No. 15-50

In The
Supreme Court of the United States

DARRILL M. HENRY,

Petitioner,

v.

THE STATE OF LOUISIANA,

Respondent.

On Petition For Writ Of Certiorari To The Louisiana Fourth Circuit Court Of Appeal

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether it violates a defendant's constitutional right to present a defense when a state allows its trial courts to exercise their discretion in allowing expert testimony in the field of eyewitness identifications.

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OTHER AUTHORITIES

The State of Louisiana, through the Orleans Parish District Attorney's Office, respectfully opposes Darrill M. Henry's petition for a writ of certiorari to review the judgment of the Louisiana Fourth Circuit Court of Appeal in this case.

OPINIONS BELOW[1]

The published opinion of the Louisiana Fourth Circuit Court of Appeal is appended to Petitioner's brief. Pet. App. B. The decision of the Louisiana Supreme Court denying discretionary review is appended to Petitioner's brief. Pet. App. A. Respondent State of Louisiana appends Petitioner's "Motion *in limine* to Admit Expert Testimony on the Effect of Proper Police Procedures on Perception, Memory and Eyewitness Reliability" filed in the trial court. Resp. App. A.

JURISDICTION

The Louisiana Fourth Circuit Court of Appeal entered judgment against the Petitioner on August 6,

[1] Hereafter, citations to the appendices will be cited as "Pet. App. ___" and "Resp. 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.

2014. The Louisiana Supreme Court denied discretionary review on April 10, 2015. Petitioner filed his petition for writ of certiorari on July 9, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

> 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 defence.

U.S. Const. amend. VI.

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State 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, § 1.

INTRODUCTION

Petitioner's sole question presented in this case is founded on a false premise: that Louisiana has a "per se ban on the introduction of eyewitness identification expert testimony." Pet. i. As explained at length below, Louisiana trial courts – just like the vast majority of other courts around the country – have discretion whether to allow such expert testimony. Indeed, the very decision that Petitioner seeks to appeal here makes that point crystal clear: "[I]n 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." App. 37a (emphasis added).

There are additional reasons for denying the petition. First, Petitioner made no substantive constitutional claims before the trial court. This Court should follow its usual practice and decline to exercise its discretionary authority to review a claim that was not properly preserved below.

Second, Petitioner wrongly asserts that his right to present a complete defense is dependent on being tried in a non-Louisiana jurisdiction. Pet. 11. Not so. If Petitioner had been tried in another jurisdiction, it is likely the trial court would have excluded Petitioner's proffered expert witness, just as the Louisiana trial court did here.

Third, Petitioner is wrong on the merits. Those courts outside of Louisiana that have barred expert

testimony regarding eyewitness identification have properly concluded that such testimony invades the province of the jury.

For all these reasons, the petition should be summarily denied.

STATEMENT OF THE CASE

On June 15, 2004, at approximately 1:30 p.m., Petitioner stabbed 89 year old Durelli Watts fourteen times in the face, chest and neck inside her home in New Orleans, Louisiana. Petitioner proceeded to burn Ms. Watts alive and set her house ablaze. As he was leaving the residence, Petitioner encountered Ms. Watts' 67 year old daughter, Ina Gex, and shot Ms. Gex dead on the front porch. At least *three* neighbors independently corroborated that it was Petitioner who committed these vicious murders.

The first neighbor was Ms. Cecilia Garcia, who was on the phone at about 1:30 p.m. when she heard "what sounded like a pebble hitting her house." Pet. App. 11a. (The sound was actually Petitioner shooting Ina Gex.) Ms. Garcia went to her front porch and saw a man standing on Durelli Watts' front porch and "a woman in a prone position on the porch." Pet. App. 11a. Ms. Garcia started walking toward Ms. Watts' house as Petitioner started walking away. Petitioner walked "leisurely" (as if "taking a Sunday stroll"), and Ms. Garcia and Petitioner passed each other on the street. Pet. App. 11a. When Ms. Garcia saw a sketch

of the perpetrator on television that evening, she thought it was incorrect. Pet. App. 12a. She directed her husband to draw a more accurate sketch, and she later identified Petitioner in a six-person photo lineup and also "unequivocally identified" Petitioner at trial. Pet. App. 11a-12a.

The second neighbor was Steven Dominick, who was at his parents' house, directly across the street from Ms. Watts' residence, the afternoon of the murders. Pet. App. 12a. Mr. Dominick walked to the house's front picture window when he heard gunshots from across the street and saw Ms. Gex fall on Ms. Watts' front porch. Pet. App. 12a. Mr. Dominick witnessed Petitioner put a gun to Ms. Gex's head and fire another shot. Pet. App. 12a. He then saw Petitioner walk "casually" from the scene. Pet. App. 12a. Mr. Dominick monitored Petitioner's movements from inside the house, called 911, and carried Ms. Gex from the burning house. Pet. App. 12a. Although Mr. Dominick was unable to make a positive identification in a photographic lineup, he happened to be placed in the same holding cell as Petitioner when both were waiting for a court hearing. Pet. App. 13a. Mr. Dominick immediately recognized his cellmate as the man who shot Ms. Gex and alerted jailhouse deputies. Pet. App. 13a.

The third neighbor was Ms. Linda Gex Davis, who was retrieving something from the trunk of her car when she saw Petitioner speaking to Ms. Watts in Ms. Watts' front doorway. Pet. App. 14a. Not witnessing any trouble, Ms. Davis returned inside her home

until she also heard gunshots. Pet. App. 14a. Ms. Davis walked to her front door, saw a woman lying on Ms. Watts' front porch, and also saw the man she had previously seen talking to Ms. Watts shoot the woman on the porch three times. Pet. App. 14a. Ms. Davis continued to watch the shooter as he walked from the porch and up the street; "she had a good opportunity to view Petitioner's face as he stood on the porch speaking with Ms. Watts," *before* the excitement of the gunshots. Pet. App. 14a. Moreover, because Petitioner walked slowly away from the crime scene and "turned several times to see if anyone was behind him," Ms. Davis had ample "opportunity to get a good look at" Petitioner. Pet. App. 15a. Ms. Davis positively identified Petitioner as the shooter from a photo lineup and in court. Pet. App. 15a.

I. Proceedings Below

A. Trial Court Proceedings

On September 2, 2004, the Orleans Parish Grand Jury indicted Petitioner with two counts of first degree murder, a charge which carries a possible death sentence in Louisiana. On September 29, 2004, Petitioner, through appointed counsel, moved to suppress the identifications made by Ms. Watts' neighbors and others. At the conclusion of an evidentiary hearing on February 11, 2005, the trial court denied Petitioner's motion.

The case was scheduled for trial on August 8, 2005, but was continued until November 15, 2005 on

defense motion. In the interim, Hurricane Katrina struck New Orleans, causing a stall in Petitioner's case until late 2006. The trial court appointed Petitioner new counsel on October 26, 2006.

Starting in early 2007, Petitioner's new attorneys filed a flurry of additional pleadings and moved to reopen Petitioner's previously denied motion to suppress the identifications. The trial court obliged, and after three additional evidentiary hearings in 2008-09, the trial court again denied the motion. Pet. App. 27a.

Pretrial litigation continued over the next several years, and on July 22, 2011, less than a month before trial, Petitioner filed a "Motion *in limine* to Admit Expert Testimony On the Effect of Proper Police Procedures on Perception, Memory and Eyewitness Reliability." R.-429. Specifically, Petitioner moved to introduce the testimony of Dr. John C. Brigham, a social psychologist, regarding how the memories of two eyewitnesses, Cecilia Garcia and Linda Gex Davis, were affected by purportedly suggestive photographic lineups. R.-431-33. Petitioner attempted to distinguish Mr. Brigham's proposed testimony from that excluded by the Louisiana Supreme Court in *State* v. *Young*, 09-1177 (La. 4/5/10); 35 So. 3d 1042. Significantly, Petitioner did *not* argue that the holding in *Young* was unconstitutional.[2] *See* Pet. App. 70a.

[2] In the last sentence of the last page of Petitioner's motion *in limine*, he alleged generically that excluding his expert's

(Continued on following page)

Although Petitioner claimed during oral argument that he did not intend to introduce evidence regarding the reliability of the witnesses, Petitioner attached to his motion *in limine* a written statement by Dr. Brigham in which the doctor opined in detail that the witness's identifications were unreliable. Pet. App. 73a; R.-467-68. The trial court denied Petitioner's motion, citing *Young*. Pet. App. 74a.

On August 17, 2011, jury selection began, and trial commenced August 23, 2011. On the evening of August 31, 2011, Petitioner was found guilty as charged. On September 2, 2011, at the conclusion of the penalty phase, the jury spared Petitioner the death penalty and recommended a life sentence.

On January 12, 2012, Petitioner filed a motion for new trial and again argued that the exclusion of the testimony of his proposed expert was in error. Again, no constitutional issues were litigated. *See* Pet. App. 187a-89a. The trial court denied the motion after argument on May 18, 2012. Petitioner was sentenced to two concurrent life sentences on May 24, 2012.

B. Appeal

On direct appeal, Petitioner argued, *inter alia*, that the photographic lineups presented to the eyewitnesses were unduly suggestive, and the testimony

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testimony would violate the state and federal constitutions, but he presented no substantive arguments on this issue. R.-434.

of Petitioner's proposed expert was erroneously excluded. Critically, Petitioner claimed that he had only intended to introduce expert testimony to support his motion to suppress the identifications, *not* to refute the eyewitness identifications at trial. *See* Pet. App. 36a-37a. A three-judge panel of the Louisiana Fourth Circuit Court of Appeal affirmed Petitioner's convictions and sentences on August 6, 2014, noting that "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." Pet. App. 25a. Ultimately, the court held, "in accordance with the current controlling jurisprudence of the Louisiana Supreme Court," that the trial court did not "abuse[ ] its discretion in refusing to allow the defense expert to testify." Pet. App. 37a. The Honorable Max N. Tobias concurred, opining that *Young* does not serve as a complete bar to the admission of eyewitness expert testimony. Pet. App. 44a-64a. The Honorable Madeleine M. Landrieu agreed with that assessment. Pet. App. 64a.

On April 10, 2015, the Louisiana Supreme Court denied supervisory review. Six of the seven justices voted to deny Petitioner's application.[3] Justice Marcus R. Clark issued a concurring opinion and addressed Judge Tobias's opinion below, citing the reasoning espoused in *Young*. Pet. App. 3a-4a. Justice

[3] Chief Justice Bernette J. Johnson, who concurred in *Young* that expert eyewitness testimony is not *per se* inadmissible, did not vote.

Jefferson D. Hughes, III, however, also issued a concurring opinion agreeing with Judge Tobias stating, "I do not consider the issue closed." Pet. App. 5a.

II. Facts Presented at Trial

A. The Investigation

Durelli Watts was an elderly seamstress known to employ men in her neighborhood to perform odd jobs and errands. The night before her untimely death, Ms. Watts' grandson offered to cut her grass, but she informed him she had already hired someone to do the job. Ms. Watts told her grandson she did not trust the man she hired but did not identify him by name.

On Tuesday, June 15, 2004, at approximately 1:53 p.m., police were dispatched to Ms. Watts' home located in the Gentilly neighborhood of New Orleans at 1930 Duels Street. When police arrived, the home was on fire and the body of Ms. Watts' daughter, Ina Gex, had been moved by neighbors from the front porch across the street. Ms. Gex was unresponsive and suffering from gunshot wounds to her forehead, chest, back and arm. When firefighters entered the home, they found Ms. Watts lying next to the kitchen stove. Ms. Watts had been stabbed fourteen times in the face, chest, and neck before being doused with accelerant and set on fire. The autopsy examiner determined that Ms. Watts was still alive when she started to burn.

When firefighters made entry to Ms. Watts' residence, the kitchen faucet was running, and police discovered her purse open on the front bedroom floor. These facts led detectives to conclude the perpetrator washed up in the kitchen after stabbing Ms. Watts and was in the process of rifling through her purse when Ms. Gex arrived. Detectives discovered a small amount of blood on the side of the kitchen stove and on the refrigerator. Crime scene technicians swabbed the area, and Anne Montgomery, an expert in DNA analysis, later testified one of the swabs contained a mixture of two DNA profiles: one belonging to Ms. Watts and another belonging to someone other than Petitioner. The expert testified the unknown DNA profile could have belonged to anyone who had previously been present in Ms. Watts' kitchen. "[T]he DNA in this case proved to be nothing of evidentiary value – nothing implicated or exculpated anyone in the murders." Pet. App. 23a.

The day after the murders, police spoke with Steven Dominick, who lived across the street from Ms. Watts and had observed the perpetrator. Mr. Dominick assisted the police in compiling a composite sketch. On June 17, the sketch was distributed to local media.

The following day, June 18, a man approached detectives at the crime scene and informed them that his wife, Cecilia Garcia, had also seen the perpetrator, and that she believed the sketch that had been broadcast was inaccurate. He provided them with a sketch he drew based upon Ms. Garcia's description.

At that time, Ms. Garcia was afraid and unwilling to speak to police.

After investigating numerous anonymous tips, detectives ultimately developed Petitioner, who had lived several blocks from Ms. Watts, as their prime suspect on June 23.[4] The lead detective, Winston Harbin, compiled a six-person photographic lineup containing Petitioner's picture and five other individuals of like characteristics that were randomly selected by a computer. The only photographs of Petitioner available in the police's electronic database depicted Petitioner wearing a red shirt, the same color as that worn by the perpetrator. Pet. App. 35a. Detective Harbin composed several lineups with Petitioner displayed in different positions in order to prevent any witness from influencing the identification of any other. Pet. App. 31a.

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[4] Petitioner implies he was developed as a suspect based only upon Crimestopper tips which indicated he resembled the man depicted in the composite sketch. *See* Pet. 5. This is not the case. During the February 11, 2005 preliminary hearing, the lead detective testified Ms. Gex's husband informed him that a "gentleman in the neighborhood" led the family to a nearby residence and informed them the murderer resided there. When police queried the residence, they learned Petitioner lived there and had been arrested twice for domestic violence. The detective was eventually able to speak with the "gentleman," who stated he knew the murderer lived at the residence and had been arrested the night of the crime. The man would not elaborate as to how he knew this information or cooperate further. R.-1071-72.

The following day, June 24, detectives presented one of the lineups to Mr. Dominick. Upon viewing Petitioner's photograph, Mr. Dominick stated he recognized Petitioner from the neighborhood but did not positively identify him as the killer at that time.[5]

On July 7, after Ms. Garcia expressed a willingness to come forward, detectives presented her with a photographic lineup containing Petitioner's picture. Ms. Garcia promptly identified Petitioner as the perpetrator.

That afternoon, detectives arrested Petitioner for the murders of Ms. Watts and Ms. Gex. Petitioner was already in custody at the time, having been arrested approximately eight hours after the murders on unrelated charges. During a recorded interview, Petitioner informed detectives that he was job hunting on June 15 and informed them of the locations he

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[5] Petitioner claims, for the first time, that Mr. Dominick was shown a lineup in which Petitioner was depicted wearing "a white shirt with blue stripes." Pet. 5; *but see* Br. for Def.-Appellant at 5, *State* v. *Henry*, 147 So. 2d 1143 (La. Ct. App. Aug. 6, 2014) (No. 2013-KA-0059) ("Instead of using Mr. Henry's photo from his municipal arrest on June 15, 2004, eight hours after the incident, the police used a photo that was over a year old, because in that photo, he was wearing a red shirt."). Petitioner seemingly implies that after Mr. Dominick failed to identify Petitioner as the killer, police switched the photos to depict Petitioner wearing a shirt of the same color as that worn by the perpetrator. However, there is nothing in the record indicating that the lineup viewed by Mr. Dominick contained a different picture of Petitioner than the lineups viewed by the other witnesses. *See* Pet. App. 29a.

visited. That night, detectives searched Petitioner's mother's residence, where Petitioner was living at the time. No red shirts were discovered, and police seized two pairs of Petitioner's pants and a pair of shoes. A small amount of blood was discovered on one of the shoes, and DNA testing showed the blood was Petitioner's.

During the following weeks, detectives checked Petitioner's alibi by visiting the various businesses he described. They reviewed logs and other documents kept by the businesses and attempted to obtain surveillance footage from June 15. While they confirmed Petitioner had visited the businesses later in the day, they were unable to find any information placing Petitioner at any of the locations before or during the time of the murders. The evidence Petitioner presented at trial likewise failed to show he was elsewhere at or around 1:30 p.m. on June 15, 2004. Pet. App. 25a.

On August 17, two additional witnesses, James and Helen Cheek, were shown photographic lineups containing Petitioner's photograph. The Cheeks did not appear at trial, but the lead detective testified they provided corroborating information and did not exclude Petitioner as a suspect. Tr. 841-42.

In September, Linda Gex Davis, a neighbor and distant relative of Ms. Gex, provided a statement to detectives and prosecutors after receiving a grand jury subpoena. She also positively identified Petitioner as the perpetrator in a photographic lineup.

B. The Eyewitness Testimony

Ms. Garcia, Ms. Davis, and Mr. Dominick, all of whom lived across the street from Ms. Watts, testified at Petitioner's August 2011 trial. Ms. Garcia testified that on June 15, 2004, she heard what sounded like a pebble hitting her house. When she looked outside, she saw a woman, later identified as Ms. Gex, lying on Ms. Watts' front porch. Ms. Garcia grabbed her phone, and when she looked outside a second time, she observed a man she later identified as Petitioner standing next to Ms. Gex looking down at her. Ms. Garcia exited her house and began walking across the street towards the man, and he started to walk away. Ms. Garcia stated she and the perpetrator were in the street at the same time and looked directly at each other from a distance of approximately fifteen feet as he calmly walked away down the street. When she approached the porch, she realized Ms. Gex was bleeding from her head and called 911 before smoke began to billow from the house.

Ms. Garcia testified the perpetrator was a black male with a medium build wearing a "Gilligan" hat, a red shirt and blue pants. She recalled having previously described the perpetrator as wearing sunglasses. She testified that shortly after the murders she saw a sketch of the perpetrator on television, and she found it to be inaccurate because the perpetrator was depicted as having braids or dreads hanging down

below his hat.[6] She stated that because the perpetrator was wearing a hat, she covered the top part of each person's head as she viewed the photographic lineup on July 7, 2004.

Linda Gex Davis, Ms. Garcia's next-door neighbor, testified that on the day of the murders she returned from shopping and realized she had left her phone in her car. When she went back outside, she saw and heard Ms. Watts telling a man, who she later identified as Petitioner, to leave her home. When Ms. Davis went back inside, she heard a shot. She then went to her front door and saw the man stand over Ms. Gex and shoot her. The perpetrator proceeded to dig through Ms. Gex's purse before shooting her again. Ms. Davis called 911 and watched from her upstairs window as the perpetrator walked down the street, repeatedly looking over his shoulder.

Ms. Davis testified she got a good look at the perpetrator's face when she initially saw him on Ms. Watts' porch just prior to the shooting. He was wearing a red shirt and blue jeans, and he did not have a hat or sunglasses on at that time. She did not recall him wearing a hat or sunglasses thereafter. Ms. Davis described the perpetrator's hair as in small

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[6] Petitioner avers Ms. Garcia saw Petitioner's picture on the news prior to identifying him in the photographic lineup. Pet. 6. This is incorrect. Ms. Garcia's identification of Petitioner formed the basis for the warrant for Petitioner's arrest. There is no indication Ms. Garcia viewed Petitioner's picture prior to her identification. *See* Pet. App. 11a-12a, 27a-30a, 33a-34a.

jheri curls, and she recalled having previously described him as having deep-set eyes.

Ms. Davis testified she was initially afraid to cooperate with law enforcement, but did so at the urging of her family after receiving a grand jury subpoena. She acknowledged that Petitioner was depicted wearing a red shirt in the photographic lineup, and she believed the picture of Petitioner was the same one previously broadcast on the news.

Steven Dominick, Ms. Davis's next-door neighbor, testified he knew Ms. Watts his whole life. He came home for lunch on the day of the murders and heard gunshots from inside the front room of his home. When he ran to the window, he saw Ms. Gex fall to the ground. He then observed a man, who he later identified as Petitioner, put a gun to her head and shoot her at point blank range. Mr. Dominick ran from the window to tell his parents, who were somewhere outside, to come in. When he returned to the window, he watched as the man walked off the porch. Mr. Dominick exited his house to help Ms. Gex, and he saw the perpetrator across the street. Mr. Dominick then reentered his home and called 911. When he came back outside, Ms. Watts' house was on fire, and he thought he saw Ms. Gex's head move. With the help of two other men, he carried Ms. Gex across the street.

Mr. Dominick testified the shooter had a medium brown complexion, small twists in his hair and was clean shaven. Mr. Dominick stated the perpetrator's hair was partially visible when viewed from the rear.

Tr. 250. He wore a red shirt, blue jeans, and a canvas hat with a brim around it. Mr. Dominick stated he assisted the police in compiling a sketch, but did not review the final version before it was released.[7] He stated the sketch depicted the hat too small and the hair too long. Mr. Dominick testified he identified Petitioner in a photographic lineup as looking familiar.

On July 17, 2010, Mr. Dominick was in jail on pending charges and was placed in a holding cell with dozens of other inmates awaiting a court hearing. Petitioner was escorted in, and Mr. Dominick testified he recognized Petitioner immediately as the killer. Mr. Dominick testified he was afraid for his safety and alerted deputies, who placed him on a tier separate from Petitioner. Pet. App. 13a. The jury heard recorded phone calls placed by Mr. Dominick from jail to his family members which corroborated these facts. *See* Tr. 442; Pet. App. 24a. Mr. Dominick's lawyer, John Butler, Esq., testified he asked prosecutors repeatedly for consideration in Mr. Dominick's case in exchange for his testimony, and the State flatly

[7] Petitioner alleges, "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." Pet. 5. This is Petitioner's interpretation of Mr. Dominick's testimony. It was not established at trial that Mr. Dominick told police the sketch was inaccurate prior to its release. *See* Tr. 295 ("Q. When did you first see the final sketch? A. I believe I saw it in the newspaper.").

refused. Mr. Dominick testified against Mr. Butler's advice. Pet. App. 24a-25a.

REASONS FOR DENYING THE PETITION

I. Louisiana Has Not Imposed a *Per Se* Ban on the Admission of Expert Testimony Pertaining to Eyewitness Identifications.

The chronology of appellate decisions in Louisiana regarding eyewitness-identification expert testimony begins with *State* v. *Stucke*, 419 So. 2d 939 (La. 1982). In *Stucke*, a pre-*Daubert* case, the Louisiana Supreme Court canvassed decisions from other jurisdictions and concluded that "the trial court *did not abuse his discretion* in failing to allow the expert witness to testify." *Id.* at 945 (emphasis added). The *Stucke* decision did not purport to impose a *per se* bar on such testimony, and the concurring opinion emphasized that important point: "Trial courts should not view this decision as imposing a 'rule of inadmissibility' with regard to expert testimony of the nature offered here." *Id.* at 951 (Lemmon, J., concurring). Instead, "trial courts should cautiously approach the question of admissibility of such evidence in each instance." *Id.*

One year later, the Louisiana Supreme Court revisited the admissibility of eyewitness-identification expert testimony in *State* v. *Chapman*, 436 So. 2d 451 (La. 1983). The decision affirmed the trial court's exclusion of the testimony, emphasizing the circumstantial evidence which corroborated the victim's

positive identification of the defendant. *Stucke*, 419 So. 2d at 951. Referencing *Stucke*, the *Chapman* court highlighted Justice Lemmon's concurring opinion "emphasiz[ing] 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.* (emphasis added).

In subsequent years, various Louisiana Court of Appeals decisions reaffirmed the principle that trial courts have discretion whether to admit eyewitness-identification expert testimony. *E.g.*, *State* v. *Coleman*, 486 So. 2d 995, 1000 (La. App. 2d Cir.), *writ denied*, 493 So. 2d 634 (La. 1986) ("Competence of an expert witness is a question of fact to be determined within the sound discretion of the trial judge. . . . The trial judge [here] did not abuse his discretion in refusing to allow this expert witness to testify."); *State* v. *Gurley*, 565 So. 2d 1055, 1057-58 (La. App. 4th Cir. 1990), *writ denied*, 575 So. 2d 386 (La. 1991) ("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. . . . We . . . conclude that the trial court did not abuse his discretion in failing to allow the expert witness to testify.").

The Louisiana Supreme Court again addressed the issue of eyewitness-identification expert testimony in *State* v. *Higgins*, 898 So. 2d 1219 (La. 2005). Citing *Stucke*, the court emphasized again the trial

court's "wide discretion" to determine an expert witness's competence and essentially rejected the idea that there was any *per se* ban on the admissibility of such evidence: "Under *Stucke* and its progeny, a trial court *may* exclude expert testimony regarding the reliability of eyewitness identification." *Id.* at 1239-40 (emphasis added).

Finally, the Louisiana Supreme Court discussed the issue of eyewitness-identification expert testimony in *State* v. *Young*, 35 So. 3d 1042 (La. 2010), a case in which the trial court exercised its discretion to admit an expert in the field of eyewitness identification psychology. The court acknowledged "the ongoing legal debate over the admissibility of expert psychological testimony on the validity of eyewitness identification." *Id.* at 1049. And the court expressed the concern, echoed by numerous courts in other jurisdictions, that such an expert "has the broad ability to mislead a jury through the 'education' process into believing a certain factor in an eyewitness identification makes the identification less reliable than it truly is." *Id.* at 1050 (citing *United States* v. *Angleton*, 269 F. Supp. 2d 868, 873-74 (S.D. Tex. 2003)), and *United States* v. *Lester*, 254 F. Supp. 2d 602, 608-09 (E.D. Va. 2003). Declining to overrule *Stucke*, the court reaffirmed its commitment to an abuse-of-discretion standard but concluded that the trial court did abuse its discretion in allowing the expert psychologist to testify in this particular case. *Id.*

In a concurring opinion, Justice Johnson summarized the current state of Louisiana law: "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." 35 So. 3d at 1051 (Johnson, J., concurring). "In *Stucke*, this Court held that the trial court did not abuse its discretion in excluding expert witness [testimony] regarding the quality of an identification." *Id*. "[I]n *Chapman*, this Court . . . cited the *Stucke* decision, and discussed the concurring opinion in *Stucke* which emphasized the trial court's discretion in admitting such evidence." *Id.*

And to remove any lingering doubt, concurring Justice Knoll criticized *Young* for *declining* to adopt a bright-line, *per se* rule and urged the Louisiana Supreme Court to do so. *Id.* at 1052 (Knoll, J., concurring) ("[T]he resolution of the issue in this case concerning the admissibility of expert testimony regarding this 'junk science' is best resolved by the adoption of a *per se*/bright-line rule of inadmissibility.").

The most recent case involving this issue was rendered this past June, when the Louisiana Supreme Court denied review in *State* v. *Lee* after a split panel of the Louisiana Fourth Circuit Court of Appeal reversed a trial court's ruling admitting eyewitness expert testimony. *Lee*, 14-1335 (La. App. 4 Cir. 3/24/15) (unpub.); *writ denied*, 15-0899 (La. 6/19/15); ___ So. 3d ___. The majority of the Fourth Circuit panel found it "unnecessary to base its decision . . . on a *per se* rule of exclusion" noting, "this is not a case in which there is no corroborating evidence supporting the eyewitness's identification of the defendant."

Id., p. 5. Judge Madeleine M. Landrieu dissented, finding the trial court acted within its discretion. *Id.*, p. 6 ("I do not read *State* v. *Young* to impose an absolute ban on expert testimony concerning eyewitness identifications in all circumstances.").

This Court should decline to exercise its discretionary jurisdiction to review Louisiana law when a majority of the Louisiana Supreme Court has yet to determine whether a *per se* rule is actually the law of the state. Only two Louisiana Supreme Court Justices to date, Clark and Crichton, have explicitly found that *Young* represents a bright-line rule of inadmissibility. *See Lee*, 15-0899, p. 1. Justice Knoll strongly favored such a rule in *Young*, but indicated one had not actually been imposed by the majority opinion. *Young*, 35 So. 3d at 1052. On the other hand, Chief Justice Johnson, Justice Weimer, and Justice Hughes have all posited that Louisiana jurisprudence allows trial courts discretion when there is a dearth of corroborating evidence. *See Young*, 35 So. 3d at 1051-52; Pet. App. 5a. Finally, Justice Guidry, the author of the *Young* opinion, has not yet articulated an opinion on the issue. This Court should not exercise its jurisdiction before a majority of the Louisiana Supreme Court has resolved whether *Young* actually represents a complete bar to eyewitness identification expert testimony.

II. Petitioner Did Not Properly Present His Constitutional Arguments to the Louisiana Courts.

"[T]his Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim was either addressed by or properly presented to the state court that rendered the decision [it has] been asked to review." *Howell* v. *Mississippi*, 543 U.S. 440, 443 (2005) (internal quotations omitted). "[W]hen . . . the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street* v. *New York*, 394 U.S. 576, 582 (1969).

Prior to trial and during post-trial proceedings, Petitioner argued that the holding in *Young* did not bar the expert testimony he sought to introduce at trial. While Petitioner made a passing reference to constitutional principles in the last sentence of the last paragraph of his motion *in limine*, he made no substantive constitutional claims before the trial court. *See* R.-434; Pet. App. 70a, 187a-89a. As a result, it appears the Louisiana appellate courts generally disregarded Petitioner's constitutional arguments, as they had been brought for the first time on appeal. *Cf. State* v. *Hankton*, 12-0375 (La. App. 4 Cir. 8/2/13); 122 So. 3d 1028, 1029, *writ denied*, 2013-2109 (La. 3/14/14); 134 So. 3d 1193 and *cert. denied*, 135 S. Ct. 195 (2014) (finding defendant's failure to request evidentiary hearing on constitutionality of non-unanimous

jury verdict precluded review); *State* v. *Schoening*, 00-0903 (La. 10/17/00); 770 So. 2d 762, 766 ("because there was no contradictory hearing held specifically for the purpose of debating the constitutional question, there is an inadequate record on review"). This Court should not address an issue that was neither properly presented nor fully litigated in state court.

III. Had Petitioner's Trial Been Conducted in a Jurisdiction Which Explicitly Affords Trial Courts Discretion to Admit Eyewitness Identification Expert Testimony, the Testimony of Petitioner's Expert Might Still Have Been Excluded.

Petitioner was positively identified by two witnesses in photographic lineups and by a third who recognized him among hundreds of other similarly dressed men while in jail. In his motion *in limine*, Petitioner wrote that his proposed expert, Dr. Brigham, "will not address 'significant stress, weapon focus, cross-race identification, identification based on time delays and psychological phenomena, such as feedback factor and unconscious transference' . . . . His testimony will address suggestibility of lineups which are improperly composed." R.-432 (quoting *Young*, 35 So. 3d at 1049). Petitioner attached a written declaration of Dr. Brigham, which stated he reviewed the photo lineups shown to Ms. Garcia and Ms. Davis and found them to be suggestive because Petitioner was depicted wearing a red shirt. R.-467. Dr. Brigham wrote that "research has shown that an innocent suspect wearing the same type of clothes as the

perpetrator is over *twice* as likely to be falsely identified than if he were wearing different clothes. That is known in the research literature as 'clothing bias.'" *Ibid.* (italics in original).

Under the circumstances of this case, it is more than likely Petitioner's expert still would have been excluded even if Petitioner committed the murders in another jurisdiction. Petitioner correctly notes that the majority of jurisdictions "afford trial courts the discretion to determine whether or not eyewitness expert testimony should be admitted in a particular case." Pet. 12. At the time of Petitioner's 2011 trial, it appears only one appellate court had addressed expert testimony regarding clothing bias and determined it was properly excluded. *See United States* v. *Welch*, 368 F.3d 970, 974 (7th Cir. 2004), *cert. granted, judgment vacated on other grounds*, 543 U.S. 1112 (2005) ("Although the average person may not know what the term 'clothing bias' means, it is common knowledge that one may mistake a person for someone else who is similarly dressed."). Furthermore, Petitioner sought to have his expert offer an opinion on the particular lineups shown to the witnesses, which some states do not allow. *E.g.*, *Washington* v. *State*, 296 Ga. 252, 254 (Ga. 2014) ("direct questions specifically related to the photos in the lineup were appropriately excluded" because "an eyewitness' personal ability to identify another person is a matter to be explored exclusively on direct and cross-examination"). Moreover, while Petitioner was convicted based on eyewitness testimony, he was identified by *multiple* eyewitnesses. *See Cook* v. *State*,

734 N.E.2d 563, 571 (Ind. 2000) ("Cases that more typically lend themselves to the admission of expert eyewitness identification testimony generally involve a single eyewitness"). There is no guarantee Petitioner's proffered expert would have been permitted to testify in another state. *See Smiley* v. *State*, 84 A.3d 190, 211, *cert. granted*, 89 A.3d 1104 (Md. Ct. Spec. App. 2014) and *aff'd*, 111 A.3d 43 (Md. 2015) (finding Dr. Brigham's proposed testimony regarding high stress, weapon focus, and unconscious transference are "intuitive" and would "not be of real appreciable help to the trier of fact.").

IV. The Opinions of Courts Which Have Determined That Expert Testimony Regarding Eyewitness Identifications Invades the Province of the Jury Are Neither Arbitrary Nor Disproportionate.

"A defendant's right to present relevant evidence is not unlimited," and "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *United States* v. *Scheffer*, 523 U.S. 303, 308 (1998) (upholding *per se* rule against admission of polygraph evidence in court martial proceedings). The federal constitutional right to present a defense is only violated by state evidentiary rules that "infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve." *Holmes* v. *S. Carolina*, 547 U.S. 319, 319-20 (2006) (quoting *Scheffer*, 523 U.S. at 308).

"Only rarely [has this Court] held that the right to present a complete defense was violated by the exclusion of defense evidence under a state rule of evidence." *Nevada* v. *Jackson*, 133 S. Ct. 1990, 1992 (2013) (citing *Holmes* v. *S. Carolina*, 547 U.S. 319, 330 (2006) (state supreme court's rule excluding evidence of third party guilt did "rationally serve" legitimate purpose); *Rock* v. *Arkansas*, 483 U.S. 44, 62 (1987) (*per se* rule limiting defendant's testimony to matters he could prove were recalled prior to hypnosis infringed on right to testify); *Chambers* v. *Mississippi*, 410 U.S. 284, 297 (1973) (state did not even attempt to explain reason for its "voucher" rule which precluded defense from impeaching its own witness); *Washington* v. *Texas*, 388 U.S. 14, 22 (1967) (rule disqualifying alleged accomplice from testifying on behalf of defendant but not prosecution could not be defended "rationally")).

The Louisiana Supreme Court's decision in *Young* is grounded in Article 702 of the Louisiana Code of Evidence. 35 So. 3d at 1043 ("The proposed testimony on the general factors contributing to a misidentification does not satisfy the standard for admission of expert testimony articulated under Louisiana Code of Evidence article 702."). The article, which mirrors Rule 702 of the Federal Rules of Evidence, provides that expert testimony is only admissible if it "will help the trier of fact to understand the evidence or to determine a fact in issue."

Simply because an aspect of human behavior can be subjected to scientific testing does not necessarily

render it an appropriate subject for expert testimony at a criminal trial. "The basis for the admission of expert testimony is necessity, arising out of the particular circumstances of the case, and that the witness can offer assistance on a matter not within the knowledge or common experience of people of ordinary intelligence." 31A Am. Jur. 2d Expert and Opinion Evidence § 21. Louisiana, like many other courts, is reluctant to allow experts to opine about memory and an individual's ability to properly recognize others. While jurors may be unaware of the terms psychologists have dubbed for various principles pertaining to memory, it is not unreasonable for courts to conclude that the foibles of the mind are within the experience of the average citizen. *See Welch*, 368 F.3d at 974 ("it does not require an expert witness to point out that memory decreases over time."). In the vast majority of cases, expert testimony regarding perception is neither required nor desirable. *See United States* v. *Hall*, 165 F.3d 1095, 1107 (7th Cir. 1999) ("the credibility of eyewitness testimony is generally not an appropriate subject matter for expert testimony because it influences a critical function of the jury – determining the credibility of witnesses."). Such evidence is particularly unnecessary in a case such as this involving multiple eyewitnesses. *See United States* v. *Bartlett*, 567 F.3d 901, 907 (7th Cir. 2009) ("the scholarly findings about eyewitnesses have only limited application when multiple witnesses identify the same person."). Louisiana's preference for "thorough effective cross-examination and artfully crafted jury instructions"

over a battle of psychologist witnesses is neither arbitrary nor disproportionate. *Young*, 35 So. 3d at 1050.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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SEPTEMBER 24, 2015

APPENDIX

STATE OF LOUISIANA	CRIMINAL DISTRICT COURT
VERSUS	
DARRILL HENRY	PARISH OF ORLEANS
FILED:	CASE NO. 451-696, SECTION L
	DEPUTY CLERK

MOTION IN LIMINE TO ADMIT EXPERT TESTIMONY ON THE EFFECT OF PROPER POLICE PROCEDURES ON PERCEPTION, MEMORY AND EYEWITNESS RELIABILITY

July 22, 2011

COMES NOW, defendant, Darrill Henry, and moves this Honorable Court for an Order In Limine to admit expert testimony on the effects of proper police procedures on the perception, memory and reliability of eyewitnesses.

This request is distinguished from the Louisiana Supreme Court decision in *State v. Young*, 2009-KK-1177, (La. 4/5/10), 35 So.2d 1042, wherein it was held that "proposed testimony on the general factors contributing to a misidentification does not satisfy the standard for admission of expert testimony articulated under Louisiana Code of Evidence article 702, because the testimony will not aid in the jury in its deliberation, and instead, is inclined to be more prejudicial than probative in value."

As the Supreme Court observed, "potentially persuasive expert testimony as to the generalities of the inaccuracies and unreliability of eyewitness observations, are already within a juror's common knowledge and experience, [and] will greatly influence the jury more than the evidence presented at trial. (Citation omitted)."

The proposed expert testimony in this case will not address what the witnesses observed, for how long, under what conditions. The testimony will not address "the generalities of the inaccuracies and unreliability of eyewitness observations."

To the contrary, the expert testimony required in this case is narrowly crafted to the peculiar facts of this case. Proper police procedures can enhance the reliability and validity of the identification. In the instant case, in contrast to *Young*, the expert testimony does not presume a misidentification. However, flawed police procedures, and its effect on memory and recall, have undermined the reliability beyond the normal experience of the average juror.

A key feature described by all witnesses in this case was the description of the perpetrator as wearing a red shirt. It was acknowledged by Detective Harbin at the suppression hearing that the red shirt was significant.

On June 23, 2004, after unverified double hearsay allegations and minimal investigation, the lead detective, Winston Harbin, commenced composition of a photolineup [sic] containing the photograph of

Darrill Henry. As he composed the lineup, the lead detective was aware of the importance of the red shirt as an identifying factor.

Detective Harbin was also aware that Darrill Henry was arrested on June 15, 2004, and was in custody. Detective Harbin was aware that Mr. Henry was wearing a white tee-shirt when arrested on unrelated municipal charges several hours after the murders. His booking photograph showed him wearing a white tee-shirt. Det. Harbin even called the officer who arrested Mr. Henry and confirmed that Mr. Henry was wearing a white tee-shirt. However, Detective Harbin did not utilize this most recent photograph of Darrill wearing a white tee-shirt. The detective utilized a photograph from a 2003 arrest, wearing a red shirt.

Accordingly, the placement of a photo of Mr. Henry in a red shirt in the lineup was known by Det. Harbin to be a significant feature for any potential witness who viewed the photo lineup.

The fact of this awareness by Det. Harbin is shown by the fact that he composed a second lineup with filler photos of a second individual wearing a red shirt, and two others wearing orange shirts. The first lineup had only Darrill Henry wearing a red shirt. *See* Exhibit 1, *in globo*. Thus, Detective Harbin could have shown the second, less-suggestive line-up to Ms. Garcia and Ms. Davis. However, Detective Harbin showed the suggestive line-up to Ms. Garcia three weeks after the murders; he showed this suggestive

line-up to Ms. Davis two and one-half months after the murders.

The line-up shown Ms. Garcia and Ms. Davis focused their attention on the photo of the only person in the red shirt. This is, by definition, suggestiveness. *See State v. Sterling*, 687 So.2d 74, 75 (La. App. 4 Cir. 1996).

The action of Detective Harbin violated the NOPD's own written procedures as well as the standards set forth by the United States Department of Justice, promulgated in "Eyewitness Identification – A Guide for Law Enforcement," a research report published by the United States Department of Justice in 1999. This report provided guidelines for all aspects of collecting eyewitness evidence, from 911 calls, witness interviews, line-up composition and identification procedures. *See* www.cops.usdoj.gov ("resource information center").

The issue for the expert is to educate the jury about how Ms. Garcia's memory was affected by the suggested lineup. Ms. Garcia stated she saw a man who seemed to be black, with a thin nose, narrow lips and pointed chin. She has testified that she viewed the photos in the lineup from the nose down, covering the photos with her hand from the eyes up. She did this because she remembered the man in the red shirt wearing a hat and sunglasses, and therefore could not see the upper half of the face. Thus, she focused her attention on the nose, lips, chin and the shirt of the photographs. The lineup procedure

employed by the detective ensured that the only photo of a red shirt to be observed by the witness would be that of Darrill.

Ms. Garcia, despite her specific facial description, chose the photograph of a man whose facial features were in contrast to the description based on her own memory of the face of the man she observed.

Accordingly, an expert's testimony is required to educate the jury regarding why Ceclia would pick the photo of a man whose lower facial features do not match the photo she selected. The expert will address how memory can be affected by suggestive police procedures to produce an unreliable identification. The operation of perception, and how its images are stored as memory in the brain, and are recalled by the brain, will be explained by the expert. These issues are not within the common knowledge and experience of the lay juror.

This testimony will not foster a *per se* disbelief in eyewitness testimony. It will educate the jurors as to how a witness's memory could be of a man who looks nothing like Darrill Henry; yet will point with certainty in-court to Darrill Henry as the man she saw in the red shirt. The reason for this "certainty" is the improper lineup procedure employed by Detective Harbin; not generalized unreliability of eyewitness identifications.

This issue is analogous to the improper collection of any evidence, e.g., DNA or fingerprints: if it is

improperly collected, its reliability as an identifier of a perpetrator is undermined.

This expert testimony will be even more relevant and material to the jurors regarding witness Linda Gex Davis. Ms. Davis was also shown the lineup with the fillers with only Mr. Henry wearing a red shirt. However, Ms. Davis was not shown the lineup until September 2, 2004. She admitted to Detective Harbin she saw a photograph of Mr. Henry on television the night he was booked with the murders of Ms. Watts and Ms. Gex, July 7, 2004. This photo was the same one as Darrill in a red shirt which was placed in the lineup. *See* Exhibit 2.

Regarding Mrs. Davis, the expert's testimony will address the same issues as that of Ceclia Garcia. However, the expert will further address how the initial memory of the person Ms. Davis saw on June 15, 2004, became replaced by the memory of the person she saw on television July 7, 2004, and was then confirmed by that same photo of the only man in a red shirt on September 2, 2004.

Replacement of the actual memory, and enforcement of the memory of the booking photo seen on television, is beyond the common knowledge of lay persons.

As the court is aware, the issue in *Young* was not whether there are problems of admissibility pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993). The *Young* Court cited *State v. Stucke*, 419 So.2d 939 (La. 1982) and

State v. Higgins, 03-1980 (La. 4/1/05), 898 So.2d 1219, in which the court ruled that the expert testimony was *unnecessary: it would not assist the juror*. *Young*, 350 So.3d 1050.

The defense has retained John C. Brigham, Ph.D., to testify at the trial of this case. *See* Exhibit 3, CV of John C. Brigham. His testimony will ***not*** address "*significant stress, weapon focus, cross-race identification, identification based on time delays and psychological phenomena, such as feedback factor and unconscious transference . . . " See Young*, 35 So.3d 1049. His testimony will address suggestibility of lineups which are improperly composed. See Exhibit 4, Declaration of John C. Brigham.

Why Did Harbin Change Fillers?

On September 25, 2008, in response to questioning, Detective Harbin attempted to explain how he decided to show Ms. Garcia (as ultimately Ms. Davis) a line-up with only Darrill wearing a red shirt, when he had another line-up with three fillers with red and orange shirts:

> Q What criteria did you use to make the decision to show Linda Davis and Cecelia Garcia a photo with only Darrill Henry wearing the red shirt?
>
> A ***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 to 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 to 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.***

Q I'm going to ask the question simply in just layman's terms. You have one photographic lineup with two red shirts; you have one photograph [lineup] with one red shirt. Why did you choose one group of photographs over another to show James Cheeks as opposed to the two other ladies?

> A ***The best answer regarding that question is the fact that I had lineups printed in preparation of showing them to witnesses, and that was the lineup that I took out of the case file and presented to the witness.***

Transcript, September 25, 2008, pp. 17-18 (emphasis supplied).

This testimony indicates at trial that Detective Harbin will testify that the shirt just does not matter: "[t]he witnesses either saw the perpetrator or they didn't see the perpetrator. . . . they either say yes or they say he's not in the there." Detective Harbin, apparently, does not get it. An expert such as Dr. Brigham is required to educate the jury that Det. Harbin is ignorant of the consequences on memory and recall caused by his failure to follow proper lineup procedure.

Absent the testimony of Dr. Brigham, Det. Harbin will be the *sole authority on the consequences of his own failure* to follow proper police procedure. His conclusion will be, that these witnesses saw the man and they picked the man. The detective will assert that his years of professional investigative experience have shown the shirt is irrelevant; it is the face that matters, and Darrill's face was picked.

Dr. Brigham will describe for the jury that if the line-up procedure is fairly and constitutionally

conducted, the odds are heightened that the identification was accurate and that the right man is on trial.

However, if the initial line-up procedure is unfair and suggestive, the odds are increased that the identification was mistaken and that an innocent man is on trial. This initial mistaken identification will be inexorably carried through all future identifications. *See Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247 (1968)[1]. Rarely will a witness who becomes positive by virtue of suggestion, express any doubt in later judicial proceedings. *See* N. Sobel, Eyewitness Identification, at 7-8 (2d ed. 2008).

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[1] "It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. Even if the police subsequently follow the most correct procedures and show him the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification. This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized. (Footnote omitted). . . . Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification. (Footnote omitted)"

The dangers of convicting an innocent man under these circumstances are heightened when the prosecution is a "pure" identification case: a case in which there is no other evidence to establish guilt. The prosecution of Darrill Henry is such a "pure" identification case. Thus, the actions of Detective Harbin have created a real danger of convicting an innocent man.

DNA exoneration evidence complied [sic] by the national Innocence Project has shown that 75% of the wrongful convictions of innocent persons involved mistaken eyewitness identification. *See* www.innocence project.org.

The *effect on memory produced by the flawed procedures employed by the lead detective in this particular case,* ***whether deliberate or misguided***, is not within the "juror's common knowledge and experience . . . "

Wherefore, defendant prays that John C. Brigham be permitted to testify that proper identification procedures enhance the reliability of eyewitness identifications; and that flawed, suggestive identification procedures diminish the reliability of eyewitness identifications. Failure to allow this testimony will deny Darrill Henry due process, the right to present a defense, his right of confrontation and a fair

trial under the Louisiana and United States constitutions.

Respectfully submitted,

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By: /s/ Michael J. Rocks

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been served this day upon the District Attorney for the Parish of Orleans this 22nd day of July 2011.

/s/ Michael J. Rocks

Declaration

Of

John C. Brigham, Ph.D
249 Intrepid Court
Tallahassee, Florida 32312

Who hereby asserts:

That he is a Social Psychologist with expertise in the psychological factors affecting the accuracy of eyewitness identifications; psychology-law interactions; memory; children as witnesses.

* * *

That he has been retained in the capital defense of Darrill Henry to provide analysis of suggestibility of the line-up procedures, and factors affecting the memory recall and retention of the eyewitnesses in this case:

That he has reviewed the following documents in this case:

911 audio tape
Maps of crime scene (including
measurements), Satellite Photo
Garcia Line-up, 7/7/04
Davis Line-up, 9/2/04
Garcia transcribed statement, June 23, 2004
Steven Dominic transcribed statement,
June 16, 2004
Photo lineup composed with the photo
Of Charles “Chuck” Gray
NOPD sketch of suspect
Garcia sketch of suspect

Transcript, Motion Hearing, February 11, 2005
Preliminary Exam transcript
Davis statement, 10 April 7, 2008
Rollin Garcia Statement, April 28, 2008
Supplemental Report, November 22, 2004,
Winston Harbin
Supplemental Report, Det. Nixon
Supplemental report (60pp), Winston Harbin
Various photo line-ups with photo of
Darrill Henry
Orleans Parish Sheriff's Office Web
Page for the Inmate Information for
Darrill Henry, booking date June 15, 2004
including photo
Darrill Henry Booking Photo, February 2003
Photographs of homes of witnesses;
Home of Durelli Watts

That his conclusion is that the photo line-ups shown witnesses Garcia and Davis was suggestive, unfair and biased;

That the photograph lineup used in this case did not meet accepted accepted [sic] standards for a fair, unbiased lineup;

The red shirt makes the defendant stand out, distinctive from the other photos; research demonstrates that a lineup member who is *distinctive* is more likely to be falsely identified, which is noted in the Justice Department's *Eyewitness Evidence: A Guide for Law Enforcement*;

That although the nominal size of the line-up was six individuals, the functional size of the line-up (the number of lineup members who were viable

choices) was only one: the person wearing the red shirt.

That it was in violation of accepted law enforcement procedures to utilize a lineup in which only the suspect was in a red shirt, when it was known that the murderer had worn a red shirt; research has shown that an innocent suspect wearing the same type of clothes as the perpetrator is over *twice* as likely to be falsely identified than if he were wearing different clothes. This is known in the research literature as "clothing bias";

That research has conclusively shown that the likelihood of a mistaken identification is much greater when law enforcement personnel use procedures, such as an unfair lineup, that may bias witnesses' responses and choices. Clothing bias creates a lineup that is highly suggestive and unfair to the suspect, and significantly increases the chances of an erroneous eyewitness identification;

That it is his further conclusion that any positive identification in the present case was likely made on the basis of distinctiveness and/or similar clothing, as indicated by Linda Davis: "I guess they must have taken his picture on the same day;" That the use of the distinctive red shirt made the retrieval phase of memory unreliable (and thus the identification) because the witnesses were likely to have exercised a relative-judgment process; choosing the line-up member who most resembled the suspect relative to other members of the line-up, in this case leading to a

positive and certain recognition/identification of a red shirt, not a positive recognition of Darrill Henry as the person Garcia and Davis saw on June 15, 2004;

That it is his conclusion that the use of a "clothing biased" lineup was in clear violation of accepted and recommended police procedures. Such a lineup is so biased, and hence unfair, that any positive identifications are meaningless as a valid measure of a witness's memory of the actual suspect.

s/ John C. Brigham
JOHN C. BRIGHAM