, Officer Kenneth Leary who has been qualified as an expert in the examination of firearms and ballistics can testify to why the 357 Colt Python would not be consistent with the .38 caliber projectiles recovered from the scene. Though he did not generate a report in connection with that his expertise would allow him to demonstrate why he can compare the two and eliminate that 357 Colt Python as the possible murder weapon.

THE COURT:

Anything by the defense?

MR. ROCKS:

A couple. Number 1, Judge, the 357 Colt Python is completely separate from this murder at 1930 Duels Street.

THE COURT:

That weapon was allegedly found where?

MR. ROCKS:

It was allegedly found on August 13, 2004, I believe, a separate incident of a shooting of an individual by the name of James Cheek. First he alleged that he had been shot by a drive-by and then he [16] admitted that he shot himself. At some point he then made allegations against Darrill Henry. Not that he was witness to any of the occurrences on June 15th but that he knew him as Short Story and saw him the day of the murders with a gun. That was fully investigated by Detective Herbin. They actually found the gun. Seized the gun. Tested the gun. That was a .38. Ballistics came back that was not the gun. But Detective Harbin then asked for testing of the 357 as a possible murder weapon because the 357 when seized from the Cheeks location had .38 caliber ammunition in it. Testing was requested. We have requested the results of that testing. We have been told the tests were never done and/or there are no documentation of the tests.

THE COURT:

The weapon or the type of bullet that allegedly took the life of any victim is alleged in this case is of what type, please?

MR. ROCKS:

A .38 caliber. Its completely irrelevant of anything that is going on in the murder —

THE COURT:

I am not seeing the relevancy. Help me out if you believe there is something.

MS. RODRIGUE:

[17] I guess that is exactly what the State's position is. Essentially the defense is sort of coming at two different angles. They are saying that the gun is not relevant. However, they are asking that Detective Harbin or any State witness be prevented from saying that the murder weapon was not the 357 Colt Python.

THE COURT:

Well it couldn't be if a .38 was the weapon that would have had to fired the pellet that took the life of the individual. Is that correct?

MS. RODRIGUE:

Yes, your Honor, the 357 Colt Python using a .38 caliber projectile.

THE COURT:

That's where I am ignorant. Its capable you allege of firing such a bullet?

MS. RODRIGUE:

You know, this is the defenses motion. My position is yes. It would be capable of using a .38 caliber. However, this weapon is not — the State is not alleging is the murder weapon. The defense is trying to prevent the State from saying this is not the murder weapon. I guess essentially the only reason they are — the basis for that is is because no report was generated.

[18] MR. TRENTACOSTA:

No, because it is irrelevant to the case. It has nothing to do with Mr. Henry. That's why.

THE COURT:

Unless it is capable of firing a .38 caliber pellet she says.

MR. TRENTACOSTA:

But it has nothing to do with the crime of Mr. Henry.

THE COURT:

But she says it is a .38 caliber bullet that took the life of any victim?

MR. TRENTACOSTA:

Correct and its a 357 and whether or not assuming for the argument that a .38 bullet can fire out of that weapon. There is still no relevance to the case.

THE COURT:

Let me do it this way. I will tell you now that unless I can see the relevancy of any piece of evidence or there is an objection for me to decide I am obviously not going to allow that evidence in.

MS. RODRIGUE:

Your Honor, I guess the phrasing of defenses motion maybe what is putting us in a circular argument here. They specifically ask in their motion that no State witness be allowed to say that the murder was not the 357 Colt Python.

[19] MR. ROCKS:

Very simply if I can try to clarify my motion. There is no test results for this 357 against the bullets removed from Ms. Gex. There are no results. We don't want any mention of the 357 or any results one way or another since there are no results and the State has gone on the record saying no test was made.

MS. RODRIGUE:

Your Honor, I believe that the drafting of the motion was then done in a wrong language essentially by the defense. Essentially what they are asking for now is the opposite of what their motion requested.

THE COURT:

Let me ask this and pardon my ignorance because I am truly at a disadvantage. Do you intend to offer evidence regarding the pellet that was recovered at lets say an autopsy? I am just talking of extremes. I am not saying that occurred here. Is that what you are going to offer the traditional recovery of the pellet from the body of the autopsy?

MS. RODRIGUE:

Yes, your Honor, the State will offer evidence of the .38 caliber projectiles removed from Ms. Ina Gex.

THE COURT:

[20] Are you in a position to tell us that then you will argue that it was fired from a .39 revolver or a —

MS. RODRIGUE:

Your Honor, the State merely seeks to say that this 357 Colt Python could not have been the murder weapon period. That really is the only information —

THE COURT:

I don't see how anyone is at a disadvantage by that being mentioned.

MR. TRENTACOSTA:

Well, it doesn't come in because it is not relevant. She could come in and say this balloon was found on the street and —

THE COURT:

Likewise it wasn't a double barrel shotgun that fired.

I will sustain that one. I will grant that one unless I find during the course of the trial there is a reason. Sometimes the Motions In Limina and I am not accusing either side of creating problems for the Court, but sometimes Motions In Limina are very difficult to rule on because we don't know the ebb and flow of the trial. How things unfold and then sometimes something becomes relevant. Preliminary I believe I will grant that one but I will listen to you for one more moment.

[21] MS. RODRIGUE:

Yes, your Honor, this would be jumping ahead but number five of the Omnibus Motion In Limina, the defense mentions James Cheek again and him being shown a line-up and his participation in the investigation of this case.

Again, the State's position being if James Cheek is coming forward and information about James Cheek comes out during the course of this trial, then the weapon recovered from James Cheek certainly becomes relevant to the case.

THE COURT:

And if that is the case, I will re-open the issue. You have my word on that.

MS. RODRIGUE:

Yes, sir.

THE COURT:

I would say the same even if I had been the judge from the outset and heard every motion that was heard earlier in this case.

I grant that one on behalf of the defense, number two.

Number three?

MR. ROCKS:

Number three, your Honor, is regarding a case agent. In the past a case agent had been nominated as Winston Harbin and of course we are fine with [22] that. The substance of our motion is that if Mr. Harbin remains the case agent that he be called as the initial witness for the

State and that if he remains in the court as the case agent he be precluded from being called as a rebuttal witness. The State will argue that there is no jurisprudence, but I think if we look at the Code article that your Honor has the ability and discretion to craft it which ever way you feel justice requires.

THE COURT:

The response by the State?

MS. RODRIGUE:

Yes, your Honor, according to Code of Criminal Procedure 773, neither the State nor the defendant can be controlled by the Court as to the order in which evidence shall be adduced.

THE COURT:

I agree with you on that.

MS. RODRIGUE:

The defense cites no authority for the proposition that the State's right to present rebuttal evidence is restricted because the law exempts certain persons from the rules of sequestration. That would be in this particular case, case agent Detective Winston Harbin.

Appendix C

THE COURT:

I am denying number three. I note [23] the objection for the defense but —

MR. TRENTACOSTA:

Your Honor —

THE COURT:

— wait, wait. Give me a chance, please. If I have to hear further I will listen again. I also need one of you two for the defense to be the presenter. The same with the State if there are two attorneys here. Only one on each issue if you don't mind.

I am not here to tell them the order in which they shall present the witnesses. I am here to tell them however that despite the codal article about the so called case agent being allowed to be exempt from sequestration, that is a procedural rule crafted by the Legislature. I am here to tell you that there is always a danger that if the Court feels that somehow the State has been favored and the defense has been disfavored by the presence of that person in the room under that codal provision it may, it may cause the Court to have to consider that in deciding whether or not it would allow rebuttal evidence or further testimony at any point from that agent regardless of who he or she is.

So what I am saying in essence is that how you present the case and whether you have that person seated in the

room, [24] you do so at your own peril despite the codal provision. The Code alone, you know doesn't always control. I don't know if that touches upon what you Mr. Trentacosta wanted to point out or your co-counsel.

MR. TRENTACOSTA:

The only point to make, your Honor is the reporters and their comments state that the case agent should not be allowed to rebut. The case law on the topis was very, very sparse and it goes to the particular facts of the case where the Court finds harmless error.

THE COURT:

In the case of this nature where it is the penalty of death, I must tell you that I would be more moved if I had to make a general statement and this is very difficult for a court to predict but I can only tell you what my gut feeling is. I would be prepared to probably preclude it so if you want to run the risk and have this person seated here, what advantage you are at I don't know or what disadvantage you experience by not having the person in the room that is up for you to decide and make your decision. But, there is a chance the Court would not allow rebuttal or any further testimony even during the course of your case in chief if the person remains in the room.

[25] MS. RODRIGUE:

Yes, sir.

MR. ROCKS:

Your Honor, for the record respectfully note our objection and we appreciate your comments.

THE COURT:

So I note the objection but with that caveat. I am not here to tell either side how to present their case or how to make these decisions, but I would never as an attorney run the risk of not being allowed to present such evidence merely to have someone sit in the room. No reflection on the Legislature in creating this rule.

Number four?

MS. RODRIGUE:

Number four, your Honor, is a Motion In Limina to preclude reference mention of speculation by the witness, Cecilia Garcia. The defense is essentially asking that the State be precluded from the statement Ms. Garcia made that the man in the red shirt who is alleged to be the defendant that the man in the red shirt walked away and looked back as to see if she were going to get up.

THE COURT:

As to what may have motivated someone to look back I will sustain that. As to her being allowed to say that he [26] did look back allegedly, I will allow that. But any speculative comment as to what may have prompted the

man if indeed that he looked back to look back, I sustain the position of the defense and will not allow that.

MS. RODRIGUE:

Your Honor, the State's only objection would be the case law in *STATE V. HIGGINS* which cited that a witness may state a natural inference from something that is rationally based on her perception. In that case where a witnesses testimony was that it appeared as if a robbery were taking place.

THE COURT:

I appreciate that. I just think there is a distinction.

I will grant that one and I note the objection for the State.

MR ROCKS:

Number five, your Honor, as a two part motion dealing with Mr. James Cheek. I will address the second part first since the State does not object to the second part and that is there is a signature by Mr. Cheek on the front of that line-up. That photographic line-up will be a necessary piece of evidence in the case but we don't want the jury to be confused as to why there is a signature on the front. The State has not objected [27] to cropping or doing what is necessary to eliminate that name.

THE COURT:

I appreciate the fact that they are cooperating in that regard.

MS. RODRIGUE:

Your Honor, the only caveat there being is if Mr. Cheek does testify then his signature on the line-up would be relevant and admissible the State would allege.

THE COURT:

If it becomes relevant, I will allow it in just as I will if it is relevant evidence for the defense. I will allow it in.

MR. ROCKS:

That would take us to the first part of the motion, Judge and that is that the mentioning of James Cheek being shown a line-up be precluded. As we mentioned earlier, Mr. Cheek was involved in a totally separate incident at a subsequent time.

THE COURT:

For other alleged criminal activity.

MR. ROCKS:

Right. His allegations against Mr. Henry that somehow Mr. Henry had a weapon. He was very specific

about the weapon. That it was a handgun. That it was a security guards handgun. He knew [28] this because it had a holster and a spot for handcuffs and had gotten it from a stolen car. Later in the day on the day of the murders he saw Darrill Henry being chased by the police and he actually laughed at Darrill as he ran by.

THE COURT:

But not in connection with this alleged incident? Pardon my ignorance.

MS. RODRIGUE:

Yes, in connection with this alleged incident.

MR. ROCKS:

Right and he makes these allegations in August. Detective Harbin tracks down where this allegedly stolen car and finds the owner and finds the weapon. The owner is a cousin of Darrill Henry. The weapon is part of a security guard issued to the cousin. He is a security guard. He says he had the gone on the job until 6:01 the morning of the murders. They got a search warrant. They take the gun. No problems. They test it. The ballistics come back being tested against Ms. Gex and it is not the same weapon.

They also investigate whether there was any hot pursuit of any suspects in the area of the murders on June 15th. So the second allegation that Mr. Cheek made that he saw Darrill Henry on June 15th running

with the same weapon apparently [29] from the police, that was investigated by Detective Harbin. He found no evidence that there was any reports of a hot pursuit of any suspect on June 15th in the area of the murders on 1930 Duels Street. So we don't think that any of this Cheek information is relevant. He has been thoroughly discredited.

THE COURT:

Does he allegedly make an identification? Help me out here.

MS. RODRIGUE:

Yes, sir.

MR. ROCKS:

What he does, Judge and that is the one that he signs. The detectives there are saying you are saying all these things about a fellow named Short Story.

THE COURT:

His signature is on photograph that he allegedly picked out?

MS. RODRIGUE:

Yes, sir.

THE COURT:

Which is the traditional — usually it is on the back, but that's okay.

MR. ROCKS:

So they say, alright, you have said all of this but they haven't investigated yet but you said all of this stuff about this fellow you know as Short Story. Let us show you a line-up and see if you can [30] point to the fellow that you say is Short Story. He points to the photo as Short Story. That is in fact a photograph of Darrill Henry. Then they go and investigate and it turns out that it is not the weapon. Darrill didn't steal the car. Didn't steal the weapon. The weapon is not the murder weapon and there is no evidence of any hot pursuit of anybody. So all of the allegations made by Mr. Cheek are apparently untrue and irrelevant.

THE COURT:

What is the relevancy that the State alleges Mr. Cheeks testimony would involve?

MS. RODRIGUE:

Your Honor, I think again this takes us back to the original issue that we had talked about prior with the weapon James Cheek was alleged to have fired not being the murder weapon. Essentially all of this work is work that the detective does to eventually come to the conclusion that it is Darrill Henry. It is all done during the course of

his investigation. All fingers again pointing to the same person. It leads him —

THE COURT:

But what is the relevancy of this alleged observance by Mr. Cheek of Mr. Henry?

[31] MS. RODRIGUE:

He sees him fleeing from the crime scene, your Honor.

THE COURT:

From the crime scene with a gun in his hand?

MS. RODRIGUE:

Yes, your Honor.

THE COURT:

But that gun you will concede could not have fired the bullet that allegedly took the life of Ms. Gex?

MS. RODRIGUE:

No, your Honor. The gun that they are alleging is a separate gun that was tested was a gun recovered from a different person. They are essentially making it —

THE COURT:

Wait, I am lost and I apologize to each of you. I am at a terrible disadvantage here.

MS. RODRIGUE:

Your Honor, I guess essentially —

THE COURT:

Wait, please, I beg you. You are alleging and if there is any difficulty it is my fault and not any of yours. You are alleging that a man, Mr. Cheek will say that he saw the defendant running from the scene of the location where the lady was allegedly killed. Is that [32] correct?

MS. RODRIGUE:

Yes, your Honor.

THE COURT:

After she had been killed?

MS. RODRIGUE:

Yes, your Honor.

THE COURT:

And you are alleging that he had a gun in his hand at that time that Mr. Cheek observed?

MS. RODRIGUE:

Mr. Cheek made a statement that he observed the defendant to be in possession of a gun. Now that gun was not recovered, your Honor, so therefore we can't say whether the same gun that was later tested was the gun he was running.

THE COURT:

I appreciate that. I will certainly allow any evidence of an alleged observance made by Mr. Cheek allegedly of the defendant with a gun in his hand. I can't deny the State that and I don't. So I allow you to present that part of his testimony clearly.

You may, of course as I know you will attempt to challenge that in some form or fashion as the law allows you to and I want you to. Same for the State. I want you both to.

[33] MR. ROCKS:

Note our objection respectfully.

THE COURT:

Yes. Number six?

MS. RODRIGUE:

That would be number six, your Honor.

Appendix C

THE COURT:

I apologize. Number seven?

MS. RODRIGUE:

This would be the Motion In Limina to preclude reference —

THE COURT:

Do you intend to do this?

MS. RODRIGUE:

No, your Honor.

THE COURT:

Seven is granted. Its not even relevant for the defense.

Number eight?

MS. RODRIGUE:

Preclude reference to defendants misdemeanor Municipal convictions. Again, the State will not do this unless the defendant testifies.

THE COURT:

Eight is granted, obviously.

Appendix C

Number nine regarding alleged double hearsay. Unless there is an exception to the rule assuming it is offered to prove its truthfulness, it is not admissible. Do you intend to offer it?

[34] MS. RODRIGUE:

Your Honor, again, the State's position on this is going to be the *State v. Bazile* case indicating that the – the State would object to the motion in so far it would preclude an officers testimony as to the non-hearsay purpose of explaining the basis for —

THE COURT:

If it is not hearsay basis and it is otherwise relevant and its probative value is not significantly outweighed by prejudicial effect, then its admissible. But I don't know that until we get into the case. If its authored for its truthfulness and there is no exception that would otherwise allow it, then I won't allow it whether its single hearsay or double hearsay.

In effect I grant number nine if indeed it is an attempt to present hearsay unless there is some exception.

I grant nine and note your objection for the State.

Number 10, I would do the same unless there is some exception that applies and the relevancy is not significantly outweighed by prejudice because it is indeed relevant.

MS. RODRIGUE:

Your Honor, can we just take that as the trial proceeds?

[35] THE COURT:

Yes, but 10 and 11 I grant as well. Again, if it offered to prove its truthfulness then 10 and 11 are granted on behalf of the defense. The objection is noted for the State.

MR. ROCKS:

Finally, your Honor, regarding number 12 regarding any speculation or regarding the truthfulness of Darrill Henry's three hours of statements to investigators regarding whether or not they seemed to think he was telling the truth or lying.

MS. RODRIGUE:

Your Honor, the State would object to this motion under the premise that an officer interviewing a defendant may testify concerning his impression of the truthfulness of the defendant's statements so long as the officers testimony is based on his own personal observations of the defendant through the interview process as was held in *State v. Keller*.

THE COURT:

I will allow the State to offer evidence and I am not here to say that this is what they are going to do. But by

way of example, if the officer indicates I didn't believe the gentleman was being truthful with me and therefore [36] I continued to question him or I took additional action if it forms the basis for explaining what he did and why he did it.

With that caveat I will deny 12 and I will note the objection there for the defense.

MR. ROCKS:

Thank you, your Honor and that would complete the defense Motions In Limina.

THE COURT:

We have issues regarding and correct me if I am wrong. Let me ask either of you is there something else you want to take up before I make sure I have my little check list covered?

MS. RODRIGUE:

Your Honor, the State filed its Motion In Limina to exclude argument, questioning and/or extringent evidence pertaining to witnesses, acts, vices or courses of conduct which have not resulted in criminal convictions.

THE COURT:

Unless there is something that is otherwise relevant that is the general rule. What is the position of the defense in that regard?

MR. ROCKS:

We acknowledge that is the general rule, your Honor.

THE COURT:

[37] I grant that but if there is any exception we will certainly address it as it unfolds.

I like the attention to detail by both sides. I applaud both of you.

MS. RODRIGUE:

Your Honor, we have the State's Notice of Intent to Compel the defendant to display physical characteristics to the jury.

THE COURT:

Demonstrative evidence as we know is allowed. I don't know what you are intending to do, but rolling up a sleeve and letting someone see a tattoo or scar or something of that sort demonstrative evidence if its otherwise relevant and probative value is not significantly outweighed by prejudicial effect, the Court will allow that to occur.

Are you at liberty to tell us what you specifically to seek to introduce?

MS. RODRIGUE:

Tattoos, your Honor.

THE COURT:

That is the one I just mentioned. Its a common one.

MR. ROCKS:

A couple of issues, Judge. To give you some historical context, there was a Crimestoppers tip that came in saying that the fellow who committed the crime [38] his nickname Short Story and had Short Story tattooed on his arm. We would certainly acknowledge —

THE COURT:

Well its hearsay if that comes in. I am not going to allow that.

MR. ROCKS:

But any of the tattoos we think simply are going to be number one, irrelevant and number two, unduly prejudicial just to show jail house tattoos —

THE COURT:

If I find that, I am not going to allow it in. But I am not here to say that I am automatically tell the State that they are not ever going to be allowed to have his tattoo

if he has one displayed. It has to be relevant in probative value not significantly outweighed by prejudicial effect. We both know that. All of us know that going in whether this motion was filed or not.

MR. ROCKS:

Well procedurally I think your Honor might be able to review it because Mr. Henry indicates to us that last week he was asked to take off his shirt and be photographed his tattoos. We might be able to get some relevancy issues before the —

[39] THE COURT:

I will reserve the ultimate ruling on whether this is allowed or not, but I will allow the State if its deemed relevant to show or have him roll up his sleeve or lift up his shirt if indeed it is deemed relevant and its probative value is not significantly outweighed by its prejudicial effect. That's all I can tell you.

MS. RODRIGUE:

And, your Honor, I will provide copies of the photographs taken of the tattoos to defense counsel. I can have them brought over before the ending of this hearing.

THE COURT:

I appreciate you doing that as well.

MS. RODRIGUE:

Your Honor, finally, I received the updated Notice of Alibi from the defense this morning.

THE COURT:

I have read that myself. Is there any comment by either side?

MS. RODRIGUE:

The States only comment is that he does not — there is no alibi presented at the time of the offense. Each category of witnesses is prefaced. The first category saying prior to the offense and the second category saying [40] after the offense. The State has no objection to these witnesses but the State then is essentially saying that the defendant has no alibi for the time of the commission of the crime.

THE COURT:

They speak of the fact that Mr. Henry is a sole witness who may testify regarding his alibi for the time of 12:53 PM to 1:53 PM on June 15, 2004. Is it within that time frame that you allege that the killing occurred?

MS. RODRIGUE:

Yes, your Honor, and my only purpose of addressing it is that none of these witnesses will be able to then essentially corroborate the defendant's testimony. Is that —

THE COURT:

I don't know that. I am not here to say that. It appears that the defense is saying that the only possible alibi witness is the defendant himself.

MR. ROCKS:

Yes, your Honor, we filed the additional witnesses in an abundance of caution since there is some jurisprudence. There is some jurisprudence out there that suggested that at least this could potentially be construed alibi witnesses and we certainly did not want to risk doing [41] that.

THE COURT:

I appreciate you doing that and even saying thus this information is being provided in an abundance of precaution — of caution and you then listed these additional perspective witnesses.

MR. ROCKS:

Yes, sir.

THE COURT:

Is there anything further by the State?

MS. RODRIGUE:

No, your Honor.

THE COURT:

I find that the defenses second updated Notice of Alibi comports with both the letter of the law contained in the 700 articles I believe — it number 727 of the Code of Criminal Procedure along with the jurisprudence. I find that it is sufficient and for the record I will note the objection for the State, I guess, in that regard.

MR. ROCKS:

Your Honor, we have a couple of motions and I don't know if this was on your list of things to accomplish this morning. One was the Motion for Color Copies of the working line-ups which are the ones that have the identifying numbers underneath.

[42] THE COURT:

I have that on my list. I put it as line-up photo issue.

MR. ROCKS:

Those just to — because I think Mr. Shute was addressing this issue earlier for the benefit of Ms. Rodrigue. These line-ups, these working line-ups are not in evidence in the Clerks Office.

THE COURT:

These so called color versions. Does the State have any color versions?

MS. RODRIGUE:

Your Honor, the detective is present in court today with his file as ordered by this Court so he can review his case file.

THE COURT:

But has he looked at it? Do you have it?

MS. RODRIGUE:

Your Honor, I was under the impression they had removed the color copies from Evidence and Property last week pursuant to an order signed by this Court. However, they are telling me that this is a different one.

MR. TRENTACOSTA:

What we removed was the signed line-ups by the four people who were shown them.

MR. ROCKS:

[43] Just to clarify and eluviate the confusion, the color line-ups that were actually presented to the witnesses were in the custody of the Clerks Office and have been delivered to the outside photo agency. What we were requesting were the working line-ups from which the color line-ups were produced which have the indication of date and time that they were allegedly composed.

THE COURT:

Do you have those?

MS. RODRIGUE:

I would have to check with the detective, your Honor because those were not logged into evidence, they weren't signed by any witnesses essentially they are just —

THE COURT:

If you have those the Court orders you to make them available for inspection and there after to have copies made for the defense.

MS. RODRIGUE:

Yes, sir, we will review the file right now.

THE COURT:

Anything else?

MR. ROCKS:

We have also, your Honor had a standing motion and we may be able to work this through with Ms. Rodrigue [44] regarding an EMS run report for Ms. Gex and the reverse side of the Coroners Day Report for Ms. Watts. Can you think of any reason why we are not going to be able to work that through, Ms. Rodrigue? Is there any objection in producing that?

MS. RODRIGUE:

No, your Honor, I have no objection in producing if I have those documents.

THE COURT:

Alright. Any other issues that you lady and gentlemen wish to take up?

MR. ROCKS:

Well we did have the issue of the jury questionnaire, your Honor.

THE COURT:

Let me save that one for last if you don't mind. I have the EMS report and the Coroners Day Report. I have a note on that.

MR. ROCKS:

That is the motion that we just addressed and Ms. Rodrigue will —

THE COURT:

I got it written down on both together and I see you dealt with them collectively as well.

The question or the stipulation by the defense as to the DNA of the so called expert testimony that is anticipated?

MS. RODRIGUE:

[45] Yes, your Honor, the State will not stipulate to the expert witness of the defense.

THE COURT:

You have every right to challenge the witness just as the defense will with any of yours without stipulation.

MR. ROCKS:

We also have pending, your Honor and I guess this ties into Detective Harbin and his file the various Discovery Motions, the various questions outstanding from the Discovery Motions that have been filed in writing. Almost all of those documents which are being requested were at one time allegedly attached to Detective Harbin's report. Such as suspect rap sheets and photographs of —

THE COURT:

They were made of part of the report and incorporated in. Within the spirit of Schropshire, they are ordered to be provided to you.

MS. RODRIGUE:

Your Honor, again, the issue I think the defense is bringing up would be any Crimestoppers tip or any anonymous source of a suspect that came in during the course of the investigation of this case. The defense is

requesting that the State provide rap sheets of any person that was [46] named during the course of the investigation of this case.

THE COURT:

I can only tell you that if a rap sheet was attached to the original police report and made part of it, it is to be turned over. If not its not to be given under Shropshire considering both its the letter of the law in that regard and the spirit of that law. If there is some other basis for it being obtained I would have to hear further argument. I trust the State and the defense will discuss this matter. The State will act as it always does and I think will do that in this regard.

MR. ROCKS:

Well, your Honor, that would address many of the if not all of the outstanding issues which were remaining from our pre-trial discovery.

We had also pending a separate Sandler motion regarding compelling information of the DEA's involvement in this murder investigation.

THE COURT:

That is also on my list, DEA involvement. Any involvement by agency? Is there anything further on that?

MS. RODRIGUE:

No, your Honor, not by the State. The State maintains the position that [47] there — asking the defense essentially to show what relevance this information would have to the current case if it were to be discovered or if any witness were to come forth and indicate that any report was generated.

MR. ROCKS:

I think that is a separate argument and Judge Alarcon had already determined there was relevance and we were proceeding accordingly. The issue is that if the State is alleging there is no DEA participation in this investigation other than the subpoena that was issued by the DEA for the telephone records for 1930 Duels Street for the month prior to Ms. Watts murder other than that if the State positions is there was no other DEA involvement I think we need to clarify for this capital record where that information came from, from whom and what authority they have to speak. If there isn't any then there isn't any.

MS. RODRIGUE:

Again, your Honor, the State indicated that — the State indicated that there was no DEA involvement as alleged by the defense. We merely indicated there was no report generated or in the possession of the State. However, again —

THE COURT:

[48] Let me ask you this and I apologize for interrupting you. Do you intend offer any evidence of DEA investigation a month before this alleged offense of any phone records or activity at that location?

MS. RODRIGUE:

No, your Honor. If I might give a little bit of a background. Defense counsel indicates that Judge Alarcon has already ruled on this and already declared that it was admissible. However, the State would like to point out that Detective Harbin has also already been ordered to come to this Court several times and provide his entire file as well as though color copied line-ups they are asking for today. So I do believe that we do have to re-address several issues. This case has been pending for some time.

With that premise, they are asking for the phone records of a 90 year old lady to apparently and I am not sure because the defense has not articulating today to apparently claim that this 90 year old lady had some sort of drug involvement or activity of some nature. Which, again, the State is putting forth the argument that there would be no relevance to her death as it pertains to this case.

[49] MR. TRENTACOSTA:

Judge, if I may, if you can indulge me and it steps into the rule —

THE COURT:

Sure, I will allow it.

MR. TRENTACOSTA:

It has nothing to do with the 89 year old victim. It has to do with the 67 year old victim. Detective Harbin received information that the crime involved drug dealing in the school system. The 67 year old victim is a retired employed of the New Orleans school system. With regards to the DEA investigation in this case, I as an officer of the court report to the Court that I have spoken with the United States Attorney and I have spoken with the DEA local counsel. Both lawyers tell me that when the subpoena provides two different file numbers from the DEA, there are files. They don't make up numbers and put them on a subpoena. They don't do that. When they issue and subpoena and the subpoena is returned, they make a note of it. They make a report of it. Some months ago the State stood up and said I talked to the agent and the agent said there were no files. I went back and talked to lawyers, those files do exist. They are relevant because the detective was investigating something that has [50] nothing to do with Darrill Henry and it is very helpful to the defense to get those documents.

THE COURT:

When will you all be able to ascertain if there is such a file? Did the DEA admit to you that these files presently exist and they have not been destroyed? That they literally

still exist? I only ask that because of the number of years that have past. Is there something still in existence?

MR. TRENTACOSTA:

The DEA keeps a lot of files and I guarantee you that the Federal Government if they are going to throw paper away scans the files electronically. I am told that the files exist.

MS. RODRIGUE:

Your Honor, the defense could certainly subpoena these alleged lawyers that he has spoken with and have them come into court and testify as to the whereabouts of these files. However, the State's position maintains the same and I believe the defenses own statement demonstrates to this Court that this information is not relevant. He says, these phone records have nothing to do with Darrill Henry. If they have nothing to do with Darrill Henry then they have nothing to do with the murder that [51] occurred at 1930 Duels Street.

THE COURT:

Unless it would offer evidence of someone else possibly being someone who might be viewed as the culprit.

MR. TRENTACOSTA:

Yes.

MS. RODRIGUE:

Your Honor, again, the defense is asserting that this 67 year old lady or her 90 year old mother were involved in drug trafficking merely because they worked at a school where drugs were being investigated. The State is going to assert that that is —

THE COURT:

You are free to do that. You are free to assert. That's the beauty of the system. You can argue that that is absurd. The jury can —

MS. RODRIGUE:

Not only absurd —

THE COURT:

I am going to let you talk again, I promise. The jury can evaluate that and see if they agree with you on that. Please continue.

MS. RODRIGUE:

The State is not only asserting that it is absurd, its not relevant. To essentially come in and say that these women were drug dealers because one of [52] them worked in a school where drugs were being investigated is a ridiculous premise and it does — just the sheer nature of the argument that the defense is making goes to essentially

argue, they are going to throw whatever they can bad on two elderly women who had nothing to do with drug trafficking at a school.

THE COURT:

I understand your position.

Again, these records allegedly involve phone calls/ possible conversations a year before the alleged —

MR. TRENTACOSTA:

No, no. It is absolutely absurd to suggest that these women were dealing drugs. That is the furthest thing we are going to assert. Detective Harbin in his report talks about the involvement of drug dealing in the schools related to this murder. Okay. We are not saying Ms. Gex was a drug dealer.

THE COURT:

Are you going to introduce any evidence or seek to introduce evidence regarding that issue? That there was drug dealings in the school where this ladies may have taught or been involved in a professional manner?

MS. RODRIGUE:

No, sir.

MR. TRENTACOSTA:

[53] The State's prosecutor is well aware that we have no subpoena power to the Federal government. I can not bring in. If we could subpoena the DEA records, that subpoena would have been issued seven months ago.

THE COURT:

Can I ask you one other question? When would these alleged phone calls made? What was the time frame, if there was a DEA report or reports, the possibility of two reports?

MS. RODRIGUE:

Again, this is information the defense is bringing to this Court.

MR. TRENTACOSTA:

Your Honor, we have two file numbers on a subpoena issued from the DEA to Bell South for the phone records.

THE COURT:

For what time period?

MR. TRENTACOSTA:

Thirty days prior to the murder is the request. We don't know when the DEA investigation began. That would be contained in the files that would include those numbers.

Appendix C

THE COURT:

Here is what I am doing. Is there anything further?

MS. RODRIGUE:

No, your Honor.

[54] THE COURT:

I am ordering the trial to proceed whether the records are present or not. I am not here to say that they are relevant. I don't know if they are. I have no way of knowing that. I will note that objection for the defense. If these records are produced or God forbid produced at some point should there be a conviction in this case and something became relevant, then this Court will re-examine that. But at this point that is the ruling of this Court.

MR. TRENTACOSTA:

If I may clarify. The ruling is that you are not compelling the State to present to the Court first evidence that has potential exculpatory values —

THE COURT:

I am not saying that, sir. I am saying that if they have something in their possession. They obviously have an ethical obligation, they will turn it over. But I don't see the relevancy of it at this point exculpatory or otherwise.

MR. TRENTACOSTA:

Your Honor, it is in their possession because the DEA is part of the prosecution team. They involve themselves in the investigation. It is in their possession.

[55] THE COURT:

I appreciate your position. I note that objection for you.

Any other issue, please from you lady or gentlemen?

MS. RODRIGUE:

Not from the State, your Honor.

MR. TRENTACOSTA:

We have some other things.

THE COURT:

Take your time.

MR. TRENTACOSTA:

The Court ordered the State as per the jurisprudence to supply the defense with gist of victim impact statements. The jurisprudence states that the prosecution shall supply written statements signed by the potential witness who will testify to the impact of the death and the character

of the victim. The State for the third time has filed merely notice of victim impact statement. All this notice does your Honor is list nine people.

THE COURT:

You agree that the jurisprudence says that there should be a formal presentation of a gist signed by each potential victim impact witness?

MS. RODRIGUE:

No, your Honor. In fact I believe that the Fourth Circuit is unique in this [56] perspective as it was held in *State v. Morris Patin* where the State declined to exercise supervisory jurisdiction stating that when the defendant sought a more expansive pre-trial hearing for a determination for the content of victim impact evidence to be introduced in the event that a capital sentencing hearing is warranted, the Fourth Circuit denied that request. And wrote, "we are mindful that are disposition of this writ application is inconsistent with the type of Bernard pre-trial hearings conducted in the Third and Fifth Circuits." However, the Fourth Circuit did not require the State to produce and the Supreme Court does not require the State to produce signed I guess summaries of what those witnesses will testify to.

THE COURT:

I plead ignorance publicly of any jurisprudence that says it must be in the form of a written document signed by the prospective witnesses.

MR. TRENTACOSTA:

Those cases are cited in our motion. I don't have the motion in front of me. Your Honor, the writ was denied. That is reviewed by the Fourth was denied. They did not review the application.

Now, the jurisprudence —

THE COURT:

[57] Do you have a copy of that? For my own personal edification, I don't see it before me and I apologize, your reference to the actual jurisprudence in that regard that requires the documentation to be signed. I don't see it here. Do you have a copy with you?

MR. TRENTACOSTA:

No, your Honor, I didn't bring it. I thought what was going to happen today is you ordered them to supply a gist —

THE COURT:

— a gist but this reference about —

MR. TRENTACOSTA:

— I wasn't here to argue the motion because I was here to accept the gist and then —

THE COURT:

— but that it has to be signed by the person.

MR. TRENTACOSTA:

There is case law on that.

THE COURT:

That is what I am asking for and I plead ignorance that it has to be signed.

MR. TRENTACOSTA:

If I look at the record I can find my motion.

THE COURT:

Sure.

MR. TRENTACOSTA:

But it makes sense —

[58] THE COURT:

Let me just see if we can find it. At the same time could I ask the State what is your position as to the idea of the gist itself being presented?

MS. RODRIGUE:

Your Honor, the State would object to that. The States understanding of the law is merely that we have to provide witnesses that we intend to call. And we have provided to them on this Notice that the witnesses will present only a quick glimpse of the life that the defendant chose to extinguish to remind the jury that the person whose life was taken was a unique human being and the individuality of that victim. As well as evidence of the impact of the crime on the victims survivors. The State does not intend to elicit the characterizations or opinions of the crime the defendant or the appropriate sentence of those witnesses. Therefore the State urges that this notice is sufficient.

THE COURT:

Given the jurisprudence that you say you have in the file somewhere I want it.

MR. TRENTACOSTA:

The case, your Honor, is *State v. Higgins*. The citation to the So. 2nd is 802, 685 and I can quote the passage.

[59] THE COURT:

Give me a second.

(A brief recess was taken)

Appendix C

THE COURT:

Is there anything further on the issue of the Discovery of the so called — if everybody could be seated, please. Is there anything further on the issue of the Discovery of a so called victim impact witnesses testimony and/or their signing any document that may represent their anticipating testimony? Please by the defense.

MR. TRENTACOSTA:

Yes, your Honor, there is one case in the State of Louisiana out of the Fifth Circuit that there is their law that a statement must be signed. That is not the law of the Fourth Circuit. The Fourth Circuit has no law. The Fourth Circuit follows *State v. Bernard*. Bernard particularly states and I quote "defense must be quote noticed of the particular victim impact evidence sought to be introduced." The purpose for notice is so that the defense can cause challenges to those notices. In other words, is it cumulative? We have nine witnesses listed. We have no knowledge whatsoever of the particularized evidence.

THE COURT:

[60] Is there any response? Because I left here last time not with an understanding that there would be anything that was offered in the form of a signed document regarding the anticipated testimony, but that a true gist of each of what is listed here as the nine prospective witnesses that a true little gist, a small gist, a brief gist

would be presented. Here this morning we only have their names. No real gist.

MS. RODRIGUE:

The State has indicated on its notice what the witnesses will testify to. A quick glimpse of the life the defendant chose to extinguish to remind the jury that the person whose life was taken was a unique human being. That is exactly what these witnesses will testify to without a gist. The State maintains its position that the Fourth Circuit has been clear. In requesting that there be a hearing on Bernard, the Fourth Circuit denied that request saying there is no need for any such hearing or any evidence to be presented as to what those witnesses will testify to. They indicated we agree that we take a different opinion from the Louisiana Third and Fifth Circuit Courts of Appeals. However, that is the position [61] of the Fourth Circuit and the State maintains that position.

MR. TRENTACOSTA:

But, your Honor, they can not take a different position than the Louisiana Supreme Court and they do not take a different position. That law says particular evidence. It doesn't say a name of an individual. What Ms. Rodrigue just read is the case law. That is not particularized.

THE COURT:

Your position please in response to that.

MS. RODRIGUE:

Your Honor, I am not sure what he means by case law is not particularized.

THE COURT:

I think he wants to know are you in a position to agree that for instance from the top, number one, Gregory Gex would simply say that — what would he say about the individuality of the alleged victim? And, secondly, the impact that their death has had on his life?

MS. RODRIGUE:

Your Honor, again, the State is asserting that we are not required to provide that information to defense.

THE COURT:

I can see your position as well.

[62] I am attempting to examine on my own the jurisprudence that I am familiar with. I don't claim to know every Louisiana Supreme Court case or Fourth Circuit case, but I hope I have read most of them. I hope I have read the ones that are relevant. I was not familiar with and I am still not familiar with those cases that are referred to. I am not faulting the defense for listening. I was as I said before I left the bench earlier, I was ignorant of any case law in this regard. Realizing it is from the Third and Fifth Circuits, I normally don't have occasion

to read those. No reflection in any way or in a negative way on their helpfulness nor their scholarship. I just read those that normally involve the Court that I normally have been assigned to and that is the Court within the Fourth Circuits jurisdiction and of course the ultimate jurisdiction of the Louisiana Supreme Court.

With that, I find that the notice that has been provided and if there is any confusion on this matter as to what was or not to be done, I take the fault. No one else need be found to be in fault. But at the same time that it is sufficient. I note the objection to protect the record. I have already [63] addressed on the record as well on a previous occasion that the Court takes the position that the evidence offered in this regard is to be tightly controlled. No reflection on the witness nor on the memory of any person who is said to be a victim. I want to empathize that as well, but it is to be tightly controlled and it will be controlled by the Court. It is to be extremely limited because of the potential for prejudice. I do allow it and I allow it according to what I appreciate to be the spirit of the jurisprudence. I do allow the individuality of the person to come to life. Excuse that phrase, but to come to life in this courtroom. I do further allow the impact that the death has had upon the witness to be made known to the jury as well. I note this objection for the defense.

MR. TRENTACOSTA:

Will your Honor be visiting this issue because last week you ruled completely opposite.

THE COURT:

I said that there was to be a gist. You are correct.

MR. TRENTACOSTA:

We can not challenge what they want to do without knowing what they have in mind.

[64] THE COURT:

I understand your position as well.

Are you able to just tell us basically what they will say? Like the individuality of this human being, how will it be made known? Are you willing to tell us at this point? I admit that I have revisited this issue. You are correct, sir, I did.

MS. RODRIGUE:

Your Honor, I believe that what these witnesses will testify to is how the death of these victims have impacted their lives.

THE COURT:

My first question was could you tell us or are you willing to tell us how they will represent their feelings about the individuality of this human being?

MS. RODRIGUE:

No, your Honor.

THE COURT:

Do you personally know though? I am not challenging you. I just want to make sure I understand. Do you know now or are you just not willing to share what you might know?

MS. RODRIGUE:

I have spoken with these persons, your Honor and several of them have written me letters. I have not asked them specifically what will you testify [65] to. I can tell you that I have an idea based on the letters and the conversations that I have had with them. I would not be in a position right now to summarize their testimony without getting that specifically from them. Again, the State would object to any order from the Court forcing the State to do so.

THE COURT:

I am going to maintain my revised position. I think it is the same as I appreciate the jurisprudence as let us say a character witness. One may present a character witness without revealing the specificity of what a character witness may be testifying to. Again, I note the objection for the defense to my having further revisiting this issue as well. If I mislead you in any way or caused you a problem I personally apologize and I note an objection.

MR. TRENTACOSTA:

Thank you, your Honor. With regards to that the State has previously twice filed notice of victim impact evidence. They have increased the numbers of people each time they have filed. We are up to three. May we have a ruling as to whether they can continue to add names to this list?

THE COURT:

I don't know that there is a rule [66] that requires the Court to require to tell you the exact number. I do know by anlage there is a rule that says that I am my discretion. If there is an objection may limit the number of character witnesses in any type of case. Therefore I guess the protection for you would be the possibility of you objecting if you thought that the number posed the problem, the literal number of such witnesses. If I thought that you were correct in that regard I would rule accordingly. That is the only safeguard I can present you with that I am aware of.

MR. TRENTACOSTA:

Thank you, your Honor. If we can move to Jackson. The State previously filed a Jackson Notice of intent to rely on aggravating circumstances, prior convictions and prior bad acts. In our motion against their notice to prevent the State from introducing prior crimes of evidence in the penalty phase, we argue the following: Number one, Mr. Henry has been convicted of a misdemeanor offense. We agree that evidence can be presented in the penalty phase

that he has one previous conviction for a misdemeanor. The State has not supplied the defense with how they wish to prove this if in fact it exists.

[69] THE COURT:

They have to give you any court documents and/or testimony.

MR. TRENTACOSTA:

On this particular misdemeanor conviction occurring in 1993, we have no documents from the State.

THE COURT:

Your position please in regard to that issue.

MS. RODRIGUE:

Your Honor, I will provide them with any court documents. I was not aware that they did not have the documents from 1993, but I will provide them with any documents we have that we intend to use for purposes of proving up that misdemeanor conviction.

MR. TRENTACOSTA:

May we have a time line, your Honor, for the presentation of those documents.

THE COURT:

Will you have it in the next 72 hours?

MS. RODRIGUE:

Yes, sir.

MR. TRENTACOSTA:

Thank you, your Honor.

THE COURT:

Thank you, I appreciate your effort. I will be away after that time period until the time I come back the weekend [68] before the trial we anticipate starting, but you can reach me by phone if you need me.

MR. TRENTACOSTA:

The State lists five unadjudicated offenses that Mr. Henry had been charged with prior to his arrest for this crime. I would like to take each of them up and argue to the Court that none of them are admissible.

THE COURT:

They can only involve what we call I believe in the jurisprudence violence against the person of a victim.

MR. TRENTACOSTA:

Well, your Honor, the first two are possession of stolen property in February '01, September, '01.

THE COURT:

They are not admissible under the jurisprudence. I think everyone would agree to that.

MR. TRENTACOSTA:

All of the documents regarding the unadjudicated priors are attached to the pleading that previous counsel had filed.

THE COURT:

They are admissible if they involve violence against the person.

MR. TRENTACOSTA:

If maybe the State will concede that possession of stolen property —

[69] THE COURT:

I have already ruled that is not admissible as I appreciate the jurisprudence. I sustained your objection.

MR. TRENTACOSTA:

Thank you. Third, simple burglary.

THE COURT:

I don't believe its a crime against the person that involves violence. If it was an aggravated burglary where it was alleged that a battery was committed while entering, during the course of being present inside of or upon that scene, the alleged sight of the burglary that would be different I believe. I will sustain your objection in that regard and note it for the State.

MR. TRENTACOSTA:

The last two, four and five, the State alleges that Mr. Henry committed acts of domestic violence of April '02, November 23, '01. The evidence of alleged acts of domestic violence are inadmissible for the following reasons: Number one, these are Municipal offense that are not classified under the Municipal Code as crimes of violence. Crimes of violence do not include domestic disturbance. That is our first argument.

THE COURT:

[70] I deny that one. I find that the spirit of the law as annunciated in the jurisprudence would allow such reference to be made during the course of a penalty phase. I note your objection on that one.

MR. TRENTACOSTA:

The two alleged offenses prescribed prior to this indictment for first degree murder. Therefore they are inadmissible.

Jackson states we further —

THE COURT:

On that basis I would sustain your objection.

MR. TRENTACOSTA:

Thank you, your Honor. If they were otherwise timely I would allow them. I note that objection for the State.

MS. RODRIGUE:

Please note the State's objection and our intent to check the prescription. If we could revisit that if that would be different prior to trial.

MR. TRENTACOSTA:

Well, your Honor, I think we need a ruling today.

THE COURT:

What do you allege the prescription period issue would involve? If its Municipal Court its a misdemeanor.

MR. TRENTACOSTA:

Well, the Code of Criminal [71] Procedure, Article 598 3 I believe is the time limitations for these types of crimes.

THE COURT:

There is a one year period in which — excuse me. It is a two year period in which to formally bring the charge.

Would you agree?

MR. TRENTACOSTA:

I don't know —

THE COURT:

Its a misdemeanor punishable by imprisonment and/or fine.

MR. TRENTACOSTA:

Less than six months.

THE COURT:

If its imprisonment and then once it is formally charged it is a one year period in which to bring it to trial. These are from 2001 —

MR. TRENTACOSTA:

And April, '02 and November '01. Mr. Henry was indicted for the alleged murders in this case in September of '04.

THE COURT:

The alleged offense occurred on June 15, 2004. So it would have to be within the period of time from June 15, 2002 to be formally charged.

MR. TRENTACOSTA:

Its time of the indictment, your Honor.

[72] MS. RODRIGUE:

Your Honor, again, without being able to review the record to see what the course of the proceedings were with regards to this —

THE COURT:

Unless it meets that time period the Court would sustain the objection of the defense. That's all I can tell you.

MS. RODRIGUE:

Yes, sir.

THE COURT:

Any other issues pre-trial on the penalty phase that we have to decide here this morning pre-trial penalty phase issues?

MR. TRENTACOSTA:

Just so we are clear none of the unadjudicated are admissible.

THE COURT:

That's my position right now.

MS. RODRIGUE:

I am not sure if I heard correctly. Was there another issue the Court wanted to address?

THE COURT:

No, I asked if there are any. Are there any other issues with the penalty evidence, penalty phase evidence?

MS. RODRIGUE:

I don't have anything else for penalty phase, your Honor.

Appendix C

[73] THE COURT:

Anything else Mr. Trentacosta penalty phase?

MR. TRENTACOSTA:

No, no your Honor.

THE COURT:

Any other issues with Mr. Rocks and/or the State with guilt phase if you will or anything else?

MS. RODRIGUE:

Yes.

MR. ROCKS:

Yes, your Honor, if you could read this on what we mentioned earlier the Discovery, items that were attached – or request for Discovery that were attached to Detective Harbin's case file and referenced in his 60 page report. We requested suspects rap sheets and photos on various individuals and also what we talked about early. If he still had the color copies of these working line-ups?

THE COURT:

Do you have them?

MS. RODRIGUE:

Yes, sir, he does. They are present in court.

THE COURT:

So you will be able to make the copy here now?

MS. RODRIGUE:

Yes, sir.

[74] THE COURT:

Will that be satisfactory?

MR. ROCKS:

That would be satisfactory, your Honor.

THE COURT:

Perfect. Anything else?

MR. ROCKS:

If we could just briefly review what additional items that have been requested and may be apparently in the detectives file, if we could do that with the assistance of counsel for the State. The Terrance Roach suspect rap sheets and photos —

THE COURT:

Terrance Roach you said, sir?

MR. ROCKS:

Terrance Roach.

THE COURT:

Do you have a rap sheet for Mr. Roach that you are willing to provide if indeed you have it?

MS. RODRIGUE:

Yes, your Honor, I believe this again went to whether or not those rap sheets were attached to the police report. Detective Harbin is present and can inform the report whether or not he attached all of the rap sheets to the police report.

THE COURT:

[75] You do have the rap sheets and you believe its present? If it was attached and its not there now?

MR. ROCKS:

Your Honor, for the sake of the record could we just call Detective Harbin —

MS. RODRIGUE:

Your Honor, the State would object to that. It is not necessary to conduct a hearing on the matter. We are simply trying to understand what information we had to say that all of the rap sheets were attached to the police report.

MR. ROCKS:

That's all we want to do.

THE COURT:

I am here as long as you all want me to be but I am just and if the officer has to testify he will but could we just informally agree were they attached originally? And if so that they should be given? If they were attached but they are not literally here right now could a copy just made and then given within this 72 hour period?

MR. ROCKS:

Perfectly acceptable, your Honor.

THE COURT:

That's all I am saying.

MR. ROCKS:

That's fine, Judge.

[76] Your Honor, for the record Detective Harbin is checking and we are certainly amenable to your order that if they are not somehow attached today that within 72 hours they be produced. That is perfectly acceptable to the defense.

THE COURT:

Would you be able to do that, ma'am? Would the detective be able to do that for us? Would the sheriff be able to help us? Just somebody to press the button and produce the rap sheet.

MS. RODRIGUE:

Yes, your Honor. Does the Court order that we produce the rap sheet?

THE COURT:

If it was originally attached to the police report. Can you just in talking to the officer say that it was or it wasn't?

DETECTIVE HARBIN:

I have everything here.

MS. RODRIGUE:

Your Honor, we will produce a copy.

THE COURT:

He has it with him and we will make a copy before we leave. Are there any other rap sheets that you seek?

MR. ROCKS:

Rap sheets and attachments. Any of the attachments —

THE COURT:

[77] Any other document that was attached.

MR. ROCKS:

That's correct. We will be fine, Judge whether it is today or if it is in 72 hours.

THE COURT:

Do you want to go ahead and do that in my presence? Its not that I don't trust both of you just so the record is clean and it has been done.

MS. RODRIGUE:

There is one other issue that the State would like to address.

THE COURT:

Sure.

MS. RODRIGUE:

In speaking to several of the witnesses prior to trial, it has been brought to our attention that defense counsel has sent the witnesses packets of information with a letter indicating why they believe Darrill Henry is not guilty. Why the identifications were corrupted. What police procedure was corrupt in showing those identifications and have attached to the packet grand jury transcripts of other witnesses who will testify which would violate sequestration as well as the privacy of the grand jury. So in other words a witness came into my office and had a packet sent to them [78] signed by the defense counsel indicating why they believed Darrill Henry was not guilty outlining corrupt police procedure and/or why the identification would be mistaken. Essentially telling her why she would have picked out the wrong person. They also attached the grand jury transcript of another witness who was not the witness that the packet was sent to as well as the motion hearing transcript of another witness. The State is objecting or takes a strong position in first all the violation of the privacy and sequestration of a grand jury transcript being disseminated via mail to a witness when that is not even her statement. It is statement of another witness as well as motion hearing transcripts of other witnesses being circulated violating sequestration. Essentially now, all of the witnesses will get to read the testimony of other witnesses as well as grand jury testimony.

It is also my understanding that the defendant has been given grand jury testimony of other witnesses —

Appendix C

THE COURT:

Please, I need everyone seated please. This is critical.

Captain, I am not going to have anybody moving in the room at this point. [79] This is very, very serious.

Please continue.

MS. RODRIGUE:

The defendant has grand jury testimony of other witnesses and is disseminating that inside of the jail as well. The State takes a strong position on the dissemination of grand jury testimony.

THE COURT:

What is the basis for your allegation that you have just made that the defendant is circulating in the prison grand jury testimony?

MS. RODRIGUE:

We have a statement from another person who was incarcerated at the same time as the defendant who viewed the grand jury testimony that the defendant had in his possession.

We have photocopied the entire packet that was sent to one of the witnesses including a grand jury deposition taken by another witness as well as motion hearing

transcripts, photocopies of color line-ups, a letter signed by defense counsel documenting why this case included corrupt police procedure, photographs of the detective they claim is corrupt in his identification. It is a voluminous packet sent —

[80] THE COURT:

Whose signature allegedly was on the letter?

MS. RODRIGUE:

Defense counsel, your Honor.

THE COURT:

Who specifically?

MR. ROCKS:

Mr. Rocks.

THE COURT:

Both?

MR. TRENTACOSTA:

Both.

Appendix C

THE COURT:

I am going to let her finish and then I will hear from you.

MR. TRENTACOSTA:

Fine.

THE COURT:

Anything further?

MS. RODRIGUE:

Your Honor, the State's position is there are reasons why witnesses are sequestered. There is a reason why one witness doesn't review the testimony of another witness. It is precisely what the defense is arguing here that there is suggestibility. If one witness reviews another witnesses testimony or if one witness reviews grand jury transcripts of another witness or a police officer. Essentially defense is saying that the [81] police procedure is suggestive and they suggested a photograph and at the same time the disseminate grand jury transcripts that other witnesses can review the testimony of their co-witnesses essentially for lack of a better term.

Again, they sent packets indicating corrupt police procedure and trying to persuade the witnesses why their identification is faulty, why they selected the wrong person, why Mr. Henry is innocent and I guess it alarmed

these witnesses to the point that they are bringing these packets into our office. This is not the first witness who showed us letters sent by the defense counsel documenting the same type of information.

THE COURT:

Thank you. Defense, please.

MR. TRENTACOSTA:

Lets get to the facts and away from hyperbole, your Honor. We, the defense have sent two letters and some public documents to two individuals.

THE COURT:

I have no problem with you doing that. Other than the grand jury testimony that creates a problem.

MR. TRENTACOSTA:

That is public.

THE COURT:

[82] You are saying the grand jury testimony was made public?

MR. TRENTACOSTA:

Judge Alarcon made pages, just a few pages public.

THE COURT:

Then I have no problem with you doing what you did.

MR. TRENTACOSTA:

Her hyperbole is false.

THE COURT:

I have no problem doing what you did.

MR. TRENTACOSTA:

I would like to explain because I would like to put the truth on the record.

THE COURT:

I have no problem with what you did based on what you just told me as an officer of the Court. My only concern was the grand jury testimony. You said his Honor Judge Alarcon has previously made it public. I have no reason to question that. If any judge did that I am sure there was a valid reason for it.

MR. TRENTACOSTA:

Let the record reflect that we have investigated this case thoroughly. That we have interviewed more than one time every suspected witness for the defense and for the State. We have spent time [83] with the one alleged

eye witness named Linda Davis. She has been in this courtroom twice to testify. We have been in her home three times to have a discussion. On the last visit to her home her husband said my wife is ill presently and due to have surgery. Why don't you do this fellas? Write us a letter of the questions you want answered. Now some of the documents that was sent along with the letter had already been shared with the witness on previous visits. That's one witness.

The second person who received the letter from us is Dr. Gex, the son of one victim and the grandson of another victim. We were in Las Vegas when we spoke to Dr. Gex. He was on call at his hospital. We spoke with him by phone. He was unable to sit down with us. He requested that we send him a letter and when we told him about documents that we had in the case and why we believed that Darrill Henry was innocent. And why we believe that the New Orleans Police Department set him up for this case. He said please send me everything you think will inform me. We are happy to provide the Court with those letters and with those documents.

THE COURT:

You don't have to do that, sir. As [84] I said based on your representation as an officer of the Court I am at least in the terms of your presentation where I began, I have no problem with what you have done.

MS. RODRIGUE:

Your Honor, I believe we did not address Mr. Henry having grand jury transcripts in jail and circulating those.

THE COURT:

If it was something that was made public by his Honor Judge Alarcon, it does not go beyond that I have no objection — excuse me, no problem with that either in terms of the law and what it allows. If you have an allegation that something further has been done, there are avenues that you may use. I am not here to advise you on that. To bring those issues to the knowledge of the appropriate authorities, but if it simply what has already been made public I know of no law that would prevent someone from disseminating that as he or she saw fit.

MS. RODRIGUE:

Your Honor, the State would maintain its position that these particular transcripts were not made public. I just asked defense counsel if Mr. Henry did have possession and they told me to prove it. I have no way of proving it other [85] than the testimony of the other person. I guess this is funny to defense counsel. Its not funny to the State in the sense that the grand jury is secret.

THE COURT:

I respect the sanctity of the grand jury. His Honor saw fit to make something public and there are exceptions

we know. There is a case out of the State of Florida. That normally involves cases that are long ago ended and the public interest would allow sometimes the veil of secrecy to be lifted. We know the US Supreme Court has ruled on that. If it is something that you feel has been done inappropriately again, you have to use the evidence that might be available to address those issues.

MS. RODRIGUE:

And we are in the process of doing that, your Honor.

THE COURT:

I am not going to allow this Court to become a forum however for something that I have no jurisdiction over. It is not to be and I am not saying you are, ma'am, but it is not to be utilized in that fashion nor will I allow that. I appreciate what you have said. I appreciate what the defense has said. I haven't heard from Mr. Rocks. Is there anything you want to say?

[86] MR. ROCKS:

As a point of clarification on this grand jury issue and there may be some confusion. I don't know. Judge Alarcon made a portion of the grand jury testimony public. Frankly I don't think that we sent that to either Ms. Davis or Mr. Gex because it was not relevant. What we did send was Linda Davis' statement which was taken in the grand jury room transcribed by Mr. Bettincourt, the grand jury court reporter. That was not her grand jury testimony.

That was her statement to Detective Harbin prior to being shown the line-up on September 2, 2004. But it does look like because it is on the same format as the grand jury testimony but it was her statement to Detective Harbin.

THE COURT:

I appreciate your position as well.

Anything further by the State?

MS. RODRIGUE:

Your Honor, that just leads us to believe that even further the circulation of the grand jury transcripts are out there because the defense has indicated that portion that the defendant has was never made public.

THE COURT:

That's up to you to investigate and take whatever action you think is [87] appropriate.

MS. RODRIGUE:

And we will, your Honor.

MR. ROCKS:

No, no, just with the Courts indulgence. There was a portion of the grand jury testimony that was made public. Some of Detective Harbin's testimony was produced.

THE COURT:

Its allowed in the public domain.

MS. RODRIGUE:

Your Honor, we will investigate that further.

THE COURT:

I appreciate your position.

MS. RODRIGUE:

In addition to that Detective Harbin is present as per the request of the Court with his file. Defense counsel —

THE COURT:

To make the copies of the so called —

MS. RODRIGUE:

Rap sheets.

THE COURT:

— rap sheets and/or any attachments. You all may do that as you see fit. What machine you use I don't know what the rules are in that regard.

Are there any other issues you wish for me to take up? I am here as long as [88] you like me to be. I am in no rush.

MS. RODRIGUE:

No, sir. Thank you.

THE COURT:

Anything else for the defense? We have the questionnaire that we have to take up.

MR. ROCKS:

The logistics of the questionnaire is on our agenda.

THE COURT:

I was thinking do you think you lady and gentlemen believe that it might be appropriate — the last time I was confronted with this as a judge we had the jurors of the day if you will as they came in in groups given the document. They were allowed to fill out right in the audience so to speak and copies were quickly made, one copy plus the original. One was given to one side and one to the other. Would that be alright? It was originally pointed out that the cost of perhaps of doing this for 500 or making 500 copies and then have to be duplicated we would then have over a 1000 copies. The cost alone would be somewhat prohibited. I don't know who is bearing the cost of this. How do you all what to work it out? Would it be more economical in a literal sense from a financial perspective to just have the group as [89] they come in fill out one? Each additional group comes in we give them additional time to fill out one and then we quickly make a copy.

MS. RODRIGUE:

Your Honor, Mr. Rocks and I met with the Judicial Administrator last week. She informed us that they would disseminate that on the day the jurors arrive downstairs to each and every juror. She indicated that would be the first group and August 2nd would be the second group of jurors.

THE COURT:

You mean today and tomorrow?

MS. RODRIGUE:

Yes, sir and then she —

THE COURT:

I don't know if that is being done but if it is —

MS. RODRIGUE:

She indicated to us that she would do that. She said by the end of the week she should have a copy for the State, a copy for the defense and they would keep the originals for this Court.

THE COURT:

If you want to confer again to make sure that has been done this morning —

MR. TRENTACOSTA:

Your Honor, it has not been done because the Judicial Administrator [90] believed that we needed to add juror number and date on the bottom of each page. That she told us to take this up with you today.

THE COURT:

Go ahead and bring it down if you are satisfied.

MR. TRENTACOSTA:

If we bring it down, the tomorrow people can file it out. The first people will be back on the 3rd and then we can have everything done.

THE COURT:

Fine. Go ahead and do it as you see fit. Thank everybody for their help.

Any other issues for both sides?

MR. ROCKS:

Your Honor, I have some witness subpoenas and subpoena duces tecum to be filed. As I pass this to Mr. Reed we have a number of witnesses who are being subpoenaed for August 15th and everyday thereafter. Obviously we are not going to be needing these witnesses on August 15th. Does your Honor have any particular

suggestion or advice regarding putting some folks on standby?

THE COURT:

You can put every person you like on standby. The same for the State.

MR. ROCKS:

Thank you, your Honor.

[91] THE COURT:

I will sign the two applications for the subpoenas that are requested.

Both the State and defense may advise their witnesses to be on standby even though the individual subpoena presented to each witness will indicate the date of August 15th as being the date of appearance. I have done that for the defense.

Anything else for either side?

MR. ROCKS:

One last for the record, I have just spoken to Ms. Rodrique. We have yet to receive the replies, transcript of what purports to be Darrill Henry's statement to the police. Ms. Rodrigue has indicated that we can get that today. For the record, we have not received it yet but she assures us —

Appendix C

THE COURT:

Who has possession of it?

MS. RODRIGUE:

I have it, your Honor. I will give them a copy of that today with everything else.

THE COURT:

With that assurance are you satisfied with that?

MR. ROCKS:

Yes, your Honor.

THE COURT:

[92] Anything else you lady or gentlemen wish me to do I am available throughout the day and the balance of the week except Friday when I will be away for the day and the next week.

MR. ROCKS:

One last, your Honor, this is maybe something we might be able to address off the record. Whether we could set time aside to have a brief pre-trial conference regarding Witherspoon, jury selection and just the mechanics of how we are going to do it and try to smooth things out for August 15th.

Appendix C

THE COURT:

Here is what I normally do if you don't mind and I will include it on the record. I normally have six additional chairs placed in front of the jury box. I have 18 perspective jurors who are questioned. I normally pre-qualify the jurors in terms of their ability to consider the penalty of death and their availability to be sequestered and their willingness to do so without any serious problems presented for them. Once they are so called "pre-cleared" you gentlemen and lady are involved in that question process taking as long as you like in any case capitol or otherwise. The jurors if you will that remain available forming the pool of the available "pre-cleared" [93] jurors are turned over to you again to take as long as you like for questioning or any and all issues that are relevant. I have a form that once you have a pool of 16 perspective jurors who are in the box who are then available, I turn it over to each side and have you print the name thereafter of anyone you wish to peremptorily challenge with their number if they are number 23 on the list. Jane Doe, 23, she is excused by the defense peremptorily. Michael Smith, 27, excused by the State. You print that persons name and their corresponding number. Those are presented back to me and those persons are excused. Back strikes are always allowed at the end of their of the two rounds, but normally allows us to have the 12 jurors who will be sworn. Two, three or four alternates depending on what we anticipate. One preemptory challenge as always for each possible alternate, perspective alternate. Same form and same fashion on the form. Challenges for cause are made on the record in open court and they are ruled upon. The

preemptory challenges obviously no one knows but you all who it is that has been excused. Any Bateson challenges must be made on the record and the person questioned. Individual Voir Dire if there is a particular issue that [94] requires a person to be taken into chambers that is the only time we have individual Voir Dire absence of something truly extraordinary. The fact that it may be a murder trial even a capital case we know in and of itself does not justify individual Voir Dire. And again, until the final 12 jurors are sworn collectively as the law requires after they are sworn. You are free to back challenge, back strike any of them as you see fit peremptorily or for cause of some kind. God forbid if some valid reason came to the forefront.

I can't think of anything else logistically that I would have to tell you all.

Some input from you all please.

MR. TRENTACOSTA:

A couple of questions. Does your Honor have a number of persons that would be death qualified to then we move on to general voir dire?

THE COURT:

Yes, I would have 18 in the box.

MR. TRENTACOSTA:

We have 18 and lets suppose we get two out of those 18.

THE COURT:

Then I move 16 more in.

MR. TRENTACOSTA:

And the next panel we get two and [95] the next panel we get two.

THE COURT:

The general question will only begin after there is 18.

MR. TRENTACOSTA:

My question is what number do we get to before we start general venire?

THE COURT:

Eighteen in the box that are all qualified. That are able to say that I can consider death and that I can stay for two weeks or whatever it might be.

MR. TRENTACOSTA:

So with one panel we will do both death penalty qualifications and general?

THE COURT:

No, no. Let me do this and then if this is not clear we will continue. Eighteen persons are called up. Of the first 18 seven in the mind of the Court after both sides have questioned them could consider death and can stay, be sequestered. Those seven stay in the box and I call 11 more up. From that 11 we get three. Now we got 10 that are potential jurors. We continue doing it that way until we have 18 there for you all to look over and question as you see fit on every other issue that you deem relevant.

MR. TRENTACOSTA:

So the 18 then general venire [96] begins.

THE COURT:

Yes.

MR. TRENTACOSTA:

Whatever happens happens. Then we put 18 in the box and we start Witherspoon again?

THE COURT:

Yes, sir.

MR. TRENTACOSTA:

Okay. We, your Honor — did your Honor say one preemptory challenge for each alternate?

THE COURT:

Yes.

MR. TRENTACOSTA:

Your Honor made a statement that I am not clear on. Bateson on the individual person. Your Honor, we would not raise a Bateson challenge until we see a pattern.

THE COURT:

Sure assuming you got a pattern.

MR. TRENTACOSTA:

So it wouldn't be on the individual person.

THE COURT:

Oh, I didn't mean it that way. If I mislead you there. Correct, if you established a pattern at any point you thought there was a pattern then you could establish — excuse me that you [97] could establish, you are free to question that individual or those individuals that you feel are in effect subject to Bateson.

MR. TRENTACOSTA:

Thank you. Your Honor, there has been an awful lot of analysis of jury selection in capital cases by the National Science Foundation over the last 20 years. There has

been a lot of psychological reviews and articles about the process of picking a capital jury. The defense is always — I should not say that. The defense in this case is at a very distinct disadvantage because we have a triable case. We believe our man is innocent. We believe the State's evidence is lacking. We do not anticipate a penalty phase. We are at the disadvantage because the process of picking this jury begins with death, death, death! And you will hear me, your Honor talk about how we are at that disadvantage or at least try to elicit responses concerning that topic. In light of my statements and the science, we would object to the Court pre-qualifying which I tend to think means that you will ask questions as to whether the juror is able to vote to execute someone or whether the juror is a life giver. Your Honor, we are already [98] at a disadvantage. We would like to put you out of the mix. Let the government stand up and say we need people who can kill this individual. We would then get up and say that is not our purpose but the law requires it.

Your Honor, if you are following me, when you start off by saying there — for example, if after the guilt phase there is a penalty phase. Well phase connotes succession. It connotes that something will happen after. For example, we will be addressing the juror on the culpability trial and the sentencing trial if need be because we want to be careful with our language. For that purpose for that reason your Honor, we move that the Court not "pre-qualify" anyone. Let the government stand up and start that.

Appendix C

THE COURT:

When I say "pre-qualify" the process is pre-qualification. I don't mean that the Court is conducting the Voir Dire. I am certainly allowed as the law allows me to do to introduce, to explain, to participate, but I am ultimately in no way to control your presentation. I don't do it in terms of its length nor its substance. I do tell the jurors that they are not in any way upon hearing the possibility and that is the key word [99] among others of that sort that there is a possibility of a penalty phase. That is in no way a reference or a reflection of this gentlemans complete and total presumption of innocence. I would trust that the Court's language, its choice of words and its entire process in this regard takes into account your concerns.

MR. TRENTACOSTA:

I may have jumped to a conclusion. I thought you would question jurors.

THE COURT:

Oh, God, no.

MR. TRENTACOSTA:

Then I have come to the conclusion of my speech.

THE COURT:

I am not gonna say I am not here and people have watched me do this. I am not here to say that I don't

make comments and at some point might ask somebody a question if I think it is necessary for me if I have to make an ultimate ruling on a challenge or something. But no, other than some basic preliminary comments, I turn it over to you all immediately.

MR. TRENTACOSTA:

Thank you, your Honor.

MR. ROCKS:

Thank you, Judge.

THE COURT:

[100] I will only inject my own comments if I feel the point is not being made clearly or God forbid someone is misquoting something and I don't mean that I think you would be doing that intentionally. Other than that it is your voir dire in any case and not just the death penalty case.

Anything else?

MR. ROCKS:

Two matters, Judge. Let the record reflect that we have received from the State the photographs taken of Mr. Henry's upper body depicting the tattoos. We continue our objection that these are personally not relevant and second there is simply no way to tell when these tattoos were applied to Mr. Henry. So we will be continuing that objection.

THE COURT:

I appreciate your position in that regard.

MR. ROCKS:

Finally, Judge, the State has indicated that they will be providing us the rap sheets of all State witnesses they intend to call. If your Honor provide us with a cut off date —

THE COURT:

Would the 72 hours be sufficient? Is that alright?

MS. RODRIGUE:

Your Honor, I believe the rest of the documents will be provided — it should be provided by the end of the day. I will ask that the rap sheets just by Friday. If we could be given till Friday to provide those.

MR. ROCKS:

That's acceptable, your Honor.

THE COURT:

Is it necessary that I come back on Thursday?

MS. RODRIGUE:

No, sir.

MR. ROCKS:

I think that's all.

THE COURT:

Anything else?

MS. RODRIGUE:

No, your Honor.

THE COURT:

Thank you.

WHEREUPON THE MATTER WAS CONCLUDED.

APPENDIX D — TRANSCRIPT OF THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS, STATE OF LOUISIANA, DATED MAY 18, 2012

[1] CRIMINAL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

STATE OF LOUISIANA

VERSUS

DARRILL HENRY

CASE NO. 451-696

SECTION "L"

Transcript of the MOTION FOR A NEW TRIAL before the Honorable Dennis Waldron, Ad Hoc Judge Presiding, Section "L" Criminal District Court, Parish of Orleans, State of Louisiana, on May 18, 2012, in New Orleans, Louisiana.

[2] THE COURT:

As to the remaining matter on the docket this morning is the matter of State of Louisiana versus Mr. Darrill Henry. Its is 451-696. Mr. Henry is present with his attorneys along with the State's representatives as well.

The pleasure of the defense you had asked for additional time to file perhaps an additional document and review certain matters prior to resuming this proceeding.

Appendix D

MR. TRENTACOSTA:

Good morning, your Honor, I am Nick Trentacosta and with Michael Rocks and we are representing Darrill Henry.

Your Honor, last time we were here the representative Blake Acuri for the Orleans Parish Sheriff's Office told the court that the information that this Court ordered to be turned over to Mr. Henry that is particularly each time Mr. Steven Dominick was taken from the Orleans Parish Sheriff's facilities and transported to the District Attorney's Office. That evidence would be found in the so called log books.

After we left this court sometime and I think it was May 1, Mr. Acuri presented us with 10 original log books from the Sheriff's Department. There is nothing in these log books that come [3] close to reflecting when Mr. Dominick was taken from the Orleans Parish Prison and brought to the District Attorney's Office.

What we have in these log books are entries regarding all inmates except there is nothing about transporting inmates. What these entries are all about more or less or for example: The following inmates received commissary. Steven Dominick's name is placed.

There is an entry that Steven Dominick was placed on physicians call out. There is nothing in here.

Appendix D

Now we have since December the 8th subpoenaed the documents we are looking for. The sheriff's office in many instances since the 8th has simply failed to make a return on the subpoena causing this court to order them to appear at another date and bring the necessary documents.

The first time a return was made a single piece of paper was presented to the court. Your Honor to explain that I have copies but my copy machine didn't work this morning. I will make the necessary copies so the court clearly sees what it is we have received. The single piece of paper shows nothing about transporting Mr. Dominick anywhere outside of the facilities. [4] When this was brought to the court's attention and another subpoena was issued the Sheriff's representative appeared with some new documents. The documents that were presented are not responsive at all to the request. There is nothing in the second set of documents that reflect that which this court ordered.

When Mr. Acuri stood before the court recently and said, well, your Honor, the information is located in the log books and those log books are off site but we will get them and we will present them to Mr. Henry's counsel which of course was done. Nothing in these log books reflect transporting Mr. Henry or any other inmate anywhere. These are log books kept at the various facilities that merely reflect as I mentioned things like an inmate having received commissary.

Now Mr. Acuri has never appeared in this court and asked the court to Quash the subpoena. He has

never appeared in this court and stated we don't have the information. What he has done or what I should say is what the Sheriff has done is to string this matter out for over six months without ever being responsive to the court's orders.

Now, your Honor, just as a little back ground, right before the trial [5] within a couple of days before the trial we had written down an inmate from Angola as a potential witness for Mr. Henry in the penalty phase. I came to court. I met briefly with the witness in the courtroom and I said well, I need to talk with you further. I will be back in an hour. When I returned to OPP and I said please produce Mr. Gayle because he is in your custody, the Angola guards turned him over to you the prison said he is not here. I said that is kind of amazing. I saw him. He was here. Where is he now? He said, well, you got to go over to another office. Maybe they have some information for you.

I went to the other office. The person said Mr. Gayle is across the street at the District Attorney's Office. I said how do you know this? She said, its entered into the computer. Whenever we send an inmate out of our facility we document it.

Now, as the court is well aware Mr. Dominick testified that he had various meetings at the District Attorney's Office. As you recall the first time he testified he really couldn't remember who was present. He named a couple of people. The second time he testified he clarified that there were about 8, 9, 10 people at the meeting including his [6] parents.

We have a Motion to Compel the Orleans Parish Sheriff to honor this Court's order and a Motion to Hold the Orleans Parish Sheriff in Contempt of Court because they have flagrantly abused this Court's orders.

Number one, again, they have never stated they don't keep information about when people leave, never. They have never moved to Quash this on any ground at all.

They merely have given us three returns that are completely unresponsive to the Order. For that reason, your Honor, we move your Honor to Compel them to Comply within two weeks and to hold them in contempt of court.

I have the motion for you.

THE COURT:

Thank you.

Any response by the State to the comments by the defense?

MS. RODRIGUE:

Your Honor, the States mere response is that this is an issue that has already been presented before this Court. The State feels this is another delay tactic and we strenuously object to any further delay in sentencing -- excuse me, on the Motion for a New Trial.

MR. TRENTACOSTA:

[7] Your Honor, if it is a delay tactic its the Sheriff of New Orleans. It certainly is not Mr. Henry.

THE COURT:

I am not going to hold anyone in contempt at this time. The Court is not reluctant to do that. It has done it in the past on occasions where the Court thought it had been done. Be it the Sheriff or an attorney or any other person or entity represented by an individual.

I don't think that there is any doubt that the jury heard that this gentleman, Mr. Dominick was the subject of more than one visit to the Office of the District Attorney.

I distinctly remember even offering to recess the trial if you wished further time to call Mr. Cannizzaro. I think I even mentioned by name. Mr. Graiman Martin, I believe mentioned him by name his First Assistant to allow the defense to present anything they wanted to the jury. Again, even allowing a recess over night to further review the matter as to how you might want to proceed on how many times he may have visited.

I remember clearly his father giving some testimony regarding visits to the District Attorney who may have been present, who may not have been present. [8]

Appendix D

MR. TRENTACOSTA:

Excuse me, your Honor.

THE COURT:

Yes, sir.

MR. TRENTACOSTA:

I wasn't in the court at all times of course. Mr. Dominick's father never testified in this case.

MS. RODRIGUE:

It was via jail tapes, your Honor.

THE COURT:

I apologize.

MS. RODRIGUE:

His testimony came out during the jail tape conversations.

THE COURT:

Excuse me. It was a very colorful conversation. Let me apologize. It was during the tapes about him chastising the son. You are correct. It was a very detailed telephonic tapes. He testified but not physically in person so to speak. You are correct.

The point that I want to make is that the jury clearly knew as it evaluated this gentleman's testimony that he had visited the District Attorney's Office. There was extensive cross examination on what may or may not have transpired there.

For that reason this Court denies any request that I hold the Sheriff in [9] contempt. I believe that they have provided in good faith through Mr. Acuri, an officer of the court, an attorney representing the Sheriff whatever volumes they may have, whatever records they may have that might show what visit or visits this man may have had with the District Attorney and/or any of his staff, his investigators, his First Assistant or any of the attorneys representing Mr. Cannizzaro as the District Attorney.

I will note the objection to protect the record for the defense on this issue as to any further delay in the proceedings and also as to the request for a contempt citation issued for his Honor Sheriff Marlin Gusman.

You objections are noted to protect the record.

MR. TRENTACOSTA:

The Motion to Compel them to Honor the Court's order is denied?

THE COURT:

I feel that they have sufficiently complied and I note your objection, sir.

Are there any other issues that you wish to address regarding the denial of the expert witness as to identity, the alleged crime scene visit by the jury, the District Attorney's closing argument and the polygraph examination results regarding the alleged innocence of the [10] defendant? The four issues that originally detailed in your Motion for a New Trial.

MR. ROCKS:

Good morning, your Honor, Michael Rocks on behalf of Darrill Henry.

With the courts permission we would like to engage in some argument on these issues.

THE COURT:

You may as you see fit.

MR. ROCKS:

Thank you, your Honor.

THE COURT:

I am turning the documents over that the Motion to Compel and the Motion for Contempt Citation are both denied and the objections are noted.

Excuse me, Mr. Rocks. Please continue.

MR. ROCKS:

Your Honor, I will address Mr. Rucker's polygraph, the expert on a witness evidence and the crime scene. Mr. Trentacosta will close with argument by improper closing argument by the State.

May it please the Court, an injustice has been done to Darrill Henry. The jury in this case after seven hours of deliberation although at times that deliberation sounded more like a street [11] brawl the jury found beyond a reasonable doubt that Darrill Henry with no history of arson, murder, shootings, stabbings, almost 29 years of age committed one of the most heinous crimes in recent memory and then voted 12 nothing for life.

That is residual doubt. Residual doubt that Darrill Henry was guilty so this is where we start in the Argument for a Motion for a New Trial and that an injustice has been done.

Mr. Neil Rucker testified that polygraphs are utilized by the United States Government, Department of Justice, the Department of Defense, FBI, DA's Office in Alabama are using them. Mr. Rucker is working with courts in Alabama using them. All attesting to the reliability of polygraph evidence. NOPD utilizes polygraphs.

Mr. Rucker testified that a polygraph also measures for attempts to deceive or trick the machine, over comes results in order to obtain a favorable reading and result. He testified that there was zero indication from the machine

that any attempt was made to deceive the machine when Mr. Henry was being examined.

Mr. Rucker concluded that Darrill Henry was truthful and he was answering the three relevant questions. Did you [12] stab and shoot the women? No.

Were you physically present at the Duels Street address when these women were attacked and robbed? No.

Have you ever been to the house before your trial? No.

Your Honor, the US Government would accept that Darrill Henry was being truthful.

Alabama DA's and courts would accept that he is being truthful.

Darrill Henry we submit is innocent and weighs in favor that the ends of justice require a new trial.

So how did an innocent man end up being identified by two well meaning bystanders? I take Steven Dominick out of this particular equation. He didn't come forward and identify Darrill Henry until faced with multiple counts of aggravated rape, kidnapping, stalking and over 100 counts of possessing child pornography. Six years later he can tell that it is Darrill Henry by the way he walks.

Mr. Dominick bragged on the stand about how proactive he was and willing to be involved. Never asked Detective Harbin to view a physical line-up after he heard

that an arrest had been made. If he was so proactive and willing to get involved they could have all done walk [13] and turn back in 2004.

We hear how Mr. Dominick gets a sketch done. A sketch that looks nothing like Darrill Henry and then conveniently when he testifies he says oh, well, that sketch wasn't really looking like Darrill. But the fellow who was so proactive and willing to get involved never bothered to pick up the phone and call Detective Harbin about the accuracy of the sketch.

Steven Dominick is a liar, a sexual predator and a mess and the State's admitted star witness. We will be able to see whether or not he gets the deal of the century when his sentencing finally comes to past. For some reason his sentencing has been dragged out for an unusually long time especially in light of the fellow who pleads guilty as charged to all counts.

So how does Cecilia and Linda, two honest women pick him out? Because Detective Winston Harbin of the Major Case detective hand chosen to solve this crime shows them suggestive line-ups. Not the line-up that was failed to identify by Mr. Dominick.

For the record, Judge, these have all been entered into evidence and I don't know if there is a need to enter them again, but for the record I am [14] holding up the line-up prepared by Detective Harbin which Mr. Dominick failed to identify with multiple individuals with red shirts and orange shirts. This court is well aware that the red shirt

was the significant identifying factor across all witnesses in this case.

Linda and Cecilia are shown line-ups with only Darrill wearing a red shirt.

Linda Davis sees the photograph of Darrill on television the day he is arrested. The same photograph that is placed in the photographic line-up that she is going to be shown in September. She is also shown a photograph of Darrill Henry by a district attorney investigator right before she is shown the photographic line-up on September 2nd. She sees it on television and she sees it like the district attorneys investigator. And she gets a suggestive line-up with only Darrill in a red shirt and she picks Darrill. Its just as bright and observed in United States versus Wade. 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. So that means the practice, the issue of identity, for all practically purpose is determined then and there before the trial.

[15] Second Circuit case, Jackson versus Fobes (spelled phonetically), centuries of experience in the administration of criminal justice have shown that convictions based solely on testimony that identifies a defendant previously unknown to the witness is highly suspect. Of all various kinds of evidence, it is the least reliable especially where unsupported by corroborating evidence.

Appendix D

As your Honor is also well aware, the DNA exonerations compiled by the Innocence Project, 75 percent of wrongful convictions of innocent persons involve mistaken eye witness identification. These statistics are scientific facts that human eyes and memories do not operate like a camera on which events are accurately recorded and subject to retrieval at any time. Yet despite such dangers juries almost invariably find eye witness testimony to be highly persuasive.

So this brings up to Richard Ernest in our Motion for Mr. Ernest to testify. Not about the generalities of the inaccuracies and unreliabilities of eye witness observations.

Ernest was going to testify about how suggestive police procedures can lead good people to pick a photo not based on their perceptions and memory but as a [16] result of poor police investigative procedures.

We will remember that Detective Harbin testified at trial he would never put five fellows in a blue shirt and one guy who is the suspect in a white shirt. He wouldn't do that because that is suggestive and it might lead someone to focus on the white shirt fellow. Yet he felt and testified that it was perfectly non-suggestive to just have Darrill in the red shirt when the red shirt was the key identifying feature. That was non-suggestive.

Well, what is a juror to think? Detective Harbin is an expert in major case crime. He must know what he is doing.

Appendix D

District Attorney Cannizzaro, he's an honorable man and he wouldn't be prosecuting a case if he felt that there was something inherently flawed in the way that the line-up was composed.

And they heard Ms. Davis and Ms. Garcia. Two nice, honest ladies who testified they were positive. And, Judge, they were positive and truthful and wrong. That is why the testimony of Mr. Bringham (spelled phonetically) was essential to due process, the right to present a defense and a fundamentally fair trial .

[17] Mr. Bringham was not addressing writing, distance, time of viewing observations, etcetera, all within the common knowledge of a juror. He was addressing the effect of improper police procedure on the memory of good people trying to do the right thing. His testimony is the same type of testimony that would address improper collection of any other type of evidence because eye witness evidence is evidence. And there are right and wrong ways to collect all evidence including eye witness evidence. Collected poorly and its value is corrupted.

The testimony regarding the collection of DNA, fingerprints, tire prints, the care and control of such evidence after it is collected, the procedure by which it is analyzed all would be properly subject of admissible expert testimony. And such testimony was presented by the defense in this case. It was perfectly admissible. But Darrill Henry was denied the opportunity to present the same testimony about eye witness evidence, how it was collected, stored and retrieved at a photo line-up. We believe this is distinguished and distinguishable from the Supreme Courts mandate.

But Darrill was denied the [18] opportunity to have a reasonable discussion to educate the jury about how police procedures and intervening events and not just time because that would be within common knowledge but other intervening events like seeing the photograph on television. Being presented the photograph before you were shown the line-up.

The police procedures in this most serious of all cases to find people viciously murdered, a man who has his life at stake on trial denied justice for Darrill and the victims and prejudiced Darrill on these particular facts on these particular line-ups with the particularized testimony that Mr. Bringham would have presented.

I turn now to the crime scene visit which dove tails with what we have just been discussing.

As your Honor recalls there was a Motion made by the State to visit the crime scene and that motion was denied until I believe it was juror, Nefrey who raised her hand and in quite common sense fashion said it seems sensible we should go to the crime scene.

Your Honor will also recall you reversed your ruling at that time in front of the jury and granted the State's motion to visit.

[19] THE COURT:

It was at the urging of the jurors and if my memory serves correctly that they be allowed to visit the scene.

The Court certainly took that in consideration as I noted and there after as you have noted I reversed my ruling and did allow that to occur over your objection.

Please continue, sir.

MR. ROCKS:

The defense was obviously in a very awkward position addressing this in front of the jury and we stated then and we maintained that we had no particular objection in theory to a visit to the crime scene if it could be the crime scene as it was reflected at the time. Specifically could they go inside the homes. The Court recalls that the visit occurred and they did not go inside the homes and you maintained our objection on those grounds.

Respectfully, your Honor, your reversal produced multiple layers of prejudice on this issue. Again, which dove tails cumulatively with Mr. Bringham issue.

It was unprofessional for the State to renew that motion in front of the jury. It pandered to the jury. It allowed them to broadcast that they were [20] somehow looking to reveal all. The jury had no understanding of the prejudice that can result when you go to a crime scene. Its extreme prejudice if that crime scene does not accurately reflect when the crime scene when the crime occurred.

This is especially true your Honor in this case and this issue right now is an overriding issue in all of the arguments for Motion for a New Trial, this is pure identification case. There is no other evidence for whatever

reason, there is no other evidence. Either they didn't collect it and what they did collect never went to Darrill Henry. You recall nothing was ever found in Darrill's home that indicated that he had any connection to these crimes or these ladies, ever!

Same is true with the home on Duels Street. There was no evidence collected there that showed Darrill Henry had any link to that residence for these ladies. It is a true, pure identification case.

When they go to the crime scene, Ms. Watts house is gone. Ms. Gex car is not there which partially obstructed the views of all the witnesses. Without Ms. Garcia's shrubbery which she had lining her driveway which would have been obstructing her view from inside her [21] house and her front porch. Without seeing the view from inside Ms. Davis' house through her two front door and her intervening porch, the grill work on the porch nor did they get an opportunity to get a feel for the interior of Mr. Dominick's home which would have been very constructive and useful if it had been arranged. But it wasn't. And therefore what could have been constructive and useful became unduly prejudicial.

The State suggests that there was no prejudice here because the jurors could just use their common sense and their imaginations. They realized that the witnesses were inside and you have to just adjust their imaginations accordingly.

Darrill Henry's life is at stake. We are not worried about gross prejudice, beyond a reasonable doubt or

whether there can be confidence in this verdict. We will leave it to their imaginations.

Your Honor, at one point during the trial you paused and you addressed us all referring to the State's seal which was hanging in the courtroom and hanging on the wall and how the words union, justice, competence were bringing you comfort as the proceedings unfolded. I submit that even prior to hearing Mr. [22] Trentacosta address arguments regarding closing argument there is not a way to look at this seal, look at the word competence. Not you, not the State nor the victims family can look at those words and have confidence in this verdict.

The search for truth is perhaps the most lofty goal in a criminal trial. The search for truth in this case was undermined and there was prejudicial error which undermined it. Justice would be served by granting a new trial in this case.

An injustice has been done to Darrill Henry and requirements for granting a New Trial, I submit respectfully your Honor have been met on these first three claims. Now I yield to Mr. Trentacosta.

THE COURT:

Anything further from the defense, please?

MR. TRENTACOSTA:

Thank you, your Honor. I will address the improper and prejudicial closing argument given by the State in this case.

Appendix D

The violations to Mr. Henry's constitutional rights fall into six categories. I hasten to add, your Honor that I have not seen so many categories [23] of misconduct in the closing argument. I will not address all of them but let me address the most important ones.

First off, while it might not be the most important one the State's repeated disparaging of Mr. Henry's rights to object to the exclusion of evidence or not is a violation of not only a violation of the Sixth but of the Fourteenth Amendment Rights. Time and time again the State called to the juries attention the fact that the representatives of Mr. Henry were abiding by the law but they never said that. We abided by the law when we object to evidence that is inadmissible. We didn't say we were abiding by the law. They said things like why didn't they want you to see this?

Lets talk about the police report of Detective Harbin. She says that is Ms. Rodrigue, I wanted you to have the entire police report. I didn't object. They said, no, no, no. They didn't want you to see it.

Your Honor is well aware the police report is inadmissible. That is why we objected to it.

Ms. Dot and I will get to Ms. Dot again, were objected when prosecutor raised some information falsely about Steven Dominick's testimony. What did we [24] hear after the objection? Why the objection, ladies and gentlemen? Why the objection?

Appendix D

The State said we begged you, we begged the judge to let you go to the crime scene. Why do you think there was an objection? Why would the defense not want you to go to the crime scene?

Now as a matter of fact we never objected to a visit to the crime scene. We objected to the manner in which this court was to conduct that visit.

The final call, the prosecutor stated, this phone call, again a phone call that the defense didn't want you to hear. Well if we had grounds for an objection we make it and they can not disparage his rights for making it.

Crimestopper tips, the Crimestopper tips, the ones that did not pertain to the defendant which the defense attorneys did not want you to hear about. Now, during closing when the prosecutor is encouraging the jury to take it -- how would you say it? To find fault with Mr. Henry's counsel for objecting, we stopped objecting. We saw that as a trap for us because as the court is aware, they pointed it out. We didn't want to fall into that trap.

So after the argument, when we had argument before your Honor on a mistrial, [25] your Honor asked us well some of the points your raising you didn't object. And we explained why. It was a trap and your Honor then said I will reach the merits. I will excuse the lack of contemporaneous objection for all of the ways and I will reach the merits. I point that first only because the State has not addressed the merits. They say, well, we didn't object. Therefore this court can't deal with the matter. The

Court did deal with the matter on the merits. It denied the Motion for Mistrial. Our claim here is that denial was error.

Most egregious example of misconduct is when the State argued -- I'm sorry, when the State told the jury that Mr. Henry did not testify. For almost 50 years the Constitution has been interpreted that a prosecutor can not directly or indirectly refer to the defendant not taking the stand. What Ms. Rodrigue said was I can't control what information they present about the defendant or if he chooses to testify. That is not in my control. I don't know if there is anything more direct than that. He did not testify ladies and gentleman! That's direct. If by some far fetch of the imagination the State would later argue because they didn't in [26] this proceeding, that it was an indirect reference then we; still win, Judge because the comment was intended to be a reference on his failure to testify. That is the most egregious misconduct in the closing argument.

Second mistake repeatedly referred to evidence that was not admitted. Now its hardly evidence if it wasn't admitted. That's what the case law says. They made things up, she, Mr. Rodrigue made things up in closing argument that never came off the stand and never found in any documents.

For example, Ms. Rodrigue stated and I quote "the perpetrator, Darrill Henry knew Ms. Durelli Watts. She let him in. She knew him. She recognized him and when he goes up to the house she was standing in her door. She

always sat on the porch with the door right behind her leaning up against the wall. We know that they knew each other." Not one shred suggestion of evidence came into this court into the trial rather that came close to suggesting that Mr. Henry and Ms. Watts knew each other. They made this up. It was not evidence. For the government to stand in front of a jury where the juries sole purpose is to find justice and to say, we knew they knew each other is gregious and it is a [27] reversible error.

But that's not all. The second comment was regarding Ms. Dot. The Court may recall that Ms. Henry introduced into evidence an employment application from Rally's. This was part of his case as to what he was doing on the day of the crime. In that application was someone listed as a reference, Ms. Dot. Ms. Dot testified. Ms. Dot was the aunt of Darrill Henry.

What Ms. Rodrigue stated is Detective Harbin testified when he showed Steven Dominick the line-up that Steven Dominick said that this guy looks familiar and from the neighborhood. I am thinking that this is the guy that looks familiar. He hangs out with Ms. Dot's grandson. Mr. Dominick never testified to that. The Court has the transcripts. We scoured them. Detective Harbin never testified to that. No witness on either side testified to that. They made it up trying to tie Steven Dominick's shaky testimony a little bit tighter. Sure he knew it was Darrill because he saw him hanging out with Ms. Dot's grandson. Was never entered into evidence.

Appendix D

It was stated on page 84 in the closing argument transcript, on page 86 of the closing argument, on page 87 and on page 88. It was a four page theme that [28] Steven Dominick or Detective Harbin testified, but again, it didn't happen!

Third, Ms. Rodrigue argued that there were witnesses that they did not hear from because the witnesses were afraid to come to court. She stated, you know through the course of this trial there were witnesses who were presented line-ups who did not come forward and you can't fault them. Detective Harbin compiled two different line-ups and those two line-ups were distributed equally among the witnesses. Some of the witnesses did not come forward. That's false! That is an absolute lie! Detective Harbin never testified nor anyone else that there were eye witnesses who could provide relevant testimony to the jury that did not come because they were afraid. Not one. Never it didn't happen!

The government was trying to bolster its case because as the court is well aware it was not a strong case. It was trying to bolster its case by saying we could have given you more witnesses which would be an easy task for you ladies and gentlemen. But those witnesses were too afraid to come to the court. Too afraid to come forward.

Your Honor, it is a flat out lie. It requires a reverse of this conviction.

[29] Next, Ms. Rodrigue argues -- said eye witness, Renaldo Antonio did not want to get involved. Flat out lie.

Mr. Antonio never testified. In fact, Mr. Antonio readily spoke to the police on the day of the crime. His information that he gave to them was contained in Detective Harbin's report. Not in there did he say he was afraid he wouldn't come forward. He said this is what I saw. As the court will recall when he testified he said this is what I told the police. What I am testifying to now. There is no evidence in the record or outside of the record that suggests that he didn't want to get involved.

Next, Ms. Rodrigue argued that we, the defense tortured, their words not mine, and harassed witnesses. Your Honor, highly improper. First of all we didn't torture anybody and second of all we didn't harass anybody. We can ask people questions whenever we wish. It was not harassment. She goes on to say that even Cecilia Garcia doesn't put her real address on her listing address anymore. That happened after the crime. That had nothing to do with the alleged torture.

There are other examples during the motion but just to be clear on the last one the prosecutor argued that Ms. Garcia [30] got such a good look at the witness that she could draw his face. Ms. Garcia never testified that she drew his face nor that she knows how to draw his face. In fact she testified she did not draw his face.

Your Honor, the other categories that we have laid out in the motion is one is the burden shifting. I will not belabor this but the prosecutor continued to explain or argue to the jury that it was our burden to prove Mr. Henry innocent. That is obviously not the law and it is improper.

Lastly, the prosecutor engaged in improper vouching and expressed personal beliefs. That too is improper.

If this was a case of overwhelming evidence, if it was a case of whether or not a confession was true or not, if it was a case where the DNA found at the scene matched the defendant was actually him, if it was a case involving fingerprints and the defendant at trial it would be a different story.

We have a weak case from the prosecutor. Everyone is aware of that. That is not to say that it may not rise to the level in the juries mind reasonable doubt but when the government makes these egregious misconduct statements disparaging Mr. Henry's rights [31] of keeping quiet. Arguing facts not in evidence is most egregious, Judge. Telling the jury that people could have put Mr. Henry away but they didn't want to come to the courthouse is a flat out lie. I will say it again. Its not in a case as close as this one that one can not say that these comments, arguments didn't influence the verdict. They did influence the verdict. This can never be called harmless error. There was no overwhelming evidence.

If your Honor has any questions I am happy to answer them.

THE COURT:

I don't have any but I thank you.

Appendix D

MR. TRENTACOSTA:

Thank you.

THE COURT:

Any remarks by the State please in response?

MR. CAPLAN:

Your Honor, we addressed most of these in writing previously and I really don't want to drag the proceedings out any longer so we will submit on what has previously been submitted.

THE COURT:

Thank you.

The Court of course has had time to think about this and the Court has thought about reaching a conclusion [32] Until I arrived here this morning and listened to each of you.

There are three witnesses, Ms. Cecilia Garcia, Ms. Linda Davis and Mr. Steven Dominick who basically formed the basis for the conviction in this case. I don't think anyone can take away from that.

Now the defense of course had argued with great conviction that they believe that these citizens at least two of them Ms. Garcia and Ms. Davis are law abiding, reputable, honest people who merely are mistaken.

Appendix D

As to Mr. Dominick the defense and properly so as an advocate for Mr. Henry as painted Mr. Dominick as one who is an opportunist. Who sought to take the advantage of the situation that he found himself in being charged with a series of horrendous crimes himself regarding sexual activity that was illegal and pornography charges. All of this was presented before the jury in a most and very assertive manner. Mr. Dominick's playing out of this with Mr. Henry was based on his desire as I stated to gain some advantage in his that is Mr. Dominick's particular case and the fact that he would say anything to better his current position.

The case is basically one of [33] identity. It is the issue of the Court denying the expert on identity issue the Court stands by the jurisprudence of this State. The most recent jurisprudence from the Louisiana Supreme Court in this regard and feels that the law of this State did not require the court to allow that. Even after hearing the testimony of the gentleman in the Post-Conviction proceeding, the Court maintains its position in that regard.

The crime scene as everyone has pointed out and agrees was clearly an issue that was before the Court in the outset of the proceedings with the Court originally denying the request to visit it. Ultimately as I have already stated at the urging of at least one of the jurors if not more than one but certainly clearly by the one that voice his desire to wish to see it and he seemed to be speaking on behalf at least more than himself, perhaps not the entire jury but more than himself, but none the less that caused the Court to reconsider the issue. The Court does not find

the visit to the crime scene in any way prejudiced either side. It is true that the jurors did not go inside the house and were not at the elevation a few feet higher than they were as they stood on the lawn in front of the particular home where there [34] was testimony that a person from inside had witnessed what they testified to in court. I think the jurors clearly understood that distinction and I don't find in any way that the visit to the crime scene by the jury presented any prejudice or injected any type of impropriety into the proceedings that this trial involved.

The argument, it is true that there was no timely objection to certain portions of it. The Court I think even noted if not on the record certainly I know I said informally if not formally to all of you collectively that if there had been an objection that the Court would have sustained it but would not have granted a mistrial. I understand the idea of the totality of the circumstances, a test being applied even to an evaluation of an argument as to those portions of it that might be deemed by the law individually to be improper and yet not the basis for a mistrial. But when considered collectively with all improprieties during the course of the argument that that sometimes under our law forms a basis for a mistrial or the granting of a new trial.

I don't find that any reference to the defendant not testifying or that he could have testified was a direct [35] reference. I find that it was an indirect reference and taken into the context of the trial and the totality of everything presented would not form a basis for a new trial.

Ms. Dot's status and who was Ms. Dot? And the fact that the defendant may have hung out with or chose to be with her grandson, the Code of Criminal Procedure says and our jurisprudence backs up that the argument shall be confined to the evidence admitted, to the lack of evidence, to conclusions of fact the State or defendant may draw there from and the law applicable the case. The argument shall not appeal to prejudice Article 714 of our Code of Criminal Procedure tells us these things.

We have heard in Post-Conviction who Ms. Dot may have actually have been in terms of any relationship to any particular party in this matter. There was a document that did refer to a Ms. Dot and it was only in the closing argument with that piece of evidence admitted I believe on behalf of the defense and correct me if I am wrong that the State saw fit to examine it and to make a reference to it. That argument is argument that I believe was valid. It was allowed. As to whether or not something else should [36] have been presented when that document was presented by the defense to explain who Ms. Dot was and what role she may have played in the life of any particular person including the defendant and/or Mr. Dominick was something for the attorneys to decide.

As to the balance of the comments as to whether or not the attorneys tortured or harassed any witnesses clearly in the context of Mr. Dominick's being challenged while those words might offend someone I don't know that taking again he totality of everything that was presented that one would say that that argument was totally inappropriate. Mr. Dominick as he should have been was challenged

repeatedly and with all respect to the Court I would like to think I extended as much latitude to the defense as I hope I did to the State in your examination of a particular witness. And allowing you to even revisit a particular point that you wish to make especially when it came to Mr. Dominick.

As to whether Ms. Garcia could draw the face of the defendant or not or that she would have been capable of doing that I don't know if that is an improper argument to be made where the State seeks to impress upon the jury what it believes to be the certainty and the conviction of [37] Ms. Garcia in her identification of the defendant.

Clearly the Court instructed the jury on the burden of proof in this case. I don't think that the jury regardless of what may have been said by the State in any way placed a burden on the defense to prove the innocence of the defense.

As to whether witnesses did or did not come forward and what may have motivated them I think the defense has made that point regarding the argument and what may have been improper about it. At the same time the jury was aware that there were three witnesses that they clearly must have because we all agree it is an eye witness case if you will, must have attributed tremendous credibility to. All 12 of them because as we know it was a unanimous verdict as the law required it to be being first degree murder. There was no disagreement among the jurors in that regard.

As to any reference to Mr. Antonio as well during the course of the proceeding, the Court does not find that in and of itself or considered with the other aspects of the argument that it would require a mistrial or that it requires a new trial. Again, the jurors were instructed that the arguments of the counsel were not [38] evidence. I need to point that out. The opening statements, the closing arguments, the comments, the questions and the objections of the attorneys and the comments of the court as I always instruct the jury and did instruct this jury are not evidence and they are not to be considered as such.

The Court also always in its charge at least once if not twice, I believe at least twice reminds the jury that they are to consider both the evidence and or the lack of evidence in this particular case or in any case in which a jury is instructed by this court. And that clearly was done here.

A conviction shall not be reversed on appeal nor shall it form a basis for a new trial when it is argued that there was improper arguments made by -- to a jury during the course of closing arguments unless the Court finds that those remarks influenced the jury in contributing to the guilty verdict.

The State ultimately bears the burden of proof on all of these issues. The Court must be thoroughly convinced of that according to State versus Hathorn, H-A-T-H-O-R-N, 63 So. 3rd, page 1142, from the Fourth Circuit Court of Appeal in the year of 2011.

It is not just that the Court would [39] find that the marks influenced the jury and contributed to its verdict, the Court must find that it is thoroughly convinced that that was the result of such commentary by the State that was improper.

As to the allegation regarding the polygraph examination that examination of course is allowed in a Post-Conviction proceeding for the limited of purpose of considering it along again with what I call the totality of circumstances, the totality of evidence and or lack of evidence. Our system of law within this state has yet to reach a point where we are comfortable with polygraph results as being so reliable that we allow them to become part of the fact finding process that is known as a trial. We simply do not find that they are that trustworthy and just our jurisprudence continues to reject them when they are offered as evidence be it guilt or innocence.

The State can't have someone take an examination and say, hey, look, he failed it. That's evidence that he is guilty. The defense can't have one taken and say hey, look he passed it and therefore he must be found not guilty.

Ultimately the Court is referring to the fact that Ms. Garcia, Ms. Davis and Mr. Dominick testified. I know it has [40] not been entered into the record but I think all of you would have to agree that it was just reported in the local news in the last few weeks that Mr. Dominick has pled guilty and was the subject of great cross examination during the course of the trial before any guilty plea as to whether he would ever be brought to trial or whether a guilty plea would be entered. As it relates to rape, I

think it was forcible rape before his Honor Judge Keva-Landrum, if the report is correct as noted recently in this courthouse that he now awaits sentencing if he hasn't already been sentenced. I believe it was 25 years. I could be wrong on that number.

Mr. Dominick and I mentioned earlier his father forgive me for misstating his father testified not in the sense of under oath but clearly in those phone calls, tapes that were as realistic in terms of sound and quality as if he was actually seated on the stand. The jury heard at great length Mr. Dominick. He did testify obviously under oath in the presence of the jury but in effect they heard his words and those of his father as to the visits to the District Attorney's office and what may or may not have transpired there. Mr. Dominick was adamant as to what did [41] or did not transpire in the Offices of the District Attorney and it was not an issue as to whether or not it was more than once that he visited. As to the number of times beyond two perhaps there was argument in that regard that was justified.

But clearly the jury saw Mr. Dominick. They saw Ms. Garcia. They saw Ms. Davis. They witnessed them being subjected to as the should have been and they were a very vigorous, vigorous cross examination that sought to challenge both Ms. Garcia and Ms. Davis as to the correctness, the validity of their identification.

As to Mr. Dominick not only the validity and correctness of his identification but his motive as well. Again as noted by this Court earlier, Mr. Dominick was

clearly, clearly painted as one who had an ulterior motive for coming forward to save his own hide as you will. The jury got to examine that. They got to consider that. The Court clearly instructed the jury as to the law regarding identification and the jury was further instructed by the Court that they were the exclusive judges of the facts. And for this purpose they determine the credibility of the witnesses. They may take into account their manner on the [42] stand. They got to see Mr. Dominick with all of his shuffling physically as well as his verbal antics, the manner in which he testified. His very animated style. They got to observe that and they were told by the Court, they were charged, they were required as this Court trusts they did to examine his manner on the stand, his demeanor. The probability or improbability of his statements. And perhaps most importantly the Court instructed the jury as to every witness including Mr. Dominick they were to consider what motive, what interest he may have in this particular case as well as every other fact surrounding the filing of the testimony of each witness that may in any way assist the jury in evaluating their testimony.

I commend the defense for the presentation they have made pre-trial, during the trial and their post- trial filings and their post-trial arguments and their presentation of the additional evidence.

But what this jury ultimately found that there were facts that led them to believe that Ms. Garcia, Ms. Davis and Mr. Dominick were accurate. They were correct. Individually and collectively in saying that Mr. Henry was indeed the man who took the lives of the two ladies [43] who were the victims in this case.

Appendix D

We know as recently as this past year the Louisiana Supreme Court has upheld a death penalty in State of Louisiana versus Felton, F-E-L-T-0-N, Dorsey, D·O-R-S-E-Y, at 74 So. 3rd, page 603. In that case it was identification that was the issue. And the Court pointed out where the key issue is identity the State is required to negate and reasonable probability of misidentification. The Court noted that a positive identification by even one witness if believed by the fact finder is sufficient to support a conviction in the absence of internal contradiction or irreconcilable conflict with physical evidence.

Here the issue of identity was argued. It was challenged in a most vigorous fashion as it should be in any case especially where the consequences are as serious as they were in this one. Where the potential penalty was death.

But ultimately the conclusion of the jury in this courts opinion is not to be reversed.

I ran across a quote from former President John Adams and it says the following: That facts are stubborn things. Whatever may be our wishes, our inclinations or the dictates of our [44] passion they can not alter the state of facts in evidence.

Here again I applaude the defense for their passion in representing this gentleman.

However I find that what was presented, the totality and I keep using that word, the totality of what was

presented and the convincing nature of Mrs. Garcia, Ms. Davis and yes, Mr. Dominick of what they told the jury and the certainty with what they told the jury end the conviction that came forth from their testimony as to that degree of certainty is not something that this Court shall interfere with.

I find that despite the impassioned plea of the defense and all of the points that it has made that that indeed can not alter the state of facts in evidence. And for this reason the Court denies the Motion or a New Trial.

The Court notes the objection to protect the record on behalf of the defense.

The defendant is entitled if he wishes for a 24 hour delay for sentence to be imposed. If he allows the sentence to be imposed today we all know what it must be. It is that which was dictated by our jury under our law. He then may begin the immediate process of his appeal [45] as it relates to all of the issues that were visited before trial, during trial and after trial that he finds himself aggrieved by.

Do you need a moment to confer with the gentleman, Mr. Rocks? Does he wish to wait 24 hours or does he wish to be sentenced today?

MR. ROCKS:

Your Honor, Michael Rocks on behalf of Darrill Henry. After conferring with co-counsel and Mr. Henry we wish to exercise Mr. Henry's right to his minimum of a 24 hour delay.

Appendix D

THE COURT:

He wishes to exercise that?

MR. ROCKS:

Yes, your Honor.

THE COURT:

Then I will come back one day next week. If it is all right with each of you I will come back Thursday morning, the 24th if that's all right with you.

MR. ROCKS:

That's fine.

THE COURT:

The matter will be set for this coming Thursday morning for formal sentencing.

WHEREUPON THE MATTER WAS CONCLUDED.